OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27

June 27, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laurice Garvin, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Barnwell County
Rodney A. Peeples, Trial Judge
Marc H. Westbrook, Post-Conviction Judge

Opinion No. 26005
Submitted April 20, 2005 - Filed June 27, 2005

AFFIRMED

Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Paula S. Magargle, all of Columbia, for Respondent.

JUSTICE BURNETT: Laurice Garvin (Petitioner) pled guilty in 1999 and was sentenced as follows: seven years concurrent for resisting arrest; five years concurrent for grand larceny; three years concurrent for breaking into a motor vehicle; and fifteen years consecutive for escape, suspended on the service of eight years plus five years probation.

Petitioner filed a post-conviction (PCR) application, which was denied after a hearing. The plea judge properly interpreted the escape statute, S.C. Code Ann. § 24-13-410 (Supp. 2004), and correctly imposed a mandatory consecutive sentence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner escaped from the Barnwell County jail while he was incarcerated as a pretrial detainee. Petitioner jumped from a window and over a gate and was later captured in Florida.

The plea judge, assistant solicitor, and Petitioner's plea counsel discussed whether the judge was *required* by S.C. Code Ann. § 24-13-410 (Supp. 2004) to impose a *consecutive* sentence on the escape conviction. The judge and attorneys ultimately agreed a consecutive sentence was mandatory even though Petitioner was a pretrial detainee who was not presently serving a prison sentence at the time of the escape. Consequently, Petitioner's plea attorney did not object to the imposition of a consecutive sentence.

Petitioner's primary contention in his PCR application and at the hearing was that plea counsel was ineffective in failing to assert that he should not face a *mandatory*, *consecutive* sentence for escape because he was a pretrial detainee at the time of his escape. According to Petitioner, no "original" sentence existed at the time of his escape. Therefore, Petitioner contends the statute did not require a consecutive escape sentence and it should have been imposed concurrently with the other, simultaneously imposed sentences.

ISSUE

Did the PCR judge correctly interpret the escape statute to mandate the imposition of a consecutive sentence, where the escapee was a pretrial detainee and the escape sentence was made consecutive to other, simultaneously imposed sentences?

LAW/ANALYSIS

Petitioner contends the PCR judge erred in rejecting his argument the consecutive sentence was illegally imposed. Section 24-13-410 provides:

> A) It is unlawful for a person, lawfully confined in prison or upon the public works of a county or while in the custody of a superintendent, guard, or officer, to escape, to attempt to escape, or to have in his possession tools or weapons which may be used to facilitate an escape.
>
> (B) A person who violates this section is guilty of a felony and, upon conviction, must be imprisoned not less than one year nor more than fifteen years.
>
> (C) The term of imprisonment is consecutive to the *original sentence* and to other sentences previously imposed upon the escapee by a court of this State.

(emphasis added).

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where there has been a guilty plea, the applicant must prove counsel's representation fell below the standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88

L.Ed.2d 203 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, supra. The Court will not uphold the findings when there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

However, in a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); I'On v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718 (2000). The Court will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462, 465 (2004); Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

It is undisputed Section 24-13-410 applies in Petitioner's case. See Bing v. Harvey, 274 S.C. 216, 262 S.E.2d 42 (1980) (escape from the lawful pretrial custody of a sheriff constitutes a violation of Section 24-13-410); accord Edget v. State, 791 So.2d 311 (Miss. App. 2001) (escape statute applies to pretrial detainees). It also is undisputed the statutory language indicates the Legislature intended for any escapee serving a prison sentence to serve additional, consecutive time for an escape conviction.

It is less clear, however, whether the Legislature intended for the requirement of a consecutive sentence contained in Section 24-13-410(C) to apply to pretrial detainees. Subsection (C) provides that "[t]he term of imprisonment is consecutive to the *original sentence* and to *other sentences previously imposed* upon the escapee by a court of this State" (emphasis added). The Petitioner argues the use of the emphasized terms indicates the subsection may apply only to convicted and sentenced prisoners – not to pretrial detainees. We disagree.

We agree with the interpretation endorsed by the plea and PCR judges, and conclude a mandatory consecutive sentence is required for both escapees serving a prison sentence and escapees who are pretrial detainees. Therefore, the PCR judge correctly denied Petitioner's application.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *E.g.* Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Abell v. Bell, 229 S.C. 1, 4, 91 SE.2d 548, 550 (1956).

We conclude the Legislature intended the term "original sentence" to mean the sentence related to the charges from which the detainee attempted to escape, regardless of when the sentencing occurred. In other words, a sentence is still "original" even if a defendant has not been formerly sentenced by the court at the time of his escape. Therefore, the term "original" does not refer to the timing of the sentencing or the status of the defendant. Instead, "original" simply refers to the first sentence arising from the charges on which the defendant is being held at the time he attempts to or effects an escape. This result is consistent with the intent of the Legislature, when our statutory law is considered in its entirety. In designating escape a felony, the Legislature clearly considers escape a serious crime resulting in strict penal consequences.

We also agree with the State that to hold a pre-trial detainee who escapes from jail cannot receive a consecutive sentence for his escape would lead to an absurd result. There would be no additional incentive for a pre-trial detainee not to escape if there could be no further consequences for attempted escape if the defendant were found guilty of the underlying charge. It would be nonsensical to conclude a convicted defendant who escapes is subject to a mandatory consecutive sentence, but a pre-trial detainee who escapes and is later convicted of the underlying crime is not. That would be so plainly absurd that it could not possibly have been intended by the Legislature. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). In construing the statute as a whole, we escape the absurdity and give efficacy to Legislative intent.

The dissent's reliance on Bing v. Harvey, 274 S.C. 216, 218, 262 S.E.2d 42, 43 (1980) is unfounded. In Bing, the Court addressed whether the previous version of Section 24-13-410 applied at all to pre-trial detainees. The Court held Section 24-13-410 does apply to pre-trial detainees. Whether the sentence for escape was consecutive was not in issue. However, the Court's discussion is instructive. The Court noted the "original sentence" language "distinct from the definition of the offense, merely establishes certain limitations on the punishment where a violator is *subject*[1] to a pre-existing court sentence." (emphasis added). Clearly Petitioner was subject to a sentence. That it has not yet been imposed is not relevant.

For the foregoing reasons, we affirm the denial of post-conviction relief and conclude trial counsel was not ineffective because Section 24-13-410(C) requires a mandatory consecutive sentence when a pre-trial detainee escapes.

AFFIRMED.

TOAL, C.J., and MOORE, J., concur. WALLER, dissenting in a separate opinion in which PLEICONES, J., concurs.

[1] "Subject" is defined as "having a contingent relation to something and usually dependent on such relation for final form, validity, or significance." Webster's Third New International Dictionary 2275 (8th ed. 1981).

JUSTICE WALLER: I respectfully dissent. Section 24-13-410 (C) requires the imposition of a consecutive sentence only when the person was serving his original or another previously imposed sentence at the time of the escape. In Bing v. Harvey, 274 S.C. 216, 218, 262 S.E.2d 42, 43 (1980), the Court held that an escape from lawful pretrial custody constituted the offense of escape under the previous version of § 24-13-410. The Court interpreted the "original sentence" language of the statute and held it "merely establishes certain limitations on punishment where a violator is subject to a pre-existing court sentence. Where one convicted of escape is subject to no prior sentence, these special provisions do not apply." Id. Likewise, here, subsection (C) applies only to violators subject to a pre-existing court sentence – not pretrial detainees. Here, petitioner was a pre-trial detainee. Thus, the plea and PCR judges erroneously applied the consecutive sentence requirement of subsection (C). Petitioner's plea counsel erred in failing to challenge the plea judge's interpretation of the statute and object to the imposition of a mandatory consecutive sentence and, but for the erroneous interpretation of the statute, petitioner would not have pled guilty and accepted a mandatory consecutive sentence on the escape charge. Accordingly, I would reverse the denial of PCR.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

G & P Trucking, Petitioner,

v.

