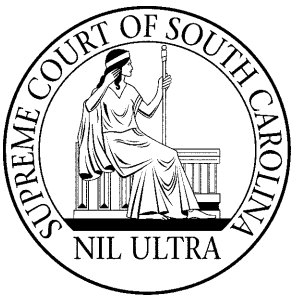

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 27, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jarvis Gibbs, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-000447

ON WRIT OF CERTIORARI

Appeal From Kershaw County
James R. Barber, III, Circuit Court Judge

Opinion No. 27630
Submitted February 16, 2016 – Filed April 27, 2016

AFFIRMED

Appellate Defender John H. Strom, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Megan Harrigan Jameson, both of Columbia, for Respondent.

JUSTICE BEATTY: A jury convicted Jarvis Gibbs of kidnapping, entering a bank with the intent to steal, and using a firearm during the commission of a violent crime. The trial court sentenced Gibbs to an aggregate eighteen years'

imprisonment. The Court of Appeals affirmed. *State v. Gibbs*, Op. No. 2011-UP-511 (S.C. Ct. App. filed Nov. 28, 2011). Gibbs subsequently filed an application for post-conviction relief ("PCR"). After a hearing, the PCR court dismissed his application with prejudice. This Court granted Gibbs' petition for a writ of certiorari to review the PCR court's finding that trial counsel was not ineffective in failing to object to claims of witness intimidation. We affirm.

I. Factual/Procedural History

On July 25, 2008, at approximately 10:55 a.m., an individual robbed the First Palmetto Savings Bank in Camden wearing gloves, a white t-shirt, and a ski mask. Witnesses indicated the individual was a black male approximately six feet, four inches tall. None of the witnesses were able to state with certainty whether the man had any noticeable scars or tattoos.[1]

Two individuals observed the man fleeing the bank on a bicycle. At this time, one of the individuals also noticed a four-wheeler in the vicinity of the bank. Shortly thereafter, the police found a bicycle on the side of a dirt road located in the general direction in which the man fled. Next to the bicycle were tracks left by a four-wheeler. The police seized the bicycle.

That afternoon, Arthur Macklin saw the bicycle in the trunk of a passing police car. Macklin, believing it was the same bicycle he loaned Gibbs, contacted his attorney who subsequently contacted the police. Macklin informed the police that he loaned Gibbs the bicycle earlier that day. He also told police that a local resident named James Drakeford drove past his house on a four-wheeler that morning.[2]

---

[1] Due to the quality of the bank's video surveillance, the police were also unable to determine whether the man had any tattoos or scars.

[2] Drakeford was subsequently charged with conspiracy to commit kidnapping and entering a bank with intent to steal.

At approximately 5:00 p.m. that afternoon, police picked Gibbs up for questioning.[3] In his video statement to the police, Gibbs denied robbing the bank. Gibbs said that morning he woke up and took a shower at a friend's house at 10:30 or 11:00 a.m. After taking a shower, Gibbs stated he headed to the Dusty Bend area of Camden to get a haircut at "11:00, 12:30, 1:30." At one point, Gibbs stated *after* his haircut, he went to Macklin's to borrow a bicycle for twenty minutes. At another, Gibbs stated he borrowed the bicycle *before* the haircut. Gibbs then provided two different versions about returning the bicycle. In one version, Gibbs dropped it off by Macklin's fence. In another, he gave the bicycle back in-person. In both versions, he borrowed the bicycle after 11:30 a.m. Gibbs was subsequently charged with kidnapping, entering a bank with the intent to steal, and using a firearm during the commission of a violent crime.

At trial, the State called Melissa Roberts, an employee of First Palmetto Savings Bank who was working at the time of the robbery. Roberts testified she knew Gibbs because they went to the same school together for one or two years approximately fifteen years before the robbery. She also said she saw Gibbs about five years before the robbery at her mother-in-law's store. In addition, Roberts testified that before the bank robbery she had seen Gibbs in the bank standing around, which she thought was strange because she did not believe he had a relationship with the bank.[4]

Roberts testified that after reviewing the video surveillance of the robbery, but before the police provided the bank with a suspect, she told the police she believed Gibbs was the individual who robbed the bank. Roberts based her belief on Gibbs' "mannerisms and the shape of his body" and the fact that he had been in the bank prior to the robbery. On cross-examination, however, Roberts conceded that, at the time she identified Gibbs from the video surveillance, she knew Gibbs had already been arrested.

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[3] Gibbs is six feet, three inches tall and weighs 220 pounds. At the time of the robbery, he also had tattoos and scars on his forearms.

[4] Roberts never said how long it had been before the robbery when she saw Gibbs in the bank. However, Leah Bailey, another bank employee, testified that, earlier in the week of the robbery, she also saw a man standing around the lobby, which she too thought was strange because he never completed a bank transaction. Bailey, however, was unable to identify Gibbs as the individual.

Chad Moore also testified for the State. Moore, who was also being held in the Kershaw County Detention Center at the same time as Gibbs, testified that Gibbs confessed to robbing the bank. Specifically, Moore testified that Gibbs told him: (1) Gibbs rode a bicycle to the bank; (2) he robbed the bank wearing a toboggan hat, a white t-shirt, blue jeans, and black sneakers; (3) after leaving the bank, he got on a four-wheeler with "Little James"; (4) Gibbs and "Little James" ditched the four-wheeler by a pond in Dusty Bend; and (5) after ditching the four-wheeler, Gibbs went to get a haircut. According to Moore, the only thing Gibbs was worried about was someone noticing his scars and tattoos. On July 28, 2008, Moore relayed this information to the City of Camden Police Department. The next day, the police recovered the four-wheeler from a pond on Firetower Road in Dusty Bend.

Macklin was also called to testify. According to Macklin, Gibbs borrowed one of his bicycles on the morning of the bank robbery. Ten to twenty minutes later, Macklin said he noticed police cars riding in the neighborhood. Later that morning, he recognized the bicycle he loaned Gibbs in a passing police car. The State then showed Macklin a picture of the bicycle and asked Macklin whether the picture was of his bicycle. Macklin replied "That's my bike." Shortly thereafter, Macklin's testimony concerning the bicycle wavered. The following exchange occurred:

> Q. Is this your bike right here?
>
> A. Like I told Lieutenant -- Detective Boan, that looks like my bicycle. I don't recall the coil being around the seat. And I thought that my bike had rubber things where the shocks are on the front.
>
> . . .
>
> Q. Do you agree that this is the same bike as in the picture?
>
> A. I'm quite sure that is the same bike in the picture.
>
> Q. Okay. And your bike was the one that was in the back of the patrol car?
>
> A. Yes, it was.

Q. And you identified this as your bike in the picture?

A. Yes.

Q. So this is your bike?

A. It has got to be.

Q. So this is the bike that Jarvis Gibbs borrowed from you?

A. Excuse me?

Q. Is this the bike that Jarvis Gibbs borrowed from you?

A. As I said, I know my bicycle, but I don't recall the things that -- that coil on the seat.

Q. Okay.

A. And I thought my bicycle had the rubber things on the shock part.

Q. Okay. But this is your bike right here, right?

A. That appears to be my bicycle.

Q. And that bicycle is the one that Jarvis borrowed from you?

A. I assume that it is.

Once the State established that the bicycle was the same one Macklin loaned Gibbs, the State questioned Macklin about what happened to him after he talked with the police. Macklin testified "some guys jumped on [him] and knocked [him] out and they were supposed to shoot [him] and kill [him] while [he] was on the ground." The following exchange occurred:

A. It was put in the paper what -- the owner of the bicycle said what happened.

Q. Yes.

A. And that might as well say I said what happened.

Q. Yes, uh-huh.

A. And I asked that whatever I said be confidently kept.

Q. Uh-huh.

A. But they put it in the paper, and I got hurt behind that.

Q. And you got assaulted because of that?

A. Yes, sir.

. . .

Q. Do you know the name -- do you know who did that to you?

A. I don't know my assailant.

. . .

Q. You didn't want to come [today], did you?

A. No, sir. I'm afraid for my life.

When the State asked about whether Macklin saw an individual riding a four-wheeler that morning, the following exchange occurred:

Q. Okay. Did you give the police a name as to who was on the 4-wheeler?

A. Yes, sir, I did.

Q. And what name was that?

A. I told them James Drakeford.

Q. Okay. Now, you got beat up, right?

A. Yes, I did.

On cross-examination, trial counsel asked Macklin if he was sure the bicycle in the picture was the same bicycle he loaned Gibbs the day of the robbery. Macklin said he was not sure. Trial counsel then asked Macklin if "Gibbs ever threatened to hurt [him] in any way?" Macklin responded "No way at all." On re-cross, trial counsel asked if Macklin had seen Gibbs after the robbery. Macklin said "Yes." Trial counsel then asked if Gibbs had said anything to him. Macklin responded "not one thing."

