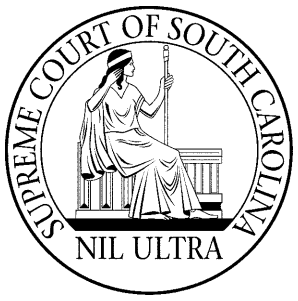

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 24, 2003

ADVANCE SHEET NO. 42

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Columbia, South Carolina
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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jerry Rosemond, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25751
Heard October 7, 2003 - Filed November 24, 2003

AFFIRMED AS MODIFIED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, of Columbia, and Solicitor Robert M. Ariail, of Greenville, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the Court of Appeals erred by finding petitioner was not entitled to a directed verdict on the charge of strong armed robbery. State v. Rosemond, 348 S.C. 621, 560 S.E.2d 636 (Ct. App. 2002). We affirm as modified.

FACTS

Petitioner was charged with strong armed robbery, resisting arrest, and assault and battery with intent to kill. After being found guilty on all counts, he was sentenced to six-years imprisonment, to be served concurrently, on each count.

At trial, Barbara Murray testified she was working the second shift at a convenience store on the night of the crime. Around 9:00 p.m., petitioner walked in and, without speaking, entered the bathroom. At the time, Murray was on the other side of the cash register sweeping. After about five minutes, petitioner came out of the bathroom and went behind the counter to the register. Petitioner never said anything to Murray. He pushed the buttons on the register in an attempt to open it. When this failed, he grabbed the bottom of the two-piece register and flipped it into the air. The register fell on the floor and petitioner lifted it and slammed it down. The register popped open and petitioner grabbed the money and fled.

Murray testified she was just a few feet from petitioner at the time. When petitioner went behind the counter, Murray stated she ran behind the freezer door because she was scared. In response to the question about what exactly scared her, Murray stated: "Just the way he looked. I mean, he didn't say anything. He didn't move toward anybody, he just looked, that's all, it was like a glare." She further testified petitioner's act of lifting the register and slamming it to the ground frightened her because they were "pretty heavy" registers. Murray identified petitioner as the perpetrator.

Defense counsel moved for a directed verdict on the strong armed robbery charge and stated it should be reduced to a larceny charge because petitioner did not act with force or intimidation when carrying out his crime.

The trial court denied the motion. Petitioner then testified and denied being involved in the crime.

The trial court granted defense counsel's request that the court charge petit larceny, the lesser-included offense to strong armed robbery. However, the jury found petitioner guilty of strong armed robbery and the Court of Appeals affirmed.

ISSUE

Was petitioner entitled to a directed verdict on the charge of strong armed robbery?

DISCUSSION

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *Id.* On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. *Id.*

Strong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). The gravamen of a robbery charge is a taking from the person or immediate presence of another by violence or intimidation. State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981). When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts. *See, e.g.,* United States v. Wagstaff, 865 F.2d 626 (4th Cir.), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3193 (1989) (taking by

intimidation occurs when ordinary person in bank teller's position reasonably could infer threat of bodily harm from defendant's acts).

We conclude there was evidence petitioner took the money from the register in the immediate presence of Murray by force and intimidation. An ordinary, reasonable person in Murray's position would have felt a threat of bodily harm from petitioner's acts. *See* State v. Gourdine, *supra*; State v. Hiott, *supra*. After petitioner exited the bathroom, he immediately went behind the register and intimidated Murray by glaring at her. Further, after his attempt to open the register failed, he acted with force by flipping the heavy register in the air and then lifting it and slamming it down to open it. Murray indicated she was scared because petitioner glared at her and because he was able to lift the heavy register and slam it to the ground. These facts are sufficient to support the trial court's decision to deny the directed verdict motion on the strong armed robbery charge.

The Court of Appeals found that Murray's fears of being harmed by the perpetrator were reasonable based on the testimony of the arresting officers that petitioner punched and struggled with them and lifted one officer off the ground and slammed him to the ground. It is improper to consider petitioner's subsequent actions because they are irrelevant to a determination whether petitioner had acted with force or intimidation at the time of the crime. Accordingly, we

AFFIRM AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Roy Edward Hook, Petitioner/Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Barnwell County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25752
Heard October 8, 2003 - Filed November 24, 2003

AFFIRMED AS MODIFIED

Katherine Carruth Link, and South Carolina Office of Appellate Defense, of Columbia, for petitioner/respondent.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown, of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent/petitioner.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision[1] holding that petitioner/respondent Hook's statement to his probation officer was inadmissible at Hook's trial for driving under the influence (DUI) third offense. We affirm as modified.