Parks Auto Sales Service & Salvage, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26006
Heard June 16, 2005 - Filed June 27, 2005

DISMISSED AS IMPROVIDENTLY GRANTED

Stephen E. Darling and Kari Hubbard, of Haynsworth, Sinkler & Boyd, P.A., of Charleston, for Petitioner.

Robert A. McKenzie and Gary H. Johnson, II, of McDonald, McKenzie, Rubin, Miller & Lybrand, L.L.P., of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in G&P Trucking v. Parks Auto Sales, Serv. & Salvage, Inc., 357 S.C. 82, 591 S.E.2d 42 (Ct. App. 2003). We now dismiss certiorari as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

The Supreme Court of South Carolina

In the Matter of Johnny W. Rabb, Jr., Respondent.

ORDER

Respondent pled guilty to one count of willful failure to file a state income tax return in violation of S.C. Code Ann. § 12-54-44(B)(3) (2000). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Jonathan M. Robinson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Robinson shall take

action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Robinson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Jonathan M. Robinson, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jonathan M. Robinson, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Robinson's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/Jean H. Toal C.J.

FOR THE COURT

Charleston, South Carolina
June 23, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Historic Charleston Holdings, LLC, Respondent,

v.

Gerard Mallon, Dixie Holdings, LLC, and Dixie Developers, LLC, Defendants,

Of whom Gerard Mallon is the, Appellant.

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 4004
Heard April 4, 2005 – Filed June 27, 2005

AFFIRMED IN PART,
REVERSED IN PART
AND REMANDED

Deborah Harrison Sheffield, of Columbia, for Appellant.

Charles P. Summerall, IV, of Charleston, for Respondent.

BEATTY, J: Gerard Mallon appeals the master-in-equity's order awarding Historic Charleston Holdings, LLC, one-half of the proceeds from the sale of a piece of property owned by Dixie Holdings, LLC, of which both Mallon and Historic Charleston Holdings were members. Additionally, Mallon appeals the master-in-equity's refusal to conduct an accounting, as well as the award of prejudgment interest, attorney's fees, and costs to Historic Charleston Holdings. We affirm in part, reverse in part, and remand.

FACTS

In June of 1998, Gerard Mallon formed Dixie Holdings, LLC, a member-managed, term limited liability company. Mallon, William Storen,[1] and Historic Charleston Holdings, LLC (HCH) executed an operating agreement as the three members of Dixie Holdings. Priestly Coker and Cynthia Coker were the sole members of HCH.[2] Subsequently, HCH and Mallon also became members in Dixie Developers, LLC. However, HCH ultimately sold its interest to Mallon, leaving Mallon as the sole member of Dixie Developers.

The members formed Dixie Holdings for the purpose of purchasing, renovating, and selling various real properties. Although Dixie Holdings' operating agreement did not specify each member's duties, the record indicates Priestly Coker (Coker) performed accounting and financial related

[1]At some point prior to this action, Mallon and HCH bought Storen's interest in Dixie Holdings and Storen filed a Statement of Dissociation with the South Carolina Secretary of State's Office. He was not a party to the underlying action and is not a party in this appeal.

[2] From the record, it appears Cynthia Coker did not take an active role in HCH or Dixie Holdings.

services,[3] Mallon, through his construction company, renovated the properties, and Storen acted as the real estate agent in locating potential investment properties and later marketing them.

Shortly after the execution of the operating agreement, Mallon, Storen, and Coker on behalf of HCH, amended the operating agreement to reflect the members' interest in Dixie Holdings. This amendment stated Mallon and HCH each owned a 49.5% interest and Storen owned a 1% interest.

Dixie Holdings purchased four properties located in Charleston, South Carolina. According to Mallon, a dispute arose between Mallon and Coker after Dixie Holdings sold two of those properties because Coker failed to provide financial information related to Dixie Holdings and Dixie Developers. Although Mallon had been given money from the proceeds of those sales, he believed he had not separately been compensated for work performed in renovating those properties.

In December 1999, the parties executed a written agreement in connection with a members' meeting that took place several days prior. The agreement provided for an audit of Dixie Holdings and stated if the members could not resolve their differences, then an arbitrator would be appointed by agreement of the parties. In addition, the agreement stated, in pertinent part:

> The primary function of the formation of these companies is purchase and sale of Real Estate.
> Sales are to be made while these matters are being dealt with.
> The sales proceeds can be held in an escrow account.
> OR [othen [sic] written accepted offer].

[3] Coker also performed financial duties for Dixie Developers until the company was sold to Mallon. In fact, both Dixie Holdings and Dixie Developers utilized one banking account under the name of Dixie Developers.

Coker gave Mallon a box containing some of the company's financial records in April 2000.

After the execution of this agreement, Dixie Holdings sold the third property, referred to by the parties as "15 Felix Street," on April 14, 2000. Coker testified that, pursuant to the parties' December 1999 agreement, he believed the net proceeds from the sale were to be placed in an escrow account until the parties determined what expenses needed to be paid and Mallon had been compensated for any related expenses. The net proceeds of $41,845.30 were given to Mallon, who placed them in a bank account in the name of Dixie Developers,[4] of which he had sole signatory authority. Despite requests from Coker within days of the closing that Mallon place the funds in a proper escrow account, Mallon retained the funds in the separate account and maintained sole signatory authority. As a result, HCH, individually and in a derivative capacity as a member of Dixie Holdings, brought suit against Mallon, Dixie Holdings, and Dixie Developers[5] on October 11, 2002.[6]

In its complaint, HCH alleged five causes of action. HCH requested: (1) a judicial decree winding up and dissolving Dixie Holdings; (2) a full and complete accounting of Dixie Holdings including transfers between it and Dixie Developers and Mallon; (3) injunctive relief reversing Mallon's diversion of funds and restraining Mallon from taking any action that would damage either HCH or Dixie Holdings' interests; (4) a declaratory judgment

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[4] Although both Mallon and Coker had signatory authority on the Dixie Developers bank account for both Dixie Holdings and Dixie Developers, Mallon opened a new account in the name of Dixie Developers for which he had sole signatory authority. Further, at the time Mallon opened the new account, he was the sole member of Dixie Developers.

[5] Neither Dixie Holdings nor Dixie Developers is a party to this appeal.

[6] Dixie Holdings' fourth and final property was sold in December 2001 and the proceeds were split equally. Thus, Dixie Holdings no longer owns any property.

regarding each member's rights pursuant to section 15-53-10 of the South Carolina Code; and (5) attorney's fees pursuant to section 33-44-1104 of the South Carolina Code. In addition to these causes of action, HCH requested the court award "full relief under Section 33-44-801, an accounting, declaratory relief, injunctive relief, fair distribution, attorney's fees, pre-judgment interest, costs, and such other relief as the Court may deem appropriate."

After the circuit court referred the case to a master-in-equity, Mallon submitted an answer. In his answer, Mallon asserted "an accounting is appropriate for both parties, and that Coker, who acted as the financial officer of Dixie [Holdings] has repeatedly and improperly failed to prepare a proper accounting, which should now be done." Mallon also claimed entitlement to reimbursement for services he performed on various properties of Dixie Holdings that exceeded the proceeds Dixie Holdings received from the sale of 15 Felix Street.

Immediately prior to trial, the master heard several motions in limine submitted by HCH. In one motion, HCH requested the exclusion of any documents not submitted prior to November 21, 2003, when the parties exchanged discovery. The master granted HCH's request. Mallon did not object to the master's decision.