After the State presented its case, trial counsel called Gibbs to the stand. Gibbs testified that on the morning of the robbery, he stopped by his "home boy house" at around 8:45 a.m. Thereafter, Gibbs stated he went to see Macklin to borrow a bicycle. Ten to fifteen minutes after borrowing the bicycle, at approximately 10:00 a.m., Gibbs testified he placed the bicycle on Macklin's fence and then walked to the barber shop. Gibbs said he was in the barber shop for approximately one hour and that it was around 10:00 a.m. or 11:00 a.m. when he left. After leaving the shop, Gibbs went to rest in Boykin Park, where the police later found and arrested him.[5]

On cross-examination, Gibbs testified he found out about the robbery while he was still at the barber shop because people were coming in the shop talking about it. The State then asked Gibbs how he could have found out about the robbery if it happened at 10:55 a.m. and he left the barber shop at 10:00 or 11:00 a.m. The State then played portions of his video statement to impeach Gibbs' trial testimony from the substantially different statement Gibbs provided the police on the day of the robbery.

During its closing argument, the State made the following comments, which Gibbs takes issue with on appeal:

[5] Gibbs also denied ever being in the bank or in Roberts' mother-in-law's store.

> You know, [Macklin] actually tried to take the Fifth up here on a couple of questions. You know, he did not want to be here. Once we got done with him, you know, he essentially told the same thing to you that he told to [the detective] back on July 25th, 2008. **And what happened because he talked to [the detective] and told him the story? He got beat up. He got knocked out. He said his whole face was swole up. He didn't want to be here. He didn't want to get beat up again. He didn't want to get hurt. He didn't [want] to get killed.**
>
> But guess what? He was here. He told the same story. He even said that -- if you remember, I asked him, when I asked him if he wanted to be here, do you remember when he said the Sheriff's Department finally caught up with him to serve him that subpoena to be here? 1:30 Monday morning. You know, he was trying not to get up there.

The jury subsequently convicted Gibbs of kidnapping, entering a bank with the intent to steal, and using a firearm during the commission of a violent crime. The trial judge sentenced Gibbs to an aggregate eighteen years' imprisonment. The Court of Appeals affirmed. *State v. Gibbs*, Op. No. 2011-UP-511 (S.C. Ct. App. filed Nov. 28, 2011). Gibbs subsequently filed an application for PCR in which he raised fifteen allegations of ineffective assistance of trial counsel, including:

a. Trial counsel was . . . ineffective for failing to object to a line of testimony in which a key witness for the prosecution, Arthur Macklin, was allowed to testify that he had been threatened and physically assaulted as a consequence of his cooperation with the Applicant's prosecution thereby improperly bolstering the witnesses' credibility and attacking the Applicant's character where there was not [sic] evidence connecting the Applicant to the behavior in question.

b. Trial counsel was ineffective for neglecting to object to an improper and highly inflammatory closing argument in which the State emphasized threats to witness Macklin where there was no evidence tying the Applicant to any such activity.

At the hearing, trial counsel explained that he did not object to the testimony or to the closing argument because he believed Macklin lacked credibility based on his disposition at trial and because it is well-known in the area that Macklin is a crack-addict. Trial counsel further testified that he did not object because Macklin admitted Gibbs did not attack or threaten him in any way. The PCR court dismissed Gibbs' application with prejudice, concluding, *inter alia*, Gibbs was not prejudiced by any of trial counsel's alleged deficiencies. Gibbs appealed.

This Court granted Gibbs' petition for a writ of certiorari to review the PCR court's finding that trial counsel was not ineffective in failing to object to claims of witness intimidation.

II. Standard of Review

"This Court gives great deference to the PCR court's findings of fact and conclusions of law." *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). If there is *any* evidence of probative value to support the PCR court's decision, this Court will uphold the decision unless it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

III. Discussion

Gibbs asserts his Sixth Amendment rights were violated when trial counsel failed to object to claims of witness intimidation. We agree, however, for reasons discussed below, we find Gibbs was not prejudiced by the violation.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). To overcome the presumption that counsel has rendered adequate assistance, the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." *Smith v. State*, 386 S.C. 562,

566, 689 S.E.2d 629, 631 (2010) (citing *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

A. Deficient Performance

Gibbs argues trial counsel's failure to object to both Macklin's testimony and portions of the State's closing argument was deficient because it allowed the State to imply, without supporting evidence, that Gibbs intimidated Macklin in an effort to prevent him from testifying. We agree.

In *State v. Edwards*, this Court held that "witness intimidation evidence, *if linked to the defendant*, may be admitted to show a consciousness of guilt." 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009) (emphasis added). Here, there is no evidence linking Gibbs to the attack on Macklin. Accordingly, the testimony and the solicitor's closing statements concerning the attack should not have been admitted. *See Mincey v. State*, 314 S.C. 355, 358, 444 S.E.2d 510, 511-12 (1994) (finding impermissible the admission of the solicitor's closing statements concerning witness intimidation when there was no evidence the defendant intimidated the witness).

B. Prejudice

While we find trial counsel was deficient for failing to object, we nevertheless affirm the PCR court's decision because there is evidence to support its finding that Gibbs was not prejudiced by trial counsel's deficiencies.[6]

Here, there is overwhelming evidence of Gibbs' guilt. Witnesses testified the robber was approximately six feet, four inches tall. Gibbs is six feet, three inches tall. A bank employee, Melissa Roberts, testified she saw Gibbs standing around inside the bank prior to the robbery. Macklin testified that, shortly before the bank robbery, he loaned Gibbs the bicycle that was used in the getaway. Macklin also said he saw James Drakeford on a four-wheeler that morning.

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[6] *See Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (finding that, while trial counsel's failure to object to the solicitor's closing statement asking the jury "to speak up for the victim" constituted deficient performance, there was not a reasonable probability that, despite trial counsel's deficiencies, the outcome would have been different).

Another individual testified that he saw a four-wheeler in the vicinity of the bank at the time of the robbery. Moore testified Gibbs told him he committed the robbery with the assistance of an individual on a four-wheeler nicknamed "Little James." In addition to corroborating the testimony of other witnesses, Moore was able to provide the police with additional information, which he obtained from Gibbs, and which ultimately led to the discovery of the four-wheeler.

Finally, there is Gibbs' testimony. Gibbs' statement from the day of the robbery contained a number of inconsistencies regarding where he was that day, when he was there, and what he was doing. Further, at trial, Gibbs told a substantially different story than those in his statements to the police. Also, at one point in his trial testimony, Gibbs unwittingly stated: "I mean, it just so happened the bicycle that I happened to rode got used to rob a bank, but I didn't rob no bank, you know what I'm saying."

Based on the evidence presented by the State and Gibbs' contradictory testimony, we agree with the PCR court that Gibbs was not prejudiced by trial counsel's deficient performance as there is overwhelming evidence of Gibbs' guilt.

IV. Conclusion

In conclusion, we find trial counsel was deficient for failing to object to the testimony and closing statements concerning witness intimidation. However, Gibbs was not prejudiced by trial counsel's deficiencies. Accordingly, the decision of the PCR court is

AFFIRMED.

PLEICONES, C.J., KITTREDGE, and HEARN, JJ., concur. FEW, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William Alvin Hueble, Jr., Petitioner,

v.

South Carolina Department of Natural Resources and Eric Randall Vaughn, Defendants,

Of Whom Eric Randall Vaughn is, Respondent.

Appellate Case No. 2012-212006

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 27631
Heard September 22, 2015 – Filed April 27, 2016

REVERSED AND REMANDED

Gregory P. Harris and Jonathan S. Gasser, both of Harris & Gasser, LLC, of Columbia; and John P. Riordan, of Smith Moore Leatherwood, LLP, of Greenville, all for Petitioner.

Thomas E. Hite, Jr., of Hite & Stone, of Abbeville; James V. McDade, of Doyle Tate & McDade, PA, of Anderson; and Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, all for Respondent.

JUSTICE HEARN: The issue here is whether a plaintiff who obtained a Rule 68, SCRCP, judgment of $5,100 in his favor is a prevailing party within the meaning of the Civil Rights Act, 42 U.S.C. § 1988 (2006), and is therefore entitled to attorneys' fees. For the reasons discussed herein, we hold he is and reverse and remand for further proceedings consistent with this opinion.