FACTS

At trial, the State introduced evidence Hook was involved in an automobile accident in the early morning hours of January 15, 1999. He failed to yield the right of way at an intersection and collided with a Williston city police car. Both Hook and the police officer were taken to the hospital.

Trooper Cruz, who was called to the crash scene, went to the hospital to question both parties. Cruz asked the treating doctor whether he could speak with Hook and the doctor gave his permission. According to Cruz, Hook appeared intoxicated and "somewhat in pain" although Cruz observed no physical injuries. Cruz smelled a strong odor of alcohol on Hook's breath and on his person. When Cruz asked if he had been drinking, Hook replied that he had "consumed alcohol, mainly beer, at 2400 hours which was 12 midnight." The wreck had occurred between 1:30 and 2:30 a.m. Hook denied he had used any illegal drugs. Cruz placed Hook under arrest, read him his Miranda rights and, with permission from the doctor, transported Hook to the detention center for a breathalyzer test which Hook ultimately declined to take. During the next few days, while in jail, Hook began spitting up blood and had to seek further medical attention. He eventually had surgery to remove a ruptured spleen.

Hook testified he drank three beers at home before dinner on the evening before the wreck between 6:00 and 7:30 p.m. He went to bed between 9:00 and 10:00 p.m. but awoke later around 1:00 a.m. and decided to return to his former residence to pick up a television set. On his way, the wreck occurred.

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[1] State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001).

On cross-examination, Hook denied he had used illegal drugs on the evening of the wreck. The State then moved to impeach Hook with a statement he made to his probation officer admitting he had snorted cocaine on the evening before the wreck and that he was impaired at the time the wreck occurred. Hook strenuously objected that the statement was privileged and inadmissible under S.C. Code Ann. § 24-21-290 (Supp. 2002) which provides:

> All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

The trial judge ruled that Hook's statement to his probation officer was admissible for impeachment only.[2]

When cross-examination resumed, Hook testified as follows:

Q: So you did not tell [your probation officer] that you sniffed powder cocaine the night of the accident?

A: No. The night of the accident was – when I went to sleep it was the 14th and, you know, I woke up that night and really, you know, when it's 1:00 or so, I still consider that even though it was actually the 15th, I was still thinking of it as the 14th.

Q: What did you tell [your probation officer]?

A: Um – I told him that I had used powder cocaine a couple of days before the accident.

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[2]The trial judge had previously ruled the statement was not admissible in the State's case-in-chief under § 24-21-290.

Q: How about did you tell anyone else about this powder cocaine usage?

A: Um – there was my other probation officer, Judy Brown.

Q: You did not tell Judy Brown that you used powder cocaine on the night of this accident?

A: I say the day before the accident. In other words, I was thinking of the day of the accident as the 14th. Even though it was actually passed over to 12:00 and turned into the 15th, you know, it was Thursday the 14th is what I was considering, although it had crossed over to 12 midnight, I was still thinking of it as the 14th.

Q: So are you denying telling Judy Brown, the officer Judy Brown, that you sniffed powder cocaine on the night of this accident and that it led to this accident?

A: Yes, I am denying that.

Q: Mr. Hook, do you admit or deny use of cocaine on the 14th, the night before the morning of the accident?

A: It – I deny it, it was on the 13th.

Q: And do you admit or deny that you told someone that cocaine caused this accident?

. . . .

A: Yes, I do deny that.

In reply, the State called Judy Brown, Hook's probation officer. Brown testified that on January 15, at the detention center, she had a conversation with Hook in which he told her that a friend had brought some powder cocaine to Hook's home "and he sniffed it and he said that's what led to the accident." Hook appealed the admission of this evidence.

On appeal, the Court of Appeals reversed and remanded for a new trial holding that (1) information received by a probation officer is privileged under § 24-21-290 and (2) because Hook's statement was involuntary due to his medical condition, it was not admissible as impeachment evidence.

ISSUE

Is Hook's statement to his probation officer inadmissible for impeachment under § 24-21-290?

DISCUSSION

Section 24-21-290 provides:

1) all information received by a probation agent in his official capacity is privileged;

2) this information is not receivable as evidence in court; and

3) this information may not be disclosed to anyone other than the judge and those specifically entitled to receive reports unless ordered by the court or the director.