The master proceeded with a trial on the issues raised by the parties. At trial, Mallon presented a statement of charges in which he claimed he was owed $9,280 for work performed on four Felix Street properties, including $1,900 for work performed on 15 Felix Street. In his order, the master denied Mallon's request for an accounting concluding he had "not timely requested, and waived, any right to an accounting." The master also determined Mallon was not entitled to reimbursement for any alleged expenses associated with properties owned by Dixie Holdings or Dixie Developers because the parties had a "course of dealing of determining expenses prior to property sales and paying authorized expenses from the sale proceeds." The master found HCH was entitled to receive one-half of the proceeds from the sale of 15 Felix Street, plus prejudgment interest on its half of the proceeds at the rate of 8.75% from the closing date of 15 Felix Street until the entry of judgment.

Finally, the master awarded HCH attorney's fees and costs pursuant to section 33-44-1104 of the South Carolina Code "based upon the record, the Affidavit of Counsel, and the factors applying to an award of fees and costs . . . ."

The master directed Mallon to turn over the proceeds from 15 Felix Street to HCH's counsel to be disbursed to HCH thirty days after the entry of his order. The master also authorized HCH to deliver articles of termination pursuant to section 33-44-805 of the South Carolina Code to the Secretary of State for filing. No post-trial motions were filed, and this appeal followed.

STANDARD OF REVIEW

In the underlying action, HCH sued in a derivative capacity for an accounting and injunctive relief. Actions for an accounting, for an injunction, and shareholder derivative actions are all actions in equity. See Lee v. Lee, 251 S.C. 533, 536, 164 S.E.2d 308, 309 (1968) (holding an action against a guardian ad litem for misappropriated funds was essentially an action for an accounting which was equitable in nature); Wiedemann v. Town of Hilton Head, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) ("Actions for injunctive relief are equitable in nature."); Anthony v. Padmar, 320 S.C. 436, 445, 465 S.E.2d 745, 750 (Ct. App. 1995) (noting that derivative actions are equitable). In an action in equity referred to a master for final judgment, this court may find facts in accordance with its own view of the preponderance of the evidence. Van Blarcum v. City of N. Myrtle Beach, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct. App. 1999). However, we should not ignore the findings of the trial judge, who had the opportunity to hear and observe the witnesses. Id.

LAW/ANALYSIS

I. Accounting

Mallon argues the master erred in refusing to order an accounting because one was necessary prior to the dissolution of Dixie Holdings.[7] We agree.

The Uniform Limited Liability Company Act outlines certain procedures for actions brought by members of a limited liability company. Section 33-44-410 allows a member to maintain an action against the limited liability company or another member "for legal or equitable relief, with or without an accounting" to enforce, in pertinent part:

> (1) the member's rights under the operating agreement;
>
> (2) the member's rights under this chapter; and
>
> (3) the rights that otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

S.C. Code Ann. § 33-44-410 (a) (Supp. 2004). Certain events may cause the dissolution and winding up of a limited liability company, including where a

[7] Mallon also asserts the master erred in limiting the scope of the underlying action to the 15 Felix Street property. However, the substance of the argument in support of the first issue on appeal fails to address why the master erred in limiting the scope of the action to 15 Felix Street. In addition, Mallon fails to cite any supporting authority for his position. Therefore, Mallon abandoned this argument on appeal and we need not address it. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that where a party fails to city any supporting authority or where the argument is merely a conclusory statement, the issue is deemed abandoned on appeal).

member has applied for dissolution and there is a judicial decree to the effect that:

> (a) the economic purpose of the company is likely to be unreasonably frustrated;
>
> (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
>
> (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;
>
> (d) the company failed to purchase the petitioner's distributional interest after giving effect to provisions of the operating agreement modifying or superseding the provisions of Section 33-77-701; or
>
> (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner;
>
> . . . .

S.C. Code Ann. § 33-44-801(4) (Supp. 2004). In winding up the business of the limited liability company, the assets of the company must be applied to "discharge its obligations to creditors, including members who are creditors," with the surplus being paid to members in accordance with their right to distribution. S.C. Code Ann. § 33-44-806(a) (Supp. 2004).

Members of limited liability companies may enter into an operating agreement that outlines the procedures governing the affairs of the company. S.C. Code Ann. § 33-44-103 (Supp. 2004). Operating agreements are binding contracts that are superior to statutory authority where they are in place. However, to the extent that the operating agreement is silent as to some matter, statutory law will apply. Id. Thus, courts deciding a controversy between members must first evaluate a limited liability company's operating agreement regarding a particular procedure prior to supplementing any areas not covered by the agreement with statutory law.

The sections of Dixie Holdings' operating agreement pertinent to this discussion concern Mallon's claim for reimbursement and the need for an accounting. Section 6.4 of Dixie Holdings' operating agreement provided that the company "shall reimburse Members for all authorized, direct out-of-pocket expenses incurred on behalf of the Company." In addition, the operating agreement contained the following provisions:

> Section 12.4 *Priority of Distribution of Assets*. In the event of a Termination Event and the Members do not elect to continue the business of the Company, the assets of the Company shall be distributed in the following order and priority:
>
> (a) To the payment of debts and liabilities of the Company (other than the Capital Contributions of the Members) and expenses of liquidation;
> (b) To the setting up any reserves . . . ; and
> (c) To each Member in accordance with their respective Membership Percentages.
>
> . . . .
>
> Section 12.6 *Final Accounting*. Each of the Members shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation. Upon compliance by the

> Company with the foregoing distribution plan, the Members shall cease to be such, and they shall execute and cause to be filed any and all documents necessary with respect to termination and cancellation.

Relying upon sections 33-44-410 and 33-44-801 of the South Carolina Code, the master noted that he had discretion to fashion a remedy short of an accounting. The master concluded that Mallon, Dixie Holdings, and Dixie Developers failed to timely request an accounting and thus waived any right to have one. Therefore, the master determined that awarding HCH 50% of the original proceeds from the sale of 15 Felix Street and dissolving Dixie Holdings was the appropriate remedy. Although we recognize the master may grant relief to a member pursuant to section 33-44-410 without an accounting of the limited liability company's business and the master has authority to order dissolution of a limited liability company pursuant to section 33-44-801, we find under these circumstances an accounting was necessary for the dissolution and winding up of Dixie Holdings' business.

Dixie Holdings' operating agreement required an accounting prior to dissolution. In order for the master to determine what amounts are to be distributed to the members pursuant to section 12.4 of the operating agreement, he was first required to determine what assets Dixie Holdings owned at the time of dissolution. Those assets cannot be determined until the debts and liabilities of the company are paid. Thus, the master must first conduct an accounting to determine the balance of Dixie Holdings' assets after the payment of liabilities, which presumably under the operating agreement includes reimbursements to members. In addition, section 12.6 of the operating agreement contemplates a final accounting upon complete liquidation. Although Coker gave Mallon a box containing some of the company's financial records in 2000, that act did not amount to a formal accounting necessary for the dissolution of the company. Because the operating agreement required an accounting, the master erred in ignoring this document.

Further, even assuming the operating agreement was silent as to some aspect of winding up Dixie Holdings, we find an accounting was warranted pursuant to statute. Section 33-44-410 provides that a member can sue the limited liability company or another member to enforce rights under the operating agreement and relief may include an accounting. S.C. Code Ann. § 33-44-410 (Supp. 2004). In winding up the business of a limited liability company, courts are required to determine the assets, discharge obligations to creditors, and distribute the surplus to members. S.C. Code Ann. § 33-44-806(a) (Supp. 2004). In most instances, including the present case, this task can only be accomplished after an accounting. Accordingly, the master erred in ordering the dissolution and ultimately the distribution of Dixie Holdings' assets without first requiring an accounting.

In addition to finding an accounting necessary under these circumstances, we find Mallon did not waive his right to an accounting.