FACTUAL/PROCEDURAL BACKGROUND[1]

In 2003, William Alvin Hueble purchased 220 acres of farming and hunting property in Greenwood County. At the time of closing, the seller informed Hueble that Respondent Eric R. Vaughn, a corporal for the South Carolina Department of Natural Resources (DNR), had a personal deer stand on the property and had hunted there in the past. The seller indicated it would be a "good idea" to allow Vaughn continued access. Hueble declined the suggestion. During 2004, Hueble received a call from the seller informing him that Vaughn had recently been on the property and left four wheeler tracks. The seller again suggested that it would be in Hueble's "best interest" to allow Vaughn to hunt on the property, and provided Vaughn's phone number to Hueble. Hueble once again declined the suggestion and did not contact Vaughn.

Hueble then acquired additional land and invested substantial sums of money to improve and maintain his property for hunting. In the summer of 2005, Hueble planted his first dove field spanning fifteen acres. More than one month prior to the opening day of dove season, Hueble mowed all standing wheat/oats and disked the dove field twice. He believed the field was non-baited and in compliance with all regulations and guidelines.

On opening day, Hueble's friends and family joined him for the first hunt of the season. Shortly into the hunt, Vaughn and other DNR officers entered Hueble's property unannounced. Vaughn and the DNR officers gathered the hunters together and began threatening them with fines and confiscation of property for baiting the dove field. Vaughn dug into Hueble's property with a knife blade to produce seeds and claimed that one seed constituted baiting a field. During this interaction, Hueble learned Vaughn was the DNR officer the seller had mentioned. Ultimately, Hueble was the only hunter charged by DNR with baiting the field.

[1] Because this matter was resolved before trial, these facts are taken largely from the complaint.

Prior to the court date for the baiting charge, Hueble invited Vaughn out to his property to discuss any other concerns Vaughn had with the property. Vaughn stated that he had actively hunted on the land previously—including in the off seasons—and had considered purchasing the property when it was for sale, but did not have the financial resources to do so. Hueble ultimately pled no contest to the baiting charge, believing this would resolve Vaughn's animosity.

Prior to turkey season, Hueble prepared for a hunt by setting up two food plots with clover, and he plowed several strips of dirt. Just prior to opening day, game cameras revealed numerous turkeys on the property; however, on opening day there were no turkeys to be found. As Hueble attempted to locate the turkeys he had previously seen on camera, he encountered a trespasser on the property and discovered the game cameras had been manipulated. Hueble contacted Vaughn to report trespassers and to inquire whether Vaughn had any information about the incident. Vaughn admitted that he and other DNR officers had been on the property on several occasions to hunt in the month leading up to that day. Hueble believed Vaughn and other DNR officers had in fact been on his property before and after opening day and, during those visits, entered his barn and accessed his equipment. At this time, Vaughn also informed Hueble that his food plots were illegal baiting and that DNR officers were prepared to arrest Hueble and his invited guests if they hunted over the food plots.

Based on these encounters with Vaughn, Hueble believed that Vaughn had a "vendetta" against him and that Vaughn's supervisor was fully aware of the alleged threats he was making against Hueble. Because of these concerns, Hueble initiated a complaint with Vaughn's supervisor at DNR. However, the supervisor responded with allegations of Hueble's illegal activity based upon Vaughn's version of the events. Hueble was again accused of baiting, this time for using a fish feeder in his pond for duck hunting season. The supervisor later recanted and instead alleged Hueble used cracked corn for baiting.

As a result of these continued allegations, Hueble filed another complaint and requested an investigation by DNR. In response, Vaughn provided a written statement detailing Hueble's alleged baiting practices and accusing Hueble of providing false information to Vaughn's superior. Ten months later, following an internal investigation, DNR determined that Vaughn had not exceeded his authority.

Thereafter, Hueble filed a complaint against DNR and Vaughn asserting several state law causes of action, along with a claim pursuant to section 42 U.S.C.

§ 1983 (2006)[2] for the violation of his constitutional rights to due process and equal protection. In his answer, Vaughn asserted counterclaims against Hueble for slander, libel, abuse of process, and intentional infliction of emotional distress. Hueble then filed an amended complaint, in which he expanded his § 1983 claim to include an alleged violation of his Fourth Amendment rights to be protected against unreasonable searches and seizures. Vaughn again asserted the same counterclaims in his amended answer. In both complaints, Hueble sought attorneys' fees and costs for the § 1983 claim pursuant to 42 U.S.C. § 1988.[3]

Vaughn and DNR jointly moved for summary judgment, and at the hearing, the trial court encouraged the parties to settle. The same day, Vaughn and DNR

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[2] 42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

[3] 42 U.S.C. § 1988(b) states in pertinent part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

offered Hueble $5,000 and a letter agreeing that Vaughn would be required to contact a supervisor before entering Hueble's property absent exigent circumstances. Hueble countered, requesting an additional term that Vaughn and DNR acknowledge Vaughn's wrongdoing; however, Vaughn and DNR would not agree to that term.

One month later, Vaughn and DNR made a joint offer of judgment pursuant to Rule 68 for $5,100. The offer of judgment stated, in pertinent part:

> Pursuant to Rule 68 of the South Carolina Rules of Civil Procedure, the Defendants, South Carolina Department of Natural Resources and Eric Randall Vaughn, hereby offer to allow judgment to be taken against them in the amount of Five Thousand One Hundred and No/100 ($ 5,100.00) Dollars. This offer shall remain valid for twenty (20) days after service of the same and shall be deemed withdrawn if not accepted within said time.

The offer of judgment made no mention of Vaughn having to obtain prior approval from his supervisor before entering the property; however, Hueble accepted it, and the court entered final judgment.

Thereafter, Hueble filed a motion for attorneys' fees and costs against Vaughn under Rule 54(d), SCRCP, and 42 U.S.C. § 1988.[4] In support of Hueble's motion, counsel submitted a memorandum, declaration of counsel as to attorneys' fees and costs, and documentation of $149,207.80 in attorneys' fees and costs. Unbeknownst to Hueble, two days before the motion was to be heard, Vaughn entered into a settlement agreement with Hueble's insurance carrier for $25,000. His counterclaims were subsequently dismissed.

At the hearing on attorneys' fees and costs, Vaughn and DNR opposed the motion on numerous grounds, including that Hueble was not the prevailing party for the purpose of receiving fees under § 1988 because the offer of judgment did not address the liability of costs and fees under § 1983; Hueble was precluded from bringing a § 1983 claim against DNR; Vaughn settled his counterclaims against Hueble for $25,000; and Hueble could not show that his recovery was based on his § 1983 claim against Vaughn. At the hearing, Hueble argued he was entitled to attorneys' fees because an offer of judgment had been entered in his favor, which

[4] DNR is not a party to this appeal because Hueble seeks attorneys' fees only on his civil rights claim, to which DNR is not subject under § 1983.

invoked § 1988. Vaughn countered that an offer of judgment alone could not qualify an individual as a prevailing party under South Carolina jurisprudence and, because both parties received some money, each party technically prevailed. Hueble explained that his homeowner's insurance settled with Vaughn, and he had no choice in the matter.

The trial court denied Hueble's motion, finding Hueble was not a prevailing party pursuant to § 1988, and even if he was, an award of attorneys' fees and costs would be unjust based on the special circumstances of the case. The trial court reasoned there had been no change in the legal relationship between the parties, and Vaughn settled his claim for five times the amount of Hueble's settlement. Additionally, the trial court held Vaughn did not achieve his desired outcome since he only received money, yet he had consistently maintained that the suit was not about money. The court of appeals affirmed. *Hueble v. S.C. Dep't of Nat. Res.*, Op. No. 2012-UP-081 (S.C. Ct. App. filed Feb. 15, 2012).

ISSUES PRESENTED

I. Did the court of appeals err in finding that Hueble's acceptance of an offer of judgment pursuant to Rule 68 did not entitle him to attorneys' fees and costs as a prevailing party under § 1988?

II. Did the court of appeals err in affirming the trial court's finding that even if Hueble were a prevailing party, attorneys' fees and costs were not recoverable due to special circumstances?