The State contends the phrase "unless ordered by the court" in phrase (3) means the information received by a probation agent in his official capacity is receivable as evidence whenever it is so ordered by the court, and therefore Hook's statement was properly admitted.

To the contrary, we find the phrase "unless ordered by the court" modifies only phrase (3), which relates narrowly to disclosure, and does not modify the information's receipt as evidence in court, which is specifically prohibited under phrase (2). We hold the Court of Appeals properly ruled § 24-21-290 does not allow the admission of a probationer's statement as evidence in court simply because the judge orders it.

In opposition to the State's position, Hook contends § 24-21-290 prohibits such a statement's admission in court for any purpose, including impeachment. We agree.

By its terms, § 21-24-290 makes information given by a probationer to his probation agent inadmissible as evidence in court with no exception. A plain reading of the statute leaves no room for grafting onto it an exception to exclusion when the evidence is used for impeachment purposes. *See* State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002) (the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation). The question of admissibility under § 21-24-290 is simply one of legislative intent. Unlike judicially-crafted rules regarding unconstitutionally seized evidence,[3] whether the statement is voluntary or involuntary is irrelevant here. Under § 24-21-290, a probationer's statement to his probation agent is inadmissible for impeachment regardless of whether it is voluntarily or involuntarily given.

Because the Court of Appeals found the voluntariness of Hook's statement dispositive rather than simply finding the statement inadmissible under § 24-21-290, we affirm as modified.

AFFIRMED AS MODIFIED.

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

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[3] *Cf.* United States v. Havens, 446 U.S. 620 (1980) (unconstitutionally seized evidence admissible for impeachment); Oregon v. Hass, 420 U.S. 714 (1975) (statement obtained in violation of fifth amendment right to counsel is admissible for impeachment); Harris v. New York, 401 U.S. 222 (1971) (statement obtained in violation of Miranda admissible for impeachment); *see also* State v. Brown, 296 S.C. 191, 371 S.E.2d 523 (1988) (statement from previous trial where conviction was overturned on appeal for legal error is admissible for impeachment in subsequent trial).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Dept. of Social Services, Respondent,

v.

Kimberly Cochran and Bobby Cochran, Defendants,

OF WHOM Kimberly Cochran is the Appellant.

IN THE INTEREST OF: Tyler Dane Cochran, DOB: 8-30-93
Minor child under the age of 18 years

Appeal From Horry County
James A. Spruill, III, Family Court Judge

Opinion No. 25753
Heard May 28, 2003 - Filed November 24, 2003

REVERSED

Kimberley Elizabeth Campbell, of Patrick Chandler & Campbell, of Surfside Beach, for Appellant.

Celeste Moore, of the Department of Social Services, of Columbia, for Respondent.

Melissa Meyers Frazier, of Law Offices of Walter J. Wylie, of N. Myrtle Beach, for Guardian Ad Litem.

CHIEF JUSTICE TOAL: Kimberly Cochran ("mother") appeals the family court's decision to terminate her parental rights of her child, Tyler Dane Cochran ("child").

FACTUAL/PROCEDURAL BACKGROUND

The Department of Social Services ("DSS") temporarily removed child from the home of mother and Bobby Cochran ("father") in August 1997 after discovering that father had physically abused the child.[1] Child was returned to mother (mother and father were separated at this time) subject to conditions that the family court judge set forth at a merits hearing. Both mother and father had to submit to drug testing, mother had to seek drug treatment, and they had to complete a parenting skills program and a marriage counseling program. If mother failed a drug test, child would immediately be removed from her custody. Mother tested positive for cocaine shortly thereafter, and DSS regained custody of child in November 1997.

A permanency planning hearing took place on July 30, 1998, and the judge concluded that DSS should retain custody of the child and that DSS could proceed to terminate mother and father's parental rights to the child. The following is a list of some of the events that transpired between the initial merits hearing and the termination of parental rights hearing, which was heard on July 20 and August 21, 2000 respectively:

1. Child was 4 years old when initially placed in protective custody, and he could not eat with silverware; he only spoke in one or two word phrases; he wet his bed and was not potty trained; and he had problems walking properly.

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[1] Father spanked the child hard enough to leave his handprint on the child.