> A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.

Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992).

HCH pled its right to an accounting in its complaint, to which Mallon assented in his answer.[8] In response to HCH's motion for a directed verdict,

[8] Mallon's letter to the clerk of court, treated as his initial answer by the master, stated that there was a need for a full accounting and he desired arbitration. In his formal answer later filed after obtaining counsel, Mallon initially states that he believes an accounting is appropriate for both parties. Later in the formal answer, he alleges that HCH should be estopped from requesting an accounting from Mallon, Dixie Holdings, and Dixie Developers because Coker's failure to maintain financial records rendered an accounting

Mallon argued that an accounting should be performed. The record is void of any evidence of Mallon's voluntary and intentional abandonment of his right to an accounting. Thus, the master erred in finding Mallon waived his right to an accounting and in not conducting an accounting pursuant to the dissolution and winding up of Dixie Holdings' business.

Finally, HCH argues that no accounting was necessary because there were no debts after the master determined that Mallon had waived his right to setoff charges and the only asset to be distributed was the disputed $41,845.30. This argument overlooks the fact that the parties were required by the operating agreement to have an accounting of all of Dixie Holdings' business prior to dissolution. The master's findings that Mallon was not entitled to setoff and the fact that Dixie Holdings' only remaining asset was the disputed amount will only serve to make this task easier.

Accordingly, we reverse the master's decision to deny the parties an accounting and remand this matter for a formal accounting of Dixie Holdings. Our decision to remand this matter for an accounting affects other aspects of the master's award to HCH. Because the proceeds from the sale of 15 Felix Street are the property of Dixie Holdings until a final accounting is performed, we must also reverse the master's decision to award one-half of the proceeds to HCH. Further, because we reverse the award to HCH, we must likewise reverse the associated award of prejudgment interest. The proceeds from the sale of 15 Felix Street shall be held in an escrow account for the benefit of Dixie Holdings until a final accounting is performed and the appropriate amounts distributed accordingly.[9]

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from them impossible. Although HCH argues that the latter statement amounted to a wavier of the request for an accounting, we interpret it as merely an expression that Coker's mismanagement of financial records frustrated the parties' ability to conduct an accounting. Thus, these sections can be consistently read together to indicate that Mallon still desired an accounting.

[9] Mallon raises several other issues on appeal, including whether the circuit court erred in: (1) disallowing Mallon's charges for the Felix Street

II. Attorney's Fees and Costs

Mallon argues the master erred in awarding attorney's fees and costs to HCH. Mallon contends because HCH asserted its own rights and not those of Dixie Holdings, HCH's action is not a derivative action. Mallon also argues the attorney fee affidavit provided by counsel for HCH was not sufficient. In addition, Mallon contends the master erred in not making specific findings required to award attorney's fees. Finally, Mallon argues Coker created the necessity for the action because he failed to provide a proper accounting.

We find most of Mallon's arguments not preserved for our review. In order for an issue to be preserved for appellate review, with few exceptions, it must be raised to and ruled upon by the trial judge. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004). When a trial court fails to address the specific argument raised by the appellant, the appellant must make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument. In the absence of such a motion, the matter is not preserved and the appellate court cannot consider the

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properties; (2) disallowing the charges involved with the Dixie Developers properties; (3) finding the relief granted was justified by Mallon's attempt to dissociate from Dixie Holdings; (4) excluding evidence of Coker's self-dealing and misappropriation of Dixie Holdings' funds; and (5) awarding attorney's fees and costs. The arguments in support of these issues, for the most part, either were not raised below or were presented in Mallon's brief in a conclusory manner without supporting authority. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues not raised to or ruled upon by the trial court my not be considered on appeal); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that failure to provide argument or supporting authority for an issue renders it abandoned). Thus, these issues each have procedural problems that foreclose appellate review and we decline to address them. However, we address the attorney's fees issue to the extent it may be viewed as preserved.

argument on appeal. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). In addition, when raising an issue through an objection, the "objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

HCH asserted in its complaint its entitlement to attorney's fees and costs pursuant to section 33-44-1104 of the South Carolina Code. This section provides:

> If a derivative action for a limited liability company is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability company the remainder of the proceeds received.

S.C. Code Ann. § 33-44-1104 (Supp. 2004). At trial, counsel for HCH submitted an attorney fee affidavit into evidence arguing HCH's entitlement to these fees pursuant to section 33-44-1104. Mallon's counsel responded with the following: "I do not concede, the Defendant does not concede that his client is entitled to attorney's fees in this case. I don't take issue with the number of hours that he proposed, or the usual things, the amount of the hours he worked, attorney time, assistant time . . . ." However, Mallon's counsel did not further specify the reason for his objection, other than the following statement: "Mr. Coker's hand is so heavy in causing this problem to come about, that being equitable, you would find that my client, according to the facts in the record, that each party pays their own attorney's fees."

Therefore, we find Mallon's argument that HCH's action did not meet the requirements for a derivative action not preserved for our review. Additionally, Mallon's counsel specifically conceded to the sufficiency of the attorney fee affidavit and, therefore, cannot take issue with it on appeal. See TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 617, 503

S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

In regard to Mallon's assertion that the master did not make sufficient findings with regard to his award of attorney's fees, we find this argument not preserved for our review and, in addition, it is without merit.

When a trial court makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal. Noisette, 304 S.C. at 58, 403 S.E.2d at 124.

The master, in his order, stated: "based upon the record, the Affidavit of Counsel, and the factors applying to an award of fees and costs, that the Plaintiff is entitled to an award and that the total amount, $15,643[.]60, is reasonable." Mallon, however, did not file a Rule 59(e), SCRCP motion to alter or amend the master's order. Rather, Mallon argues the insufficiency of the master's findings for the first time on appeal. Therefore, we find this argument not preserved for our review.

Finally, Mallon alleges Coker failed to turn over the books and records, which he claims precipitated this litigation. Thus, he argues it was inequitable for the master to award HCH attorney's fees. We disagree.

An award of attorney's fees is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. Wooten v. Wooten, 358 S.C. 54, 65, 594 S.E.2d 854, 860 (Ct. App. 2003). Although Mallon points to Coker's failure to provide adequate company records as the catalyst to the underlying lawsuit, it is undisputed that HCH filed the lawsuit after repeated requests for Mallon to place Dixie Holdings' funds from the sale of 15 Felix Street into a proper escrow account. The master found Mallon's actions necessitated the lawsuit and awarded HCH attorney's fees. We find the master did not abuse his discretion in awarding HCH attorney's fees.

CONCLUSION

We find Mallon's arguments supporting his contention that he is entitled to reimbursement for expenses paid on behalf of Dixie Holdings and Dixie Developers are either not preserved for our review or are without merit. Therefore, we affirm the master's order concerning these expenses. In addition, we find the master erred in not conducting an accounting pursuant to dissolving and winding up the business of Dixie Holdings. We order the proceeds from the sale of 15 Felix Street to be placed in an escrow account for the benefit of Dixie Holdings. Because we find the master erred in not conducting an accounting, he further erred in making a final distribution to HCH from the proceeds of the sale of 15 Felix Street. Additionally, because we find the award to HCH in error, we find no award upon which to grant HCH prejudgment interest. Finally, we find no error by the master in awarding HCH attorney's fees. Accordingly, the master's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ray Allen Waters, Appellant,

v.

Southern Farm Bureau Life Insurance Company and Mitchell Harvey Bridwell, Respondents.

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

Opinion No. 4005
Heard May 11, 2005 – Filed June 27, 2005

REVERSED AND REMANDED

William H. Ehlies, II, of Greenville, for Appellant.

Ronald S. Clement, Samuel W. Outten, and Jennifer S. Barr, of Greenville, for Respondent.