LAW/ANALYSIS

I. PREVAILING PARTY STATUS

Hueble argues the acceptance of an offer of judgment under the South Carolina Rules of Civil Procedure entitles him to collect attorneys' fees. Essentially, he contends he prevailed on his § 1983 claim, and therefore qualifies as a prevailing party pursuant to § 1988 because he obtained an enforceable judgment. We agree.[5]

[5] The trial court also determined Hueble could not be a prevailing party because the offer of judgment, made jointly by DNR and Vaughn, did not specify that it included the § 1983 claim. We find the offer of judgment included Hueble's § 1983 claim. The offer did not distinguish causes of action, and because it resolved

Hueble's argument raises a legal question, which we review de novo. *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010) (holding questions of statutory interpretation are questions of law which are subject to de novo review and which the Court is free to decide without any deference to the court below). Hueble filed this action in state court and accepted the offer of judgment pursuant to Rule 68, SCRCP; accordingly, South Carolina's procedural rules control. Rule 68 provides in pertinent part:

> **(a) Offer of Judgment.** Any party in a civil action . . . may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer.

This Court has previously held that Rule 68 includes costs, but attorneys' fees are not automatically included. *Steinert v. Lanter*, 284 S.C. 65, 66, 325 S.E.2d 532, 533 (1985) (holding a prior statute governing offers of judgment must be strictly construed to allow recovery of costs and not attorneys' fees). As a result, in order to collect attorneys' fees following an offer of judgment, South Carolina courts have required that a specific statute or rule authorize a party to collect attorneys' fees. *Id.*; *Black v. Roche Biomed. Labs.*, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993) (noting that generally costs, fees, and disbursements are allowed when judgment is entered if they are provided for under specific statute or rule).

Congress has expressly provided that a successful party in a § 1983 claim has a statutory right to seek attorneys' fees pursuant to the fee-shifting provision of § 1988, which was designed to incentivize attorneys to litigate civil rights cases. *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) ("Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process."); *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014) (explaining

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the entirety of Hueble's case, we interpret it to address all the claims involved—including the § 1983 action. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (finding if the language of a contract creates an ambiguity, a court will construe any doubt and ambiguity against the drafter); *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir. 2001) (explaining an offer of judgment is generally treated as an offer to make a contract).

the purpose of § 1988 is to "'ensure effective access to the judicial process'" for individuals with civil rights claims (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983))). Section 1988(b) provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Accordingly, in order to be awarded attorneys' fees, a party must first demonstrate that he is a prevailing party.

Therefore, our inquiry becomes whether a party who accepts an offer of judgment pursuant to Rule 68 qualifies as a prevailing party under § 1988 for the purpose of attorneys' fees. This is a question of first impression in this state with respect to a § 1983 claim. Accordingly, we look to federal interpretation for guidance. *See James v. City of Boise*, 577 U.S. __, __ (2016) (per curiam) (slip op. at 1–2) (explaining once the United States Supreme Court has interpreted the meaning of a federal statute it is the duty of other courts to "respect that understanding of the governing rule of law" (quoting *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. __, __ (2012) (per curiam) (internal quotation marks omitted))); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10, 674 S.E.2d 154, 162 n.10 (2009) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

To determine if a party qualifies as a prevailing party, the United States Supreme Court set forth a two-part test in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). The Supreme Court held that for a party to be considered a prevailing party, there must be a "material alteration of the legal relationship of the parties," and there must be "judicial imprimatur on the change." *Id.* at 604, 605 (emphasis in original) (internal quotation marks omitted). Thus, it is not enough for a desired outcome to occur to attain "prevailing party" status. Rather, it requires both a change on the part of the parties and an enforceable acknowledgement by a court. Significantly, the Supreme Court explained that interlocutory victories or a voluntary change in conduct each lack the "necessary judicial imprimatur." The Supreme Court also clarified that "'a party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ,' is a "prevailing party" for purposes of the various federal fee-shifting statutes. *Id.* at 603 (alteration in original) (quoting *Prevailing party*, Black's Law Dictionary (7th ed. 1999)).

In embracing the *Buckhannon* analysis, we hold that Hueble qualifies as a prevailing party. First, a judgment in favor of Hueble and against Vaughn and DNR was entered for $5,100. This judgment materially altered the legal

relationship between the parties by imposing an enforceable obligation against Vaughn and DNR to pay Hueble $5,100. While Hueble did not receive all of the requested relief, that is not the test; rather, the test is whether he received meaningful relief. *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011) ("A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes."); *Tex. Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 783 (1989) (explaining a prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought").

Second, Hueble has satisfied the prong of judicial imprimatur because a trial court has the authority to enforce a judgment of record. *See* S.C. Code Ann. § 15-35-530 (2005) (explaining the effect of the entry of a judgment roll to the clerk of court). We reach this decision upon a review of the implications of Rule 68 and the meaning of judicial imprimatur as outlined by the Supreme Court. Federal courts addressing Rule 68 judgments after *Buckhannon* have found acceptance of an offer of judgment conveys prevailing party status. *Grissom v. Mills Corp.*, 549 F.3d 313, 319 (4th Cir. 2008) (finding the acceptance of an offer of judgment, pursuant to Rule 68, FRCP, satisfied the *Buckhannon* two-part test); *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Co-op., Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002) (holding Rule 68 judgment for $45,000 conferred prevailing party status by changing the legal relationship and establishing judicial imprimatur even though a "court exercises little substantive review over a Rule 68 offer"). Here, a Rule 68 offer was filed with the court and the clerk entered the judgment, making it judicially enforceable. As such, acceptance of a Rule 68 offer falls squarely within the meaning of prevailing party.[6] We therefore find Hueble met the requirements of *Buckhannon* by achieving some meaningful relief on the merits which altered the legal relationship between the parties by modifying the behavior of both Hueble and Vaughn.

II. SPECIAL CIRCUMSTANCES

The trial court also found that even if Hueble were a prevailing party, special circumstances existed that precluded him from recovering attorneys' fees. Hueble argues that the special circumstances exception is to be applied narrowly, and the facts in this case do not warrant the denial of attorneys' fees. We agree.

[6] At least one other state court has considered this issue and resolved it similarly. *See Daffron v. Snyder*, 854 N.E.2d 52, 56 (Ind. Ct. App. 2006) (holding the acceptance of an offer of judgment qualifies for prevailing party status).

While we reviewed the issue of prevailing party status de novo, we review a trial court's decision to award or deny attorneys' fees for an abuse of discretion. *Heath v. Cty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion or an error of law. *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

The United States Supreme Court has held that ordinarily, a party who prevails on a claim pursuant to the Civil Rights Act should recover attorneys' fees unless special circumstances would make an award unjust. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam); *Hensley*, 461 U.S. at 429. "Courts have universally recognized that [the] special circumstances exception is very narrowly limited." *Doe v. Bd. of Educ. of Balt. Cty.*, 165 F.3d 260, 264 (4th Cir. 1998) (citations omitted) (internal quotation marks omitted). As such, it is only in rare occasions that a case presents circumstances unique enough to justify denying a prevailing party attorneys' fees. *Lefemine*, 758 F.3d at 555; *see also, e.g.*, *De Jesús Nazario v. Morris Rodríguez*, 554 F.3d 196, 200 (1st Cir. 2009) (stating that the special circumstances justifying denial of attorneys' fees are "few and far between"). Neither the statutory language of § 1988 nor the accompanying legislative history clearly establishes guidelines to delineate the confines of what suffices as special circumstances. Likewise, the Supreme Court has offered little guidance as to what constitutes special circumstances, and federal circuits have not uniformly adhered to any standard, instead cultivating a case-by-case approach.[7]

[7] While there is no exhaustive list of special circumstances, courts have typically interpreted the concept narrowly, applying it only in limited situations. *United States ex rel. Averback v. Pastor Med. Assocs.*, 224 F. Supp. 2d 342, 351 (D. Mass. 2002) (denying fees because of plaintiff's failure to maintain reliable contemporaneous time records); *Mindler v. Clayton Cty.*, 864 F. Supp. 1329, 1321 (N.D. Ga. 1994) (denying fees when plaintiff made an untimely application). Courts have also rejected a number of purported special circumstances. *See Walker v. City of Mesquite*, 313 F.3d 246, 251 (5th Cir. 2002) (holding defendant's good faith conduct does not establish special circumstances); *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986) (holding a plaintiff's ability to pay attorneys' fees is not a special circumstance); *Davidson v. Keenan*, 740 F.2d 129, 133 (2d Cir.

In finding the circumstances of this case did not warrant an award of attorneys' fees, the trial court relied primarily on three things: that Hueble's recovery was only nominal, that he failed to obtain the desired relief of barring Vaughn from entering the property, and that Vaughn's counterclaim was settled for almost five times the amount Hueble recovered. We disagree that these facts constitute special circumstances sufficient to justify denying fees in this case.