2. Mother and father attended regular meetings with a marriage and family therapist, Dr. Harold Heidt ("Dr. Heidt"), for almost a year. The visitations stopped in May 1999, and mother and father returned to have therapy from February to July 2000 at their own expense. Dr. Heidt testified that as of May 1999, he was close to recommending that the child be reunited with the parents, but as of the time that he testified, in July 2000, he would have needed to have many more sessions with the parents to determine if the child should return to the parents' home.

3. Mother and father successfully completed the parenting skills program twice at Waccamaw Mental Health Center. Father would walk 2 ½ hours to the class.

4. Mother initially was asked to give urine samples for testing for drugs, but after some problems arose, she was asked to take blood tests. Mother testified that she tested positive on five occasions.

The trial court determined that mother and father's parental rights should be terminated based on the following grounds: 1) that pursuant to S.C. Code Ann. § 20-7-1572(2) (Supp. 2000), mother and father failed to remedy or rehabilitate the situation which caused the initial removal of child; 2) that pursuant to S.C. Code Ann. § 20-7-1572(6) (Supp. 2000), mother had a diagnosed drug addiction, which prevented her from providing minimally acceptable care for the child; 3) that pursuant to S.C. Code Ann. § 20-7-1572(8) (Supp. 2000), the child had been in foster care for 15 of the previous 22 months; and 4) that termination was in the best interest of the child.

Mother appeals the family court determination and raises the following issues on appeal:

I. Did the family court err in admitting evidence of drug test results from blood samples taken from mother in May and June of 2000?

II. Did the family court err in terminating mother's parental rights because she failed to remedy or rehabilitate the situation that

caused the initial removal of child, S.C. Code Ann. § 20-7-1572(2), or because she had a diagnosable condition that made it unlikely that she could provide minimally acceptable care for the child, S.C. Code Ann. § 20-7-1572(6)?

III. Does the termination of mother's parental rights based on § 20-7-1572(8) violate her due process rights?

LAW/ANALYSIS

The family court will terminate parental rights and free a child up for adoption if it finds that one of the nine statutory grounds for termination has been met and that "termination is in the best interest of the child." S.C. Code Ann. § 20-7-1578 (Supp. 2000). The family court judge terminated mother's parental rights pursuant to three statutory grounds. S.C. Code Ann. §§ 20-7-1572(2), (6), and (8). DSS must prove these grounds by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed. 2d 599 (1982); *Richland County v. Earles*, 330 S.C. 24, 496 S.E.2d 864 (1998). When reviewing the family court decision, this Court may make its own conclusion as to whether DSS proved by clear and convincing evidence that parental rights should be terminated. *South Carolina DSS v. Brown*, 317 S.C. 332, 454 S.E.2d 335 (Ct. App. 1995).

I. Chain of Custody

Mother argues that the family court erred in concluding that DSS had established a proper chain of custody for mother's blood samples that were used for drug testing in May and June of 2000. We agree.

Although mother raises various issues on appeal,[2] in our opinion, the central issue in this case is whether mother's drug addiction is so enduring

[2] Mother contests the family court's finding of the three grounds for termination and the manner in which DSS attempted to prove that she tested positive in the two most recent drug tests.

that she cannot parent her child.[3] We find that the full picture of mother's drug addiction is unclear because DSS did not establish a proper chain of custody for key evidence that supported its allegation that mother failed two recent drug tests.

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[3] This issue focuses on the two grounds for termination, contained in subsections (2) and (6) of § 20-7-1572, which provide as follows:

> (2) The child has been removed from the parent pursuant to Section 20-7-610 or Section 20-7-736, has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the removal;
>
> …
>
> (6) The parent has a diagnosable condition unlikely to change within a reasonable time including, but not limited to, alcohol or drug addiction, mental deficiency, mental illness, or extreme physical incapacity, and the condition makes the parent unlikely to provide minimally acceptable care of the child. It is presumed that the parent's condition is unlikely to change within a reasonable time upon proof that the parent has been required by the department or the family court to participate in a treatment program for alcohol or drug addiction, and the parent has failed two or more times to complete the program successfully or has refused at two or more separate meetings with the department to participate in a treatment program.

Section (6) obviously addresses mother's potential drug addiction, and section (2) does as well because of the requirement of a determination of whether mother has rehabilitated or remedied the prior condition that necessitated the child's removal. In this case, the condition was drug abuse. Consequently, we will combine both grounds for purposes of this analysis.