WILLIAMS, J.: Ray Allen Waters appeals a circuit court's grant of summary judgment to Southern Farm Bureau Life Insurance Company and Mitchell Harvey Bridwell. We reverse and remand.

FACTS

In 1986, Appellant phoned Southern Farm Bureau Life Insurance Company ("Southern Farm") to establish an insurance policy on the life of his wife, Brenda Waters. An agent of Southern Farm visited the Waters' home and conducted an interview of Appellant and his wife. During the course of the interview, the agent filled out the required application form on behalf of the couple. Brenda Waters was designated in the application as the owner and insured of the policy and Appellant as its sole beneficiary. The application contained the following statement, prompting the applicant to mark one of two boxes: "Owner ☐ does / ☐ does not reserve the right to change the Beneficiary." Neither box was marked on the application form. The agent submitted the application to Southern Farm and the life insurance policy was later issued. The policy incorporated the application as part of the contract for insurance.

In 1999, Appellant and Brenda Waters separated. Mrs. Waters, who was then suffering from brain cancer, moved in with her mother. In July 1999, she submitted a "Change of Beneficiary" form to Southern Farm designating her brother, Richard Bridwell, as the new beneficiary. In February 2000, Mrs. Waters submitted another "Change of Beneficiary" form amending the policy to designate Mitchell Bridwell, another brother, as the sole beneficiary. Southern Farm complied with both requests, as confirmed by two change of beneficiary notices sent to Mrs. Waters.

In October 2000, Brenda Waters passed away. Appellant attempted to collect on the Southern Farm life insurance policy, but the proceeds were paid to Mitchell Bridwell in accordance with the last change of beneficiary request. Appellant brought suit, arguing the insurance contract was breached by denying a non-revocable beneficiary the proceeds of the policy. The circuit court granted Southern Farm's motion for summary judgment, concluding that the undisputed evidence reflected the parties' intent that the owner could change the beneficiary and that Mrs. Waters had not waived her right to

do so. After Appellant's motion to alter or amend the circuit court's order was denied, the present appeal was filed.

SCOPE OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

LAW / ANALYSIS

Appellant argues the circuit court erred in granting Southern Farm's motion for summary judgment because the owner's failure to declare her intention on the application regarding the right to change the beneficiary gives rise to an ambiguity in the insurance contract. We agree.[1]

When an insurance policy does not reserve to the insured the right to change the beneficiary, "the beneficiary, upon the issuance of

[1] Appellant first argues we should reverse the circuit court and rule in his favor as a matter of law. For the reasons set forth in this opinion, we instead find an issue of fact for determination by a jury.

the policy, acquires a vested interest in the proceeds of the insurance when available according to the terms of the policy, which cannot be divested by any act of the insured." Antley v. New York Life Ins. Co., 139 S.C. 23, 27, 137 S.E. 199, 200 (1927). Of course an insured may expressly reserve the right to change the beneficiary, as was clearly contemplated by the ignored prompt in the application of the present case. The right to change the beneficiary, however, may also be reserved by the language of the policy itself. See Bost v. Volunteer State Life Ins. Co., 114 S.C. 405, 409, 103 S.E. 771, 772 (1920). Because the owner failed to expressly indicate her intention to reserve or not to reserve this right in the present case, we look to the language of the policy for guidance.

The insurance policy in question addresses the right to change the beneficiary in three instances, two of which seem to reserve the right of the insured to change the beneficiary and one which seems to require that the right be expressly reserved upon application. The schedule page of the policy defines the beneficiary as the person "named in the application, **unless changed by owner**." (Emphasis added). Section 7.1 of the policy, which contains the heading "BENEFICIARY," likewise states "[t]he Primary and Contingent Beneficiary are as named in the application, **unless changed by the owner**." (Emphasis added). Section 7.3, however, states, "**[i]f the right to change the Beneficiary has been reserved,** the owner may change the Beneficiary during the Insured's lifetime by filing written notice to the Company." (Emphasis added). Consequently, we find ambiguity in the language of the insurance contract. While Section 7.3 seems to require an express reservation on the part of the applicant, Southern Farm promptly granted both of Mrs. Waters' requests to change the policy's beneficiary, further confounding the parties' intent regarding this issue.

"Where there is ambiguity, uncertainty or doubt as to proper construction of [an insurance] contract, intention of the parties becomes a question of fact for the jury to determine." Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 305, 128 S.E.2d 171, 174 (1962). After a consideration of extrinsic evidence, the jury is to resolve all remaining ambiguity in favor of the insured, in this case, the late Brenda Waters.

Id. at 304-305, 128 S.E.2d at 174. For the foregoing reasons, the circuit court's grant of summary judgment is

REVERSED AND REMANDED.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brandon Pinkard, Appellant.

Appeal from Richland County
James R. Barber, Circuit Court Judge

Opinion No. 4006
Submitted May 1, 2005 – Filed June 27, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

KITTREDGE, J.: In this criminal appeal, we are asked to decide whether a defendant forfeits his right to make the final closing argument to the jury when he offers only non-testimonial evidence. Brandon Pinkard was convicted of voluntary manslaughter. On appeal, Pinkard claims error in the trial court's ruling that his proposed display of a tattoo to the jury would constitute evidence, thereby depriving him of the right to make the last argument. We affirm and hold the presentation of any evidence by a defendant—whether characterized as testimonial or non-testimonial—forfeits his right to make the last argument to the jury.

FACTS

On June 7, 2000, during a fight outside an apartment complex between Pinkard and a third party, Roger Keitt intervened in an effort to ease tensions between the combatants. According to witnesses, Pinkard responded by shooting and killing Keitt. Pinkard was indicted for murder, convicted of voluntary manslaughter by a jury, and sentenced to 24 years imprisonment. During trial, several witnesses identified Pinkard as the shooter, but none mentioned Pinkard as having a tattoo.

Near the trial's conclusion, Pinkard asked the trial court if he could show the jury a tattoo on his arm without forfeiting the right to make the final argument. The trial court held that such a display of the tattoo would constitute the introduction of evidence and would thus preclude Pinkard from having the last argument. Pinkard chose not to exhibit his tattoo to the jury in order to preserve his right to the final closing argument. Pinkard appeals, claiming the trial court erred in ruling the display to the jury would constitute the introduction of evidence.

LAW/ANALYSIS

When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) (citing State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)). "The right to open and close the argument to the jury

is a substantial right, the denial of which is reversible error." Rodgers, 269 S.C. at 24-25, 235 S.E.2d at 809.

While the display of physical characteristics, such as a tattoo, is non-testimonial,[1] it remains evidence. See State v. Hart, 306 S.C. 344, 346, 412 S.E.2d 380, 381 (1991) (stating that exhibition of a defendant's physical characteristics is treated "like any other evidence"); 2 McCormick on Evidence § 215 (5th ed. 1999) (noting that "[t]he physical characteristics of a person may . . . constitute relevant evidence in a criminal prosecution") (emphasis added). The trial court correctly ruled that the proposed display by Pinkard of his tattoo would have been evidence, albeit non-testimonial. Accordingly, Pinkard was not entitled to display his tattoo to the jury and retain the right to the final closing argument. See Gellis, 158 S.C. at 487, 155 S.E. at 855 (1930) (holding that the state retains the right to the final closing "if a defendant offers any evidence on trial of the case"); cf. State v. Mouzon, 326 S.C. 199, 203-04, 485 S.E.2d 918, 920-21 (1997) (noting that a jury view of the crime scene pursuant to South Carolina Code section 14-7-1320 "is not regarded as evidence" and that defendant was therefore "entitled to the last closing argument").