Initially, we view the first two reasons as intertwined, and therefore consider them together. The trial court apparently perceived the award as merely a technical victory because it was for a limited sum and did not include the injunctive relief Hueble sought. We find the award neither nominal nor merely technical in nature. For guidance, we turn to *Farrar v. Hobby*, in which the Supreme Court confronted the question of whether a civil-rights plaintiff who received a nominal award was a prevailing party eligible to receive attorneys' fees under § 1988. 506 U.S. 103, 105 (1992). In *Farrar*, state officials closed a school for troubled teens and pursued and received an indictment against the owner. *Id*. The owner sued, alleging deprivation of liberty and property without due process. *Id*. at 106. Following the owner's death, the administrators of the estate sought $17 million in damages, but were awarded only $1 in nominal damages. The jury found that one defendant had deprived one plaintiff of a civil right, but ultimately concluded that defendant's conduct did not proximately cause any damage suffered by the plaintiff. *Id.* at 106.

The Court clarified that a party who wins nominal damages on a § 1983 claim *is* a prevailing party for purposes of attorneys' fees under § 1988. *Id*. at 112. However, the Court explained that "[a]lthough the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988." *Id*. at 114. In determining the reasonableness of fees under § 1988, the Court continued, "'the most critical factor . . . is the degree of success obtained.'" *Id.* (quoting *Hensley*, 461 U.S. at 436). Thus, when a plaintiff seeking compensatory damages "recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all." *Id.* at 115 (emphasis added) (internal citation omitted). Accordingly, when a plaintiff's victory is purely technical or *de minimus*, which often is reflected by a nominal-damages award, the plaintiff should not receive attorneys' fees. *Id.*

1984) (finding a defendant's reliance on the advice of counsel does not create special circumstances).

While we recognize the *Farrar* majority offered limited guidance as to how a court should approach this inquiry, the concern expressed is quite clear: where a plaintiff has failed to prove an essential element of his claim—that he was *actually* damaged—it would be unjust to allow attorneys' fees. As previously noted, the award of attorneys' fees encourages the pursuit of cases involving the infringement of civil rights because we hold those rights to be sacrosanct; awarding fees for pyrrhic victories does nothing to further that purpose. However, we find the award here is neither technical nor *de minimus*. We acknowledge Hueble repeatedly asserted this was not a case about money, and he failed to receive his primary objective—an injunction; however, simply because a plaintiff does not receive exactly what he asks for does not mean he has not suffered an injury. Furthermore, although he did not assert a specific sum, Hueble alleged actual damages. In our view, Hueble's recovery of $5,100 is not an insubstantial sum, and Vaughn's decision to enter voluntarily into the offer of judgment further reflects that Hueble had established his claim.[8]

We are further unpersuaded that Vaughn's recovery for his counterclaims has any bearing on the fairness of the award. Again, our concern here lies with the infringement on a civil right and enabling litigation designed to curtail unconstitutional behaviors. Regardless of the end result of any other claims in the suit, Hueble prevailed on his claim that a number of his fundamental rights had been violated and he was damaged by this encroachment. *See Hensley,* 461 U.S. at

[8] We note that Justice O'Connor authored a concurring opinion in *Farrar*, suggesting courts consider the following factors when determining whether attorneys' fees are warranted in a nominal damages case: the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served by the litigation. *Id.* at 122 (O'Connor, J., concurring). Several federal circuits have adopted this approach. *See Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005) (adopting the three-part test for reviewing requests for attorneys' fees in civil rights cases involving nominal damages for technical success articulated by Justice O'Connor); *Phelps v. Hamilton*, 120 F.3d 1126, 1131–32 (10th Cir. 1997) (same); *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (same); *Jones v. Lockhart*, 29 F.3d 422, 423–24 (8th Cir. 1994) (same); *Cartwright v. Stamper*, 7 F.3d 106, 109 (7th Cir. 1993) (same). While we believe Justice O'Connor's factors are insightful and may be utilized under certain circumstances, we find their application unnecessary here, where the award was not *de minimus* and an offer of judgment rather than a trial was involved.

435 (explaining that Congress's intent to limit awards requires unrelated claims be treated as separate lawsuits in evaluating attorneys' fees as a prevailing party)

Relying on *Farrar*, the dissent would allow Vaughn's award on his counterclaims to vitiate Hueble's success in this § 1983 claim. We find this reasoning misplaced. *Farrar* addressed a circumstance where a jury awarded the plaintiff $1—which the Court concluded was merely technical or *de minimus* in light of his request for $17,000,000. As discussed, *supra*, we do not find Hueble's award for $5,100 *de minimus* in nature, and we cannot agree it can be so dismissively likened to an award for $1. Moreover, the dissent fails to acknowledge that Hueble's and Vaughn's awards are independent. *See Hensley*, 461 U.S. at 435 (explaining that in cases alleging § 1983 claims, unrelated claims should be treated as a separate lawsuit when evaluating attorneys' fees). The independent success of a permissive counterclaim has no bearing on the merit of Hueble's award. A § 1983 claim is frequently accompanied by other claims and counterclaims. The measure of success for a civil rights' claim should not depend on the success of unrelated claims. This practice would eviscerate Congress's expressed desire to incentivize attorneys to take on civil rights' litigation and condone civil rights' violations by creating a means to escape the payment of attorneys' fees and costs when a party is successful on unrelated permissive claims. *Rivera*, 477 U.S. at 576.

Accordingly, we reverse the court of appeals and hold the trial court erred in denying Hueble attorneys' fees. We therefore remand this case to the trial court for a determination of the reasonable amount of attorneys' fees.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals and remand for further proceedings.

PLEICONES, C.J., BEATTY, J., and Acting Justice Jean H. Toal, concur. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I respectfully dissent. Even if I were to accept the majority's premise that "a plaintiff who obtained a Rule 68, SCRCP judgment of $5,100 in his favor is a prevailing party within the meaning of the Civil Rights Act, 42 U.S.C. § 1988,"[9] I would nonetheless find no abuse of discretion in the trial court's denial of Petitioner's request for attorney's fees. Section 1988(b) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The language of the statute speaks to a prevailing party's eligibility for attorney's fees, not an automatic entitlement to attorney's fees. The trial court, in the exercise of its discretion, determined that special circumstances precluded an award of attorney's fees to Petitioner. It seems to me that ample evidence supports the trial court's finding of special circumstances, and I would resolve the appeal on that basis.

My main point of disagreement with the majority is its decision to turn a blind eye to the resolution of Respondent's counterclaim, as the majority is "unpersuaded that [Respondent] Vaughn's recovery for his counterclaims has any bearing on the fairness of the award." In my judgment, the relative magnitude of relief obtained is a key factor in this analysis. *See Farrar v. Hobby*, 506 U.S. 103, 113–14 (1992) (recognizing that although the relative degree of success may not preclude a prevailing party's "eligibility for a fee award," the "degree of the plaintiff's overall success" is "'the most critical factor' in determining the reasonableness of the fee award" (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989))). I would not myopically ignore the fact that Petitioner paid Respondent almost five times the amount Petitioner recovered pursuant to the Rule

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[9] I acknowledge the laudable policy goals Congress sought to achieve in enacting 42 U.S.C. § 1983—and, as the majority recognizes, that "the fee-shifting provision of § 1988 . . . was designed to incentivize attorneys to litigate civil rights cases." I caution, however, against a broad reading of Rule 68, SCRCP, as a basis for seeking attorney's fees. In *Belton v. State*, 339 S.C. 71, 529 S.E.2d 4 (2000), we explained that when judgment is entered pursuant to a Rule 68 offer of judgment, the allowable costs do not include attorney's fees; however, we noted that attorney's fees may be taxed if otherwise allowed by statute or rule. *Id*. at 73, 529 S.E.2d at 5. In *Belton*, we were presented with a claim for attorney's fees pursuant to a Whistleblower action resolved pursuant to a Rule 68 offer of judgment. At that time, the Whistleblower Act provided for "reasonable attorney's fees" where there is a "court or jury award." *Id*. at 74, 529 S.E.2d at 5. Because a Rule 68 offer of judgment did not qualify as a "court or jury award," we rejected the claim for attorney's fees. Once a Rule 68 offer of judgment is accepted, the resulting entry of judgment is a ministerial act.