Mother presented evidence to support her contention that she was trying to overcome her drug addiction and improve her parenting skills. The merits hearing judge ordered mother to submit to drug testing, take marriage and family counseling courses, and seek drug treatment. Mother participated in all of these activities. She failed to finish the marriage counseling regimen with Dr. Heidt, but she and her husband later returned to continue the counseling with Dr. Heidt. However, the fact that she may have tested positive for drugs in May and June of 2000 would seem to suggest that despite her good intentions to become a better mother, she could not rid herself of her drug addiction. Therefore, mother's blood samples that were taken for the May and June 2000 drug tests become highly important in determining the progression of her drug addiction, and DSS must have established a proper chain of custody for those samples in order to utilize the results to request termination of mother's rights.

DSS has the burden to establish a chain of custody for the blood samples "as far as practicable." *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989). This Court has held:

> [T]he party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.

Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957) (cited in *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 258, 422 S.E.2d 98, 99-100 (1992)).

In this case, DSS took a telephonic deposition of Steven Ivey ("Ivey"), an employee of LabCorp, which is the laboratory that tested the blood samples.[4] Ivey testified generally as to who would have handled the samples

[4] On the first day of trial, July 20, 2000, counsel for DSS brought the positive test results to the court's attention and requested that he be able to take an

and how the testing of the samples would have occurred. However, he also testified that he did not handle the samples, nor did he know which employee handled the samples. While the chain of custody that DSS is required to establish does not have to be perfect, Ivey presented no direct evidence as to how those specific blood samples were processed. We find that Ivey's testimony does not establish the practicable chain of custody of mother's blood samples that is required by the *Williams*, *Pellum*, and *Raino* line of cases. This Court is unable to affirm the family court when key evidence of mother's alleged pervasive drug addiction has not been authenticated.

CONCLUSION

We **REVERSE** the trial court and **REMAND** this case with leave to open the record to receive any other evidence pertinent to a determination as to whether mother has overcome her drug addiction and to give DSS the opportunity to present a proper chain of custody for mother's blood samples.

We leave for another day the analysis of whether section 20-7-1572(8), the 15 months out of 22 months provision, is unconstitutional.

MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

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expert witness's deposition rather than bring the witness to the courtroom because of the "unreasonable" cost to bring him down from LabCorp's office in North Carolina. The trial judge granted counsel's request and instructed him to inform mother's counsel of the identity and expertise of the witness one week prior to the deposition. DSS counsel took the telephonic deposition of the expert, Steven Ivey, on August 18, 2000, the last business day before the trial resumed on August 21, 2000. DSS failed to give a week's notice to mother's counsel as to the identity of the expert and when the deposition would occur.

JUSTICE PLEICONES : I agree that this matter should be reversed and remanded in light of the evidentiary error, but write separately to explain why I would not reach the constitutionality of S.C. Code Ann. § 20-7-1572 (8) (Supp. 2000).

The decision to terminate appellant's parental rights was based primarily on the family court judge's finding that appellant continued to use illegal drugs. While the judge found that termination was proper under § 20-7-1572 (8), it is unclear to me whether he would have terminated appellant's rights for this reason alone. Although this Court may find facts on appeal in accordance with our view of the evidence, Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999), I am not willing to sever the parent-child relationship solely on the basis that the child has spent fifteen of twenty-two months in foster care where the appellant presented substantial evidence that much of the delay in the processing of this case is attributable to the acts of others.

In keeping with our well-established policy of declining to address constitutional issues unless necessary to our decision, Morris v. Anderson County, 349 S.C. 607, 564 S.E.2d 649 (2002), and since the family court did not rule on appellant's constitutional challenge, Talley v. South Carolina Higher Educ. Tuition Grants Committee, 289 S.C. 483, 347 S.E.2d 99 (1986)(issue must be raised and ruled upon to be preserved for appellate review), I would not reach the issue whether appellant's due process rights were violated by a termination predicated on § 20-7-1572 (8). I concur in the majority's decision to reverse and remand this family court order.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allendale County Bank, Respondent,

v.

George W. Cadle, Peerless Group, Inc., JEJ Construction, Inc., Red Earth Environmental, Inc., Steffen Robertson and Kirsten (U.S.), Inc., E & J Landscaping, Inc., and Wastemasters of South Carolina, Inc.,

Of whom

Steffen Robertson and Kirsten (U.S.), Inc. and E & J Landscaping, Inc. are Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Allendale County
Perry M. Buckner, Special Referee

Opinion No. 25754
Heard November 4, 2003 - Filed November 24, 2003

DISMISSED

Gary H. Smith, III, of Braithwaite, Smith, Massey & Brodie, of Aiken, for petitioner E & J Landscaping, Inc.