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

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[1] "Testimony" is not synonymous with "evidence"; the latter is a more comprehensive term. Evidence is said to be testimonial when "elicited from a witness in contrast to documentary evidence or real evidence." Black's Law Dictionary 1476 (6th ed. 1990); see also Schmerber v. California, 384 U.S. 757, 763-64 (1966) (distinguishing between testimonial and non-testimonial evidence); 29A Am. Jur. 2d Evidence § 951 (1994) (noting that "the accused, while not a witness on his behalf, may be required to display to the trier of fact wounds . . . tattoos . . . or other distinguishing features. Because such an exhibit is not testimonial in nature, the defendant is not required to take the stand before being allowed to exhibit himself to the jury . . .").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Deral L. Stanley, **Appellant.**

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4007
Heard June 15, 2005 – Filed June 27, 2005

AFFIRMED

J.M. Long, III, of Conway, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

ANDERSON, J.: Deral L. Stanley (Deral) appeals from his conviction for trafficking in crack cocaine. Deral argues: (1) he was prejudiced when the trial court ordered the imprisonment of a witness who

contradicted his prior statement to the police on the witness stand, and then later allowed the witness to return to testify; and (2) the trial court erred by failing to grant his motion for a directed verdict. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the night of June 12, 2003, Officer Will Lynch, a traffic officer for the City of North Myrtle Beach, was operating a radar detector on Possum Trot Road. He determined that an oncoming vehicle was traveling approximately twelve miles per hour over the posted speed limit. Officer Lynch, who was on a motorcycle, began to follow the vehicle and activated his blue lights. A high-speed chase ensued. Officer Lynch observed two people in the fleeing vehicle. The driver of the vehicle attempted to pass another car, but instead he struck the median, "spun out," and came to a stop without hitting any other vehicles.

As Officer Lynch approached, the driver exited the disabled vehicle and ran across the street into the parking lot of a nearby miniature golf course. The passenger in the vehicle was Deral Stanley. When Officer Lynch pulled up to the scene of the accident, Deral exited the vehicle and began to walk away. Officer Lynch immediately ordered Deral to get on the ground, handcuffed Deral, and arrested him.

Officer Lynch rolled Deral over to check him for weapons. At that time, he "noticed down on the ground where [Deral] was laying a large bag of what appeared to . . . be crack cocaine." Officer Lynch declared: "When I rolled him over, basically, they were right in the area—I guess you would say if I was to roll him back down, basically, around his belly button area." Officer Lynch retrieved the bag, which SLED later determined contained 22.63 grams of crack cocaine. When Officer Lynch patted Deral down, he found $4,220 in cash in his pockets. An inventory search of the vehicle revealed other drug paraphernalia—plastic baggies and digital scales—on the passenger-side floorboard.

The driver of the vehicle was Richard Stanley (Richard), Deral's cousin. Richard was apprehended soon afterward. He was cited for speeding and charged with failure to stop for a blue light and driving without a license.

When he arrived at the police station, Richard waived his rights and gave a statement to Officer Mandy Little. Officer Little wrote down what Richard said and then he signed it at the bottom. The substance of the statement was that Richard was driving Deral to "sell somebody something" when they "saw blue lights." According to Richard, Deral instructed him "to go," and Richard "went because he got scared and had no license."

At trial, the State called Richard. When the State asked Richard if his signature was on his statement, he hesitated. The trial judge sent the jury out and asked whether the statement had been made under oath. The State asserted the statement was made under oath, although defense counsel disagreed.[1] The trial judge then warned Richard that if his trial testimony differed substantially from his prior statement he could be indicted for perjury.

When the jury returned, Richard admitted his signature was on the statement. However, he denied any prior mention of selling something, claiming "I ain't said nothing about going to sell nothing." He further denied telling Officer Little that the drugs belonged to Deral. In fact, Richard stated the drugs belonged to him, not Deral. Richard testified he gave the money to Deral during the car chase. He said the baggies and scales were on the center console, but had fallen onto the passenger side floorboard during the accident. Richard declared he threw the bag of drugs when he exited the car, and Deral must have accidentally fallen on it when he was arrested. After his testimony, the trial judge asked Richard to remain in the courtroom because he might be subject to recall.

[1] The statement form contained the following language: "I am giving this statement to Off. Little. I volunteer the following information of my own free will, for whatever purpose it may serve. . . . I certify that the facts contained herein are true and correct."

After the judge dismissed the jury for the afternoon, he called Richard forward and the following colloquy occurred:

> THE COURT: Under oath you just testified that you are guilty in trafficking in cocaine. You said that under oath.
>
> MR. RICHARD STANLEY: Yes, sir.
>
> THE COURT: Arrest this individual. Put him in jail. Leave him there. He's either guilty by his own admission in trafficking in cocaine or he's guilty of perjury.
>
> He's to go to jail. Have him indicted first thing in the morning.
>
> I will not permit that sort of conduct in my courtroom.
>
> Now, he's, obviously, either guilty of trafficking in cocaine or he's lying.
>
> You agree with that, [Defense Counsel]. He can't have it both ways.
>
> MR. LONG: That's correct, Your Honor.
>
> THE COURT: Alright.
>
> He will remain in jail.
>
> Let the record reflect that I'm also putting him in jail tonight in the event we will need him for further testimony in the morning. He may be subject to recall, being under that I want to make sure he's here for recall by either the State or the defendant.
>
> But I want him indicted in the morning.

The following morning, the judge appointed the Senior Public Defender to act as counsel for Richard and asked her to speak with him along with the Solicitor. Richard was not served with a warrant at that time. Richard was then brought into the courtroom and charged as follows:

> THE COURT: They [are] going to put you back on the stand under oath and all the Court wants from you—I'm not interested in who you help or hurt. All I'm interested in is you tell us the truth and the absolute truth and nothing but the truth. Do you understand that?

Richard responded, "Yes, sir." Richard then recanted his earlier testimony. Richard professed that the drugs belonged to Deral and that Deral was going to sell them. On cross-examination, defense counsel elicited testimony that Richard had been "locked up" the night before and threatened with service of warrants for trafficking in cocaine and perjury.

After the State rested, defense counsel moved for a directed verdict of not guilty. Additionally, defense counsel moved for a mistrial based on the trial judge's handling of Richard's testimony. The judge denied both motions.

Deral testified in his own defense. Deral claimed Richard was driving because he had been drinking. Deral stated Richard gave him the money during the car chase. He denied possessing the drugs, vowing "I didn't have no drugs on me." On cross-examination, Deral admitted having conversations with Richard in which he learned that Richard would "take the blame" for the drug charge.

At the close of the evidence, defense counsel renewed his motions for a directed verdict and a mistrial. Both motions were again denied. The jury found Deral guilty of trafficking in crack cocaine. Because Deral had two prior convictions, he received the mandatory minimum sentence of twenty-five years. Defense counsel made post-trial motions for a mistrial, a new trial, and judgment notwithstanding the verdict, which the judge denied.

LAW/ANALYSIS

I. Motion for Mistrial

Deral argues the trial judge's handling of Richard's testimony was erroneous. Deral alleges prejudice in that the trial judge's conduct amounted to intimidation of a witness. He claims the judge should have granted his motion for a mistrial. We disagree.

A. Issue Preservation

Initially, we note this issue may not have been properly preserved. Although defense counsel moved for a mistrial after the State rested, no contemporaneous objection was made. Instead, when the trial judge ordered Richard sent to jail, he stated: "You agree with that, Mr. Long. He can't have it both ways." Deral's attorney replied: "That's correct, Your Honor." Our courts have held a failure to contemporaneously object to the introduction of evidence claimed to be prejudicial cannot be later bootstrapped by a motion for a mistrial. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994); State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992); see also State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) (contemporaneous objection required to preserve error for appellate review); State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977) (noting that if a party fails to make a proper contemporaneous objection to the admission of evidence, he cannot later raise the issue by a motion for mistrial); State v. Crosby, 348 S.C. 387, 398-399, 559 S.E.2d 352, 358-59 (Ct. App. 2001), rev'd on other grounds, 355 S.C. 47, 584 S.E.2d 110 (2003) (holding that no issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to sufficiency of the curative charge or move for a mistrial).