68 offer of judgment. The parties, through their negotiated settlement, reached a resolution of the relative value of their competing claims. The majority seeks to excuse Petitioner from his payment of $25,000 to Respondent because it was paid "[u]nbeknownst to [Petitioner] Hueble [by his] insurance carrier." The fact that Petitioner's insurance carrier wrote the check is of no moment. Moreover, unlike the majority, I view Respondent's counterclaims as compulsory because they arise out of the "transaction or occurrence that is the subject matter" of the Amended Complaint. Rule 13(a), SCRCP ("A pleading *shall* state as a counterclaim any claim which . . . the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." (emphasis added)). Try as it might, the majority cannot give Petitioner a pass on the payment of $25,000 to settle Respondent's counterclaims.

Under the circumstances of this case, when the resolution of the dispute is considered in its entirety, the trial court did not abuse its discretion in denying Petitioner's request for attorney's fees. *See Farrar*, 506 U.S. at 115 (noting that, in some circumstances, "even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all," and explaining that sometimes "the only reasonable fee is [] no fee at all"). Absent an abuse of discretion by the trial court, which does not exist here, we must uphold the trial court. I would affirm the court of appeals in result.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marcus Dwain Wright, Appellant.

Appellate Case No. 2013-001406

Appeal From Horry County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5401
Heard November 10, 2015 – Filed April 27, 2016

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

LOCKEMY, J.: A jury convicted Marcus Dwain Wright of murdering Jerome Green, Jr. (the Victim), trafficking in cocaine, possession with intent to distribute cocaine base, and possession of a weapon during the commission of a violent crime. On appeal, Wright argues the trial court erred (1) in admitting evidence

from the search of his residence, (2) in admitting South Carolina Department of Motor Vehicles (DMV) records without a proper foundation, (3) in admitting evidence that was the fruit of an illegal search of his motel room, (4) in excluding evidence of his co-defendant's prior inconsistent statement, (5) in denying his request to testify at trial, (6) in sentencing him to a statutory sentence of life imprisonment without parole (LWOP) without making express factual findings and where the record did not clearly support a sentence of statutory LWOP, and (7) in refusing to give his requested jury charges on voluntary manslaughter and self-defense. We affirm.

FACTS

Wright was charged with fatally shooting the Victim on the evening of April 30, 2012, at the residence of Roy Sinclair, where Wright was selling drugs. At trial, Wright sought to show that (1) he shot the Victim in self-defense because he believed the Victim was reaching for a gun or (2) he shot the Victim in a sudden heat of passion because of comments the Victim made upon entering Sinclair's residence.

Before trial, Wright moved to suppress shell casings and an ammunition receipt seized during the search of the residence at 3635 Kate's Bay Highway where he and his wife, Jacinda, lived. Wright challenged the validity of the search warrant that law enforcement obtained on May 2, 2012, to search 3635 Kate's Bay Highway. Detective David Weaver's search warrant affidavit stated one of Wright's co-defendants, Lanard Powell, informed law enforcement that Wright was the shooter, fled the crime scene in a black BMW, switched getaway vehicles to a dark Escalade, drove to 3635 Kate's Bay Highway, and left the vehicle at that address. According to the affidavit, Powell also informed law enforcement that Wright obtained the murder weapon from Jacinda at 3635 Kate's Bay Highway, that he believed Wright transported the murder weapon back to 3635 Kate's Bay Highway, and that the weapon might still be in the residence or in one of the vehicles at the residence. Detective Weaver testified he did not speak with Powell but rather prepared the search warrant affidavit based on information Detective Todd Cox provided to him. Detective Weaver also testified he told the magistrate that law enforcement tracked Wright's cell phone signal and the signal "pinged" in the "general area" of 3635 Kate's Bay Highway.

Detective Cox testified Powell did not mention the exact numerical address Wright drove to but rather described the general area; thus, the statement in the affidavit

that Powell told law enforcement that Wright drove to 3635 Kate's Bay Highway was not accurate. In addition, according to Detective Cox, Powell stated the murder weapon belonged to Jacinda but did not say where Wright obtained the murder weapon. Thus, according to Detective Cox, the affidavit incorrectly stated Powell said that Wright got the weapon from 3635 Kate's Bay Highway. Nevertheless, the trial court found the search warrant for 3635 Kate's Bay Highway valid. The trial court noted that, although the affidavit appeared to be a little "salted" and contained some information the record did not support, the affidavit had "at least enough verifiable information to support the warrant" and was supported by Detective Weaver's oral testimony that Wright's cell phone "pinged" in the area of 3635 Kate's Bay Highway.

Wright also moved to suppress drugs and money found during the May 2, 2012, search of a motel room occupied by Wright and Powell, both of whom were suspects in the Victim's murder. Detective James Chatfield testified law enforcement tracked Wright and Powell to a Sleep Inn in Conway. The motel clerk telephoned their motel room, and one of the men stepped outside of the room. Detective Chatfield identified the man as one of the two suspects, the officers identified themselves as police officers, the man tried to close the door on them, and the officers held the door open and "forced" their way into the motel room. The officers saw drugs and money in plain view in the motel room and obtained a search warrant at that time. The trial court denied Wright's motion to suppress.

The jury convicted Wright, and the trial court sentenced him to "life imprisonment" for murder and concurrent sentences of five years' imprisonment for possession of a weapon, twenty-five years' imprisonment for trafficking in cocaine, and fifteen years' imprisonment for possession with intent to distribute, all to be served consecutively with the murder sentence.[1]

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[1] Wright asserts on appeal that the trial court erred in sentencing him to LWOP under South Carolina's recidivist statute. *See* S.C. Code Ann. §17-25-45(A) (2014) (providing that upon conviction for a "most serious offense," a person must be sentenced to LWOP if that person has a prior conviction for a "most serious offense"). We note the trial court did not state it was sentencing Wright to LWOP. Rather, on the sentencing sheet, the trial court wrote "life imprisonment"; noted Wright was convicted of murder in violation of sections 16-3-10 and 16-3-20 of the South Carolina Code (2003 & Supp. 2015); and did not mark the box labeled

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012).

LAW/ANALYSIS

I. Search of 3635 Kate's Bay Highway

Wright argues the trial court erred in finding the search warrant valid and admitting the evidence seized during the search of 3635 Kate's Bay Highway. We disagree.

"The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." *Id.* at 88, 736 S.E.2d at 266; *see* U.S. Const. amend. IV.

"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. Dupree*, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). "This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test." *Id.* "The appellate court should give great deference to a magistrate's determination of probable cause." *Id.* "In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention." *State v. Martin*, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001).

"A sworn oral statement may be sufficient to satisfy the 'oath or affirmation' requirement of both federal and state constitutions." *State v. Dunbar*, 361 S.C. 240, 247, 603 S.E.2d 615, 619 (Ct. App. 2004). However, "[t]he General

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"§ 17-25-45," which would have indicated it was sentencing Wright to LWOP under the recidivist statute. The trial court had authority to sentence Wright to life imprisonment under the murder statute. *See* § 16-3-10 (defining murder); §16-3-20(A) (providing "[a] person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life").

Assembly has imposed stricter requirements than federal law for issuing a search warrant." *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000). Section 17-13-140 of the South Carolina Code (2014) mandates, "A warrant . . . shall be issued only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant. If the magistrate . . . is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant . . . ."

"A 'totality-of-the-circumstances' test is utilized in probable cause determinations." *State v. Herring*, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). Under that test,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 212, 692 S.E.2d at 496. "[M]agistrates can issue search warrants based upon hearsay information that is not a result of direct personal observations of the affiant" but rather was "given to the affiant by other officers." *Dunbar*, 361 S.C. at 249, 603 S.E.2d at 620.

"If the affidavit standing alone is insufficient to establish probable cause[,] it may be supplemented by sworn oral testimony before the magistrate." *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994). "[O]ral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant." *Jones*, 342 S.C. at 129, 536 S.E.2d at 679. "However, sworn oral testimony, standing alone, does not satisfy [section 17-13-140]." *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987)). Further, a "false affidavit [i]s the equivalent of not having an affidavit at all" and thus violates section 17-13-140 "because if an affidavit is not truthful, then the magistrate must depend totally on information provided orally by the affiant in order to determine if probable cause exists." *Jones*, 342 S.C. at 128, 536 S.E.2d at 679.

We find the magistrate had a substantial basis for determining that, under the totality of the circumstances, there was probable cause to search 3635 Kate's Bay

Highway. The information in Detective Weaver's affidavit and supplemental oral testimony, which was relayed to him by the lead investigator, created a fair probability that evidence of the shooting would be found at 3635 Kate's Bay Highway.