Ladson H. Beach, Jr., of Orangeburg, and James B. Richardson, of Richardson & Birdsong, of Columbia, for petitioner Steffen Robertson and Kirsten (U.S.), Inc.

Walter H. Sanders, Jr., of Fairfax, for respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in Allendale County Bank v. Cadle, 348 S.C. 367, 559 S.E.2d 342 (Ct. App. 2001). After careful consideration, we dismiss the writ as improvidently granted.

DISMISSED

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheap-O's Truck Stop, Inc., Respondent,

v.

Chris Cloyd and United Oil Marketers, Inc., Petitioners.

Midlands Gaming, Inc., Respondent,

v.

Chris Cloyd, United Oil Marketers, Inc., and United Gaming, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25755
Heard November 5, 2003 - Filed November 24, 2003

DISMISSED

Timothy G. Quinn, of Columbia, for petitioners.

S. Jahue Moore and M. Ronald McMahan, Jr., of Moore, Taylor, & Thomas, P.A., of West Columbia, for respondents.

PER CURIAM: We granted this petition for a writ of certiorari to review the Court of Appeals' decision in Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eddie Fields, Appellant.

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

Opinion No. 3697
Submitted October 6, 2003 – Filed November 24, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of S.C. Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

HUFF, J.: Appellant, Eddie Fields, was indicted by a Charleston County grand jury for criminal sexual conduct (CSC) in the first degree and kidnapping.[1] At the close of evidence defense counsel requested, but was denied, an instruction on assault and battery of a high and aggravated nature (ABHAN). Following a jury trial, Fields was convicted of CSC in the first degree and sentenced by the trial judge to thirty years in prison. Fields appeals, arguing the trial court erred in refusing to instruct the jury on ABHAN. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The victim, a seventeen-year-old high school student, testified that around 5:30 p.m. on February 2, 1999, she walked to the library to return a book. On her way there, she ran into one of her friends, and agreed she would meet her friend at a local restaurant on her way back from the library. As she continued toward the library, she encountered Fields, who started a conversation with her as he walked alongside the victim. Fields asked the victim if she had a boyfriend, to which she replied that she did. The victim then ran into two other friends on the street, but because she felt safe at the time, she did not tell these friends there was anything wrong. As Fields and the victim walked on toward the library, Fields asked her if she wanted a "stud for the night." The victim replied that she did not, and that she had a boyfriend. Shortly after this conversation, they arrived at the library. The victim did not go inside, but instead returned her book in the library drop box, because she planned to go meet her friend at the restaurant.

Upon leaving the library, Fields asked the victim if she would like to get a beer with him. The victim did not want to, but after Fields persisted for some time, she finally agreed. She stated she did not refuse the offer, because she was not good at confronting people or being mean to them. Fields indicated that the victim could "just have one beer with [him]," and then she would be able to leave. A short time later, as the two walked into an

[1]Apparently, the jury could not reach a verdict on the kidnapping charge and it was later dismissed.

area unfamiliar to the victim, she told Fields she was not going with him because she had to go meet her friend. At this point, Fields grabbed the victim's arm and kept threatening he would "cut [her] up" with a knife if she attempted to leave. He also told her he knew everyone in the neighborhood. The victim did not believe she would be able to get away from Fields, so she continued on with him.

As the two got to a grocery store, the victim noticed a group of men on the corner at the store. Fields said he was going in the store for a minute, and then walked over to the men and spoke to them. By the way Fields was talking to them and the way the men were looking at her, she believed Fields was instructing the men to make sure she did not leave. Fields entered the store leaving the victim outside. After exiting the store, Fields led the victim to an abandoned house. Although the victim stated that she did not want to enter the house, Fields forcefully pulled her onto the porch and then threw her into a door and onto the floor of the house.

Once inside, Fields picked the victim up off the floor and grabbed her around the neck, putting her in a headlock. He threatened to "cut [her] up" if she was not quiet. He pulled the victim up some stairs, pushed her through one room and into another, pushed her down on the ground and began locking the doors so she could not escape. He forced the victim to remove her pants and underwear and then demanded that she perform oral sex on him, grabbing her hair and pulling her down. For a significant period of time Fields was unable to perform, but eventually had vaginal intercourse with the victim.[2] When the intercourse was over, Fields told the victim to wait five minutes and then she could leave.