B. Mistrial

In any event, even if preserved, we find the issue to be without merit.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Vazquez, Op. No. 25975 (S.C. Sup. Ct. filed April 25, 2005) (Shearouse Adv. Sh. No. 18 at 43); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); see also State v. Arnold, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (noting the general rule of this State is that "the ordering of,

or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law.").

"'The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes' stated into the record by the trial judge." State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002) (quoting State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977)); see also State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (stating mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); Adams, 354 S.C. at 377, 580 S.E.2d at 793.

A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Harris, 340 S.C. at 63, 530 S.E.2d at 628; Simmons, 352 S.C. at 354, 573 S.E.2d at 862; see also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000).

C. Section 16-9-10

Deral contends that Richard's testimony at trial was not perjury because the police statement was not made under oath. We disagree.

Section 16-9-10 of the South Carolina Code provides in pertinent part:

> (A)(1) It is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State.
>
> (2) It is unlawful for a person to wilfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this State.

S.C. Code Ann. § 16-9-10 (2003).

"Giving false testimony at trial constitutes the felony of perjury and subjects the perjurer to a fine and/or up to five years imprisonment." Collins v. Doe, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000), rev'd on other grounds, 352 S.C. 462, 574 S.E.2d 739 (2002). Perjury or false swearing may constitute contempt of court. See, e.g., Crute v. Crute, 70 S.E.2d 727 (Ga. Ct. App. 1952).

In the case sub judice, Richard's initial trial testimony directly contradicted his prior testimony given in a police statement. Giving false information in a document or report required by the laws of this State is perjury. See S.C. Code Ann. § 16-9-10(A)(2). Thus, if the information given to Officer Little was false, Richard was guilty of perjury. If the information was true, Richard perjured himself on the stand by contradicting it under subsection (A)(1).

D. Arrest of Witness

Deral maintains he was prejudiced when Richard was arrested and sent to jail, and then later returned to reverse his prior testimony. This assertion is meritless.

"It is the duty of the court to exercise supervision and control over the witnesses in attendance at the trial." 23A C.J.S. Criminal Law § 1191 (1989). In South Carolina, it is firmly settled that the presiding judge has the right to order the arrest of a witness in open court who has made

contradictory statements amounting to perjury. The supreme court addressed this issue in State v. McKay, 89 S.C. 234, 71 S.E. 858 (1911):

> When the witness Purvis came off the stand, the solicitor ordered the sheriff, in open court, to arrest him and take him to jail to answer an indictment for perjury. This was done against defendant's protest. It is alleged that this was prejudicial to defendant, because it was calculated to intimidate any other witness from varying the testimony which he had given at the preliminary investigation. There is nothing in the record tending to show any such prejudice. It is purely conjectural and barely possible, but highly improbable. Therefore it affords no ground for reversal. On the contrary, we are inclined to commend prompt action by those charged with the administration of the law, when it has been flagrantly violated; and we are of the opinion that if perjurers were more invariably and promptly and vigorously prosecuted and punished, there would be fewer miscarriages of justice in our courts.

Id. at 236, 71 S.E. at 859. Thereafter, in State v. Campbell, 150 S.C. 449, 148 S.E. 472 (1929), the supreme court explained:

> The second question is as to the right of the presiding judge to order the arrest of a witness in open court who, in the opinion of the trial judge, has made contradictory statements, which in fact amount to perjury. This question has been settled against the appellant by the case of State v. McKay, 89 S.C. 234, 71 S.E. 858 [(1911)]. The trial judge is present in the atmosphere of the trial, and he must, in the administration of justice, uphold the dignity of the courts, and he would be derelict in his duty if he did not take such steps as he conceives it his duty to see that justice is administered in accordance with sound principles of law. It might be said in passing that it does not appear in the case for appeal that the judge actually had the witness arrested, and under the rules of this court no exception can be considered which does not find substantiation in the printed case.

Id. at 450-51, 148 S.E. at 473; see also H.D. Warren, Annotation, Statements, Comments, or Conduct of Court or Counsel Regarding Perjury as Ground for New Trial or Reversal in Civil Action or Criminal Prosecution Other Than for Perjury, 127 A.L.R. 1385 (1940) (citing McKay and Campbell and noting that South Carolina courts have used language which seems to indicate the mere fact that a commitment for perjury is made or ordered is insufficient to establish prejudice or constitute reversible error, but indicating that such a result may be shown in a proper case).

In Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992), our supreme court articulated:

> Petitioner also alleges that the trial judge's comments on credibility about a defense witness denied him an impartial jury and violated his due process rights. Again, the PCR judge found this issue to be without merit. At the PCR hearing, petitioner alleged that the trial judge's threats of perjury to a witness prejudiced him. Petitioner argues that the trial judge's comments amounted to comments on the credibility of a witness. During cross-examination, the trial judge reminded the witness: "You are under oath subject to perjury. I need to warn you, so you must answer the questions truthfully." Further, he stated: "The jury can hear. They can find out whether or not you are straightforward or not. Those are matters for the jury."
>
> Petitioner argues that this Court should adopt the holding of the North Carolina case of State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976), where the court held that any intimation by the judge in the jury's presence that a witness had committed perjury would be reversible error. Rhodes, however, is distinguishable from the present case. In Rhodes, the trial judge made a long statement regarding the witness' testimony and he clearly thought she had committed perjury. In Rhodes, the North Carolina Supreme Court stated that a judge may caution a witness regarding perjury outside of the jury's presence. However, the

> court cautioned that any intimation that a witness had committed perjury in the jury's presence is reversible error.
>
> In Rhodes, the court set forth several reasons for its holding. The court saw several dangers including the fact that a judge is unlikely to warn a witness about perjury unless he has determined that the witness has committed perjury which is a fact solely for the jury's determination. Secondly, a witness may change his testimony after being threatened with perjury charges. Third, a warning may discourage questioning the witness further.
>
> As to whether the comments could be construed as a factual determination by the judge, the trial judge stated whether the witness committed perjury was for the jury to determine. From a review of the testimony of the witness, the trial judge's comments did not cause her to change her testimony or discourage further questions.
>
> While these reasons set forth in Rhodes are valid, we decline to apply the holding to the present case. Although the trial judge should have refrained from cautioning the witness regarding perjury in the presence of the jury, under the circumstances of this case, we do not think it is reversible error. We find the trial judge's comments do not amount to prejudice which denied petitioner an impartial jury or violated his due process rights.

Id. at 311-12, 422 S.E.2d at 127-28; see also State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999) ("[T]here is generally no prejudice when the trial court's hostile comments are made outside the jury's presence.").

All courts have inherent power to punish for contempt. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982); State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005). This power is essential to the preservation of order in judicial proceedings and the due administration of justice. Id.

The trial judge acted within his discretion to warn Richard and to take action to prevent the miscarriage of justice by his perjury.

E. Other Jurisdictions

The South Carolina rule is in accord with that of other jurisdictions. In State v. Sheffield, 228 P.2d 431 (N.M. 1951), the trial testimony of a State's witness contradicted earlier statements given to police officers. The Supreme Court of New Mexico, citing State v. McKay and State v. Campbell, amplified:

> It appears from the record that, during the progress of the trial, in the presence of the jury, and while Oscar Connally was on the stand testifying as a witness for the State, the court told the district attorney to "enter a contempt charge against this man for perjury and to deliver him to the custody of the sheriff."
>
> The action of the court was within the power and sound discretion of the trial judge. That it might have had a bad effect upon the jury, and thereby prejudiced the defendant's case, was a matter to be considered by the trial judge at the time he committed the witness to the custody of the sheriff, but we do no[t] think it was error to do so under the circumstances. State v. McKay, 89 S.C. 234, 71 S.E. 858; State v. Campbell, 150 S.C. 449, 148 S.E. 472; People v. Hayes, 140 N.Y. 484, 35 N.E. 951, 23 L.R.A. 830, 37 Am.St.Rep. 572; Beavers v. U.S., 6 Cir., 3 F.2d 860.