We acknowledge that some of the information in Detective Weaver's affidavit was inaccurate. Specifically, Detective Cox admitted that although Powell said the gun belonged to Jacinda, Powell did not say that Wright got the weapon from 3635 Kate's Bay Highway, as stated in the affidavit. In addition, Detective Cox admitted the statement in the affidavit that Powell told law enforcement that Wright drove to 3635 Kate's Bay Highway was not accurate because Powell merely described the general area Wright drove to and did not provide a specific numerical address. However, even without this inaccurate information, the affidavit was sufficient to establish probable cause. Specifically, the affidavit stated Powell informed law enforcement that Wright was the shooter, that Wright fled the scene in a black BMW, and that Wright switched getaway vehicles to a dark Escalade. The affidavit also stated Wright obtained the murder weapon from Jacinda, law enforcement believed Wright transported the murder weapon back to 3635 Kate's Bay Highway, and law enforcement believed the weapon might still be in the residence or in one of the vehicles at the residence.

Further, Detective Weaver's use of oral testimony to supplement the inaccurate information in his affidavit was not inappropriate because there was no evidence that he intentionally, knowingly, or recklessly supplied the inaccurate information. Detective Weaver's oral testimony before the magistrate that Wright's cell phone "pinged" to the general area of 3635 Kate's Bay Highway, where law enforcement discovered Wright's vehicle, provided additional probable cause justifying the search warrant. Accordingly, we hold the issuance of the search warrant did not violate the South Carolina and federal constitutions or section 17-13-140.

II. The DMV Records

Wright argues the trial court erred in admitting his driving record and title history—both of which listed his address as 3643 Kate's Bay Highway—to show he did not reside at 3635 Kate's Bay Highway and thus lacked standing to challenge the search of the residence. Wright asserts the State failed to lay a proper foundation for the documents and they were inadmissible hearsay not falling within the business record exception. Because we find the search warrant satisfied section 17-13-140 and, thus, the search of 3635 Kate's Bay Highway was

constitutional, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues where one issue is dispositive).

III. Search of Wright's Motel Room

Wright argues the trial court erred in admitting the drugs and money seized from his motel room because the items were the fruits of a warrantless search and no exception to the search warrant requirement applied. We disagree.

"When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial [court]'s ruling if there is any evidence to support the ruling." *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "The appellate court will reverse only when there is clear error." *Id.*

"Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." *Id.* "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement." *Id.* "The State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement." *State v. Robinson*, 410 S.C. 519, 530, 765 S.E.2d 569, 570 (2014).

"Recognized exceptions to the warrant requirement include plain view and exigent circumstances." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). The two elements needed to satisfy the plain view exception are (1) the initial intrusion that afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *Wright*, 391 S.C. at 443, 706 S.E.2d at 327.

"A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." *Herring*, 387 S.C. at 210, 692 S.E.2d at 494. "A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of

danger to police or others inside or outside a dwelling." *Id*. at 210, 692 S.E.2d at 495; *see id*. at 210, 692 S.E.2d at 494 ("The likelihood a suspect will imminently flee is . . . an exigency warranting . . . an intrusion."); *Wright*, 391 S.C. at 445, 706 S.E.2d at 328 (finding "[e]xigent circumstances developed when the suspects started fleeing"); *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990) (finding exigent circumstances did not justify a warrantless entry into an upstairs duplex for the purpose of arresting an overnight guest believed to be involved in a murder where the police knew that the suspect was in the upstairs duplex with no suggestion of danger to the other occupants of the duplex, the police had already recovered the murder weapon, the police thought the suspect was the driver of the getaway car and knew he was not the murderer, the police had surrounded the duplex, it was evident that the suspect was going nowhere, and the suspect would have been promptly apprehended had he exited the duplex). "In such circumstances, a protective sweep of the premises may be permitted." *Herring*, 387 S.C. at 210, 692 S.E.2d at 495.

"[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (quoting *Whren v. U.S.*, 517 U.S. 806, 814 (1996)). "In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." *Id*.

We find evidence supports the trial court's ruling that the officers did not violate Wright's Fourth Amendment rights by seizing the drugs and money found in plain view in his motel room because the officers' entry into the motel room was justified by the exigent circumstances exception to the warrant requirement. We find this case is distinguishable from *Olson.* First, in *Olson*, law enforcement suspected the individual inside the duplex was only the driver of the getaway car and knew he was not the murderer. However, here, at the time the officers entered the motel room, law enforcement had identified both Powell and Wright as suspects in the Victim's murder. Law enforcement had issued an arrest warrant for Powell the day before the search and had been tracking Wright's cell phone for two days. Detective Chatfield testified that when one of the two murder suspects opened the motel room door, stepped outside, and saw the officers—who identified themselves as police officers—he tried to close the door on the officers. At that point, the officers entered the motel room. In addition, in *Olson*, the murder weapon had been recovered at the time the officers entered the duplex; however, here, the murder weapon had not been recovered at the time the officers entered the

motel room. Therefore, there was an ongoing danger here that was not present in *Olson*. We find this evidence showed that a potentially armed and dangerous murder suspect was attempting to flee, creating exigent circumstances justifying the officers' warrantless entry into the motel room.

Moreover, even though Detective Chatfield testified he went inside the motel room because he was looking for Wright, we find a reasonable officer would have entered the room to prevent the suspects from fleeing and to conduct a protective sweep for officer safety because both Wright and Powell were murder suspects. *See Wright*, 391 S.C. at 444, 706 S.E.2d at 328 ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." (emphasis in original) (quoting *Whren*, 517 U.S. at 814)). Accordingly, because evidence showed exigent circumstances justified the warrantless entry into Wright's motel room, the trial court did not err in refusing to suppress the drugs and money found in plain view in the room.

IV. Powell's Prior Inconsistent Statement

Wright argues the trial court erred in excluding evidence of Powell's prior inconsistent statement—a letter he wrote that allegedly exonerated Wright and implicated another individual as the Victim's killer—where Wright failed to disclose the letter to the State. Wright contends neither Rule 5(b)(2), SCRCrimP, nor Rule 613, SCRE, required him to present the letter to the State before or during trial in order to cross-examine Powell about the statement. We find this issue unpreserved.

During trial, Wright's counsel asked Powell about a letter he allegedly wrote that exonerated Wright. Powell testified that, while he was incarcerated, Wright promised to get him out of prison if he wrote a statement exonerating Wright. Powell stated Wright gave him a letter to copy, he copied Wright's letter in his handwriting, and he returned both letters to Wright. Wright's counsel asked Powell whether he wrote in the letter that a man nicknamed "Two Guns" shot the Victim. The State objected to Wright's question on the basis that it had previously requested that the letter be disclosed to it, Wright failed to disclose the letter, and it wanted to see the letter before Wright cross-examined Powell concerning the letter's contents. Because Wright's counsel was unable to produce the letter at trial, the trial court prohibited Wright's counsel from questioning Powell about the letter.

The trial court instructed the jury that there was no acceptable evidence to support the questions about the letter and not to consider any of Wright's questions or Powell's answers concerning the letter.

Because Wright failed to proffer Powell's testimony concerning whether he wrote a letter saying a man nicknamed "Two Guns" shot the Victim or the letter itself in response to the State's objection, Wright's objection to the exclusion of that evidence is not preserved. *See State v. Davis*, 309 S.C. 56, 62, 419 S.E.2d 820, 824 (Ct. App. 1992) ("[A] reviewing court may not rule on alleged error in the exclusion of evidence unless the record on appeal shows fairly what the rejected evidence would have been."). In addition, Wright's argument that the trial court erred in instructing the jury to disregard Powell's testimony concerning the letter is also unpreserved because Wright acquiesced in the trial court's ruling and failed to object to the curative instruction the trial court gave to the jury. *See State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("[A] party cannot acquiesce to an issue at trial and then complain on appeal."); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A contemporaneous objection is required to preserve issues for direct appellate review."). Accordingly, we find this issue is not preserved.

V. Right to Testify

Wright argues the trial court erred in denying his request to testify, which he made after the defense had rested and the trial court had ruled it would not charge the jury on voluntary manslaughter or self-defense. We disagree.

"A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial [court,]" and the trial court's "ruling will not be reversed absent an abuse of discretion." *State v. Wren*, 470 S.E.2d 111, 112 (Ct. App. 1996).