Id. at 431. Thereafter, the Court of Appeals of New Mexico inculcated:

> Defendant's assertion that the trial judge's comments resulted in the intimidation of Miss Saiz, causing her to change her testimony against defendant, is a matter of first impression in this jurisdiction. Defendant contends the court overstepped the neutral role assigned to trial judges and impermissibly intruded

upon the traditional functions assigned to advocates. Defendant relies upon State v. Caputo, 94 N.M. 190, 608 P.2d 166 (App. 1980) and In Re Will of Callaway, 84 N.M. 125, 500 P.2d 410 (1972).

The test of whether a trial judge has acted impermissibly in intimidating a witness turns on whether the judge's comments were so severe that they resulted in the witness's refusal to testify or to totally change testimony. Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); McNutt v. United States, 267 F. 670 (8th Cir. 1920); see also Annot. 127 A.L.R. 1385 (1940).

A trial judge is not required to sit idly by and allow perjury to be committed without bringing it to the attention of proper authorities. State v. Brown, 124 Ariz. 97, 602 P.2d 478 (1979). A judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice. ABA Standards for Criminal Justice, § 6-1.1 (2d ed. 1980). However, in a jury trial, the court must not in any manner, by demeanor or otherwise, comment upon the weight to be given certain evidence or indicate an opinion as to the credibility of a witness. See N.M.U.J.I.Crim. 1.00, 40.20, N.M.S.A. 1978 (Repl. 1982). It is not error to advise a witness outside the presence of the jury of the consequences of perjury or to caution him about testifying truthfully, when the need arises because of some statement or action of the witness. Ehrlick v. Commonwealth, 33 Ky. 977, 112 S.W. 565 (App. 1908).

Determination of whether the actions of the trial court amounted to intimidation of a witness must rest upon the facts of each case. State v. Harris, 428 S.W.2d 497 (Mo. 1968); Young v. United States, 107 F.2d 490 (5th Cir. 1939); Venable v. State, 84 Tex. Cr. App. 354, 207 S.W. 520 (1918).

Here, the trial court excused the jury prior to advising the witness as to the penalty for perjury. Outside the presence of the

> jury, it ordered that she be provided with appointed counsel and recessed the trial to allow her opportunity to consult with an attorney. At the resumption of the witness's testimony the following day, she testified in accordance with her pretrial statement obtained by the prosecution, and which had been previously furnished to the defense. The actions of Judge Cole in cautioning the witness concerning the consequences of possible perjury, and acting to provide her with the assistance of counsel was entirely proper under the circumstances.

State v. Martinez, 653 P.2d 879, 884 (N.M. Ct. App. 1982).

In a federal case, the district court expounded:

> The petitioner's second allegation is that he was denied a fair trial due to the prejudice of the trial judge. Petitioner's main contention rests upon the fact that he claims that it was prejudice for the trial judge to instruct his brother on the possible consequences of perjury after his brother began to testify on behalf of the petitioner. (The court's remarks were made to the brother outside the presence of the jury). Since the court's advice was given after his brother had completely contradicted the testimony of the police officer, it is apparent that such instruction was necessary and well within the discretion of the trial judge. After an examination of the entire record, it is apparent that this allegation of the petitioner is frivolous and provides no basis for the relief that has been requested.

Mooney v. United States, 320 F. Supp. 316, 318 (E.D. Mo. 1970). An accused is not prejudiced by proceedings for perjury undertaken against a witness outside the presence of the jury. See 23A C.J.S. Criminal Law § 1190 (1989). A New York court determined that a defendant was not denied a fair trial when the trial judge warned a witness that he was subjecting himself to possible perjury charges due to frequent lack of recall, and then allowed the witness to return several days later to continue his testimony.

People v. Stanley, 519 N.Y.S.2d 761 (N.Y. App. Div. 1987), overruled on other grounds by People v. Butler, 596 N.Y.S.2d 93 (N.Y. App. Div. 1993).

The trial judge, outside the presence of the jury, warned Richard about the consequences of perjury. When Richard persisted in contradicting his prior testimony, the trial judge ordered him committed to jail after dismissing the jury. Richard was given the opportunity to consult with counsel and then was allowed to return and testify after being charged to tell only the truth. Although the jury eventually learned of the threatened charges, Deral has no basis for complaint because his own counsel elicited this information on cross-examination.

The trial judge did not abuse his discretion in denying Deral's motion for a mistrial.[2]

II. Directed Verdict

Deral contends the trial judge erred in denying his directed verdict motion. We disagree.

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). When ruling on a

[2] Deral maintains the trial judge erred in commanding the State to charge Richard with trafficking. Deral avers this conduct violates the separation of powers doctrine in which the Executive Branch is vested with sole and unfettered discretion to decide when and how to prosecute a case. See State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). We do not reach this issue because nothing in the record indicates Richard was ever actually charged with trafficking. See State v. Campbell, 150 S.C. 449, 148 S.E. 472 (1929) (noting that no grounds for appeal exist when the record does not substantiate that the conduct complained of ever occurred). Because the nature of the charges would not affect the prejudice to Deral, this issue would be more appropriate for consideration in Richard's trial.

motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002).

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (Ct. App. 2002); see also State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004) (noting judge should deny motion for directed verdict if there is any direct or substantial circumstantial evidence which reasonably tends to prove accused's guilt, or from which his guilt may be fairly and logically deduced). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005).

The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003). The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002).

"A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or **who is knowingly in actual or constructive possession** or who knowingly attempts to become in actual or constructive possession of **ten grams or more of** ice, crank, or **crack cocaine** . . . is guilty of . . . 'trafficking in . . . crack cocaine.'" S.C. Code Ann. § 44-53-375(C) (2002) (emphasis added). Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996); State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). In order to prove constructive possession, the

State must show the defendant had dominion and control, or the right to exercise dominion and control, over either the drugs or the premises upon which the drugs are found. Ballenger, 322 S.C. at 199, 470 S.E.2d at 854. Such possession can be established by circumstantial or direct evidence or a combination of the two. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). Possession requires more than mere presence. State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it. Id.

In the instant case, the record provides substantial circumstantial evidence reasonably tending to prove Deral's guilt. Viewed in the light most favorable to the State, there was substantial circumstantial evidence to submit the charge to the jury. The arresting officer found a large bag containing more than ten grams of crack cocaine on the ground beneath Deral. He discovered $4,220 in cash in Deral's pockets and plastic bags and scales on the passenger's side floorboard of the vehicle. Deral had been sitting in the passenger seat. Richard's statement to the police that he was driving Deral to "sell somebody something" shows intent to distribute. After Richard recanted, he testified that neither the drugs nor the money belonged to him. Moreover, Richard declared that the bags and scales were Deral's. Furthermore, Deral admitted having conversations with Richard regarding the perjured testimony.

The trial judge did not err in denying Deral's motion for a directed verdict.

CONCLUSION

We hold that the trial judge did not abuse his discretion by warning a witness, out of the presence of the jury, of the consequences of perjury and committing him to jail when he gave testimony contradicting his prior statement. Deral was not prejudiced when the witness returned and reversed his earlier testimony at trial. There was substantial circumstantial evidence in

the record to deny Deral's motion for a directed verdict. Accordingly, Deral's conviction and sentence are

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.