The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id*. at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). "However, the right to present testimony is not without limitation." *State v. Rivera*, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013). "The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But restrictions of a defendant's right to testify may not be arbitrary

or disproportionate to the purposes they are designed to serve." *Id*. (internal quotation marks and citations omitted) (quoting *Rock*, 483 U.S. at 55-56). "In applying its evidentiary rules[,] a [s]tate must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id*. (quoting *Rock*, 483 U.S. at 56). Evidence rules that "'infringe upon a weighty interest of the accused' but fail to serve any legitimate interest are arbitrary." *Id*. (internal quotation marks omitted) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006)).

After the State rested its case, the trial court advised Wright of his right to testify in his defense. The trial court stated, "And I ask you now—you're not bound at this point, but have you determined whether you wish to testify or exercise your right to remain silent?" Wright exercised his right to remain silent. Wright's counsel announced that the defense had no other witnesses, the defense rested on the record, and the trial court adjourned for the day.

The next morning, the trial court held a charge conference and ruled it would not give the voluntary manslaughter and self-defense charges Wright requested. Wright's counsel then explained Wright told him that morning—before the trial court ruled on the jury charge issue—that he had changed his mind and wanted to testify. Wright noted that after the State rested, the trial court told him that he did not have to say at that time whether he wanted to testify. Consequently, Wright believed the trial court's statement entitled him to decide at a later time whether to testify. The trial court admitted it did not emphasize that Wright had to decide during the trial whether to testify; however, the trial court thought any reasonable person would believe the right to testify was extinguished after the defense rested. The trial court stated Wright's counsel should have informed it of Wright's desire to testify before the trial court ruled it would not charge the jury on voluntary manslaughter and self-defense. The trial court stated that after hearing its ruling on the charges, Wright knew which supporting evidence was missing, had it "all mapped out," and would be able to fit his testimony into the required parameters and tell the jury he "was afraid to death." The trial court refused to reopen the record to allow Wright to testify.

Initially, we note that this issue is appropriate for direct review. *See id.* at 241, 741 S.E.2d at 702 (holding the defendant's claim that he was denied the right to testify was appropriate for direct review when the record was adequately developed to permit full consideration of the defendant's claim; the pertinent facts were undisputed; a PCR hearing was not necessary to resolve a factual dispute and

would not aid in the application of the law; and the defendant's claim was presented not as an ineffective assistance of counsel claim, but rather as an error committed by the trial court in excluding the defendant's testimony, which was not an appropriate basis for an ineffective assistance of counsel claim). Although Wright asserts on appeal that his counsel erred in failing to timely inform the trial court that he wished to testify—which would be an ineffective assistance of counsel claim—he also asserts the trial court erred in denying his request to testify after the defense rested—which would be a claim of constitutional error. *See id.* (citing *Rossignol v. State*, 152 Idaho 700, 703-04, 706, 274 P.3d 1, 4-5, 7 (Ct. App. 2012), for the proposition that in determining whether the denial of a defendant's right to testify is a claim of ineffective assistance of counsel or a claim of deprivation of a constitutional right, the appropriate inquiry depends on how the claim is pled and argued). Wright is ultimately asserting the trial court deprived him of his right to testify by refusing to reopen the record and allow him to testify after the defense rested.[2] *See id*. at 240-41, 741 S.E.2d at 702 (quoting *Passos-Paternina v. United States*, 12 F.Supp.2d 231, 240 (D.P.R. 1998), for the proposition that the right to testify exists independently of the right to counsel and that "[r]egardless of whether the denial of the right to testify can be ascribed to defense counsel's conduct, the deprivation complained of is not effective assistance but the right to testify, and the right to testify itself is constitutionally protected").

We hold the trial court did not abuse its discretion in refusing to reopen the record to allow Wright to testify after the defense had rested and the trial court had ruled it would not charge the jury on voluntary manslaughter and self-defense. The trial court was concerned that if it permitted Wright to testify after hearing its ruling on the voluntary manslaughter and self-defense jury charges and learning which supporting evidence the trial court said was missing, Wright would be able to fit his testimony into the required parameters for those charges by testifying that he shot the Victim because he feared for his life. This was a legitimate ground for refusing to reopen the record, and the trial court's restriction of Wright's right to testify was not arbitrary.

[2] However, nothing in this opinion prevents Wright from seeking PCR for ineffective assistance of counsel.

VI. Jury Charge

Wright argues the trial court erred in refusing to instruct the jury on voluntary manslaughter and self-defense given that there was sufficient evidence to create an inference that Wright feared imminent danger before the shooting. We disagree.

"To warrant reversal, a trial [court's] refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *Id*. at 479, 697 S.E.2d at 584. "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

"In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant." *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). "Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14 (2011). "The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Id*. at 413, 706 S.E.2d at 15. "An overt, threatening act or a physical encounter may constitute sufficient legal provocation." *State v. Hernandez*, 386 S.C. 655, 661, 690 S.E.2d 582, 585 (Ct. App. 2010). "Sufficient legal provocation must include more than 'mere words' or a display of a willingness to fight without an overt, threatening act." *Id*.

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if

> his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial [court's] refusal to do so is reversible error." *Id*. at 650, 664 S.E.2d at 469.

Powell, who did not witness the shooting, testified Wright said that shortly before the shooting the Victim knocked on Sinclair's door and Wright opened the door while holding a gun in his hand. There was testimony that the Victim said, "[Y]ou got these dudes running your house like that?" or "[Y]ou got these young boys in your house now," when he entered Sinclair's house. According to Powell, Wright stated the Victim then reached by his abdomen—indicating he had a gun—and Wright shot him because he feared the Victim was reaching for a gun. Powell admitted that if the Victim looked like he was reaching for a gun, he would not yet have had a gun in his hand. The pathologist who performed the Victim's autopsy testified the Victim sustained ten gunshot wounds, three of which were in his back.

We hold the trial court did not abuse its discretion in refusing to charge the jury on voluntary manslaughter because, viewing the facts in the light most favorable to Wright, the evidence did not show he killed the Victim in a sudden heat of passion upon sufficient legal provocation. Hearing someone say, "[Y]ou got these young boys in your house now," or, "[Y]ou got these dudes running your house like that," would not shut out knowledge or volition or render the mind of an ordinary person incapable of cool reflection.

We also hold the trial court did not abuse its discretion in refusing to charge the jury on self-defense. First, a reasonably prudent person would not have believed he was in actual imminent danger and needed to strike the fatal blow to protect

himself from serious bodily harm or death under these facts. There was no evidence that the Victim verbally threatened Wright or that Wright actually saw a gun on the Victim's person before Wright shot him.

Second, evidence was lacking that Wright had no other probable means of avoiding the danger than shooting the Victim ten times, including three times in the back. According to Powell, Wright stated he was already holding a gun when the Victim appeared to be reaching at his side. Even giving some credence to this statement, Wright could have held the gun on the Victim or could have left the scene. Accordingly, because a jury could not reasonably infer that Wright acted in self-defense, we find the trial court did not err in refusing to instruct the jury on self-defense.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

SHORT, J. concurs.

GEATHERS, J., concurring in a separate opinion: I depart with the majority's conclusion that a reasonable police officer would have entered Wright's motel room to prevent Wright and Powell from fleeing and to conduct a protective sweep for officer safety. *See State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 495 (2009) ("A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling."). Detective Paul Johnson testified that he and other detectives "set up an outside perimeter covering all exits." Therefore, a reasonable officer would rely on this perimeter to prevent Wright or Powell from leaving the premises. *Cf. Minnesota v. Olson*, 495 U.S. 91, 100-101 (1990) (observing no need to prevent a suspect's escape when three or four police squads surrounded the home in which the suspect was a guest).

Further, there was no evidence that police conducted a protective sweep in this case. Rather, Detective Chatfield testified that he "backed out of the room" as Wright and Powell were taken out of the room and the location was secured until a search warrant could be obtained and executed. Likewise, Detective Johnson testified, "Everyone left the room." Therefore, the evidence does not support the application of the exigent circumstances doctrine discussed in *Herring*.

Nonetheless, the intrusion into the motel room was justified by the objective of law enforcement to detain, if not arrest, Wright and Powell for their involvement in the Victim's murder. *See United States v. Hensley*, 469 U.S. 221, 229 (1985) ("[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." (referencing *Terry v. Ohio*, 392 U.S. 1, 26 (1968))); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (holding the petitioner's act of retreating into her house could not thwart a warrantless arrest when it was set in motion in a public place upon probable cause). Therefore, I concur in upholding the trial court's denial of the motion to suppress and affirming Wright's conviction.