As the victim waited to make sure Fields was gone, another man entered the house and tried to prevent her from leaving. She was able to evade this man and escape the house. The victim stopped at a nearby home

[2]Although the record on appeal does not provide the exact duration of the encounter, the victim testified that after she escaped and phoned for help, she noticed from a clock that it was after 9:00, and thought to herself that she had "been there for hours."

and phoned her parents. The parents took their daughter to a hospital, where she was given a complete sexual assault examination. The attending physician testified that the victim was "very frightened, crying, and withdrawn" and noted that her behavior and appearance was consistent with someone who had been sexually assaulted.

The internal physical examination revealed injuries that were consistent with someone who had been sexually assaulted, and inconsistent with consensual intercourse. On external examination, the victim displayed significant blunt trauma to her chin, broken blood vessels around and a scratch on her neck, bruising and scratches on her breast, bruising and scrapes on her elbow, pressure bruising on her forearm, and swelling and bruising to her knees. A DNA test conducted on semen found on the victim's underwear matched that of Fields. Testimony revealed that the sample showed a "very rare DNA print," and that only one out of 66 quintillion African Americans would be expected to have the same DNA print.

After the State rested, Fields did not testify nor put forth any evidence. Thereafter, defense counsel requested that the jury be charged with assault and battery of a high and aggravated nature as a lesser-included offense of criminal sexual conduct in the first degree. After considering the evidence presented during trial, the court denied the request. The jury found Fields guilty of first degree CSC and the trial judge imposed a sentence of thirty years.

LAW/ANALYSIS

On appeal, Fields argues the trial court erred in failing to charge the jury with ABHAN. Fields asserts the jury could infer from the evidence produced at trial that he was guilty of ABHAN, but not CSC. We disagree.

Pursuant to S.C. Code Ann. § 16-3-652 (2003):

> (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim

and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

"'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2003).

ABHAN, on the other hand, "is an unlawful act of violent injury accompanied by circumstances of aggravation." State v. Primus, 349 S.C. 576, 580, 564 S.E.2d 103, 105 (2002). As an element of ABHAN, circumstances of aggravation include, inter alia, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, and taking indecent liberties or familiarities with a female. Id. at 580-81, 564 S.E.2d. at 105-06.

Our courts have consistently held that ABHAN is a lesser-included offense of criminal sexual conduct in the first degree. Id. at 581, 564 S.E.2d at 106. A trial judge is required to charge a jury on a lesser-included offense

if there is evidence from which it could be inferred a defendant committed a lesser rather than a greater offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). Conversely, a trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was guilty only of the lesser offense. State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996); State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976).

After considering the testimony given at trial as a whole, the trial court ruled that an instruction on ABHAN was not warranted. We agree. The record is devoid of **any evidence** tending to show that Fields is guilty of only ABHAN. Although defense counsel suggested in opening remarks that the sex was consensual, no evidence was presented at trial to support this assertion. The victim's uncontradicted testimony was that Fields physically forced her into an abandoned house, threw her into a door, pulled her upstairs, pushed her into a room and down on the ground, and forced her to perform sexual acts with him. Furthermore, the attending physician testified that the victim's injuries were consistent with someone who had been sexually assaulted, but not with consensual intercourse. Considering this evidence and the total lack of evidence tending to show Fields guilty of only the lesser offense, we agree with the trial court that the ABHAN charge was not warranted.

Fields also argues that, even though he did not testify or present any evidence on his own behalf, the jury could have disbelieved a portion of the State's evidence and determined the sex was consensual, and thereby found him guilty of the lesser offense of ABHAN. In Funchess, after considering a very similar argument, our supreme court held that "the [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'" 267 S.C. at 430, 229 S.E.2d at 332 (quoting State v. Hicks, 241 N.C. 156, 84 S.E.2d 545). Accordingly, Field's mere assertion that the jury might have disbelieved the State's evidence that the sex was not consensual and on the remaining evidence found him guilty of ABHAN does not entitle him to have the lesser offense submitted to the jury. See also State v. Tyndall, 336 S.C. 8,

22, 518 S.E.2d 278, 285 (Ct. App. 1999) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery did not entitle the defendant to have the lesser offense submitted to the jury where there was no evidence tending to show defendant was guilty only of simple assault and battery); State v. Rucker, 319 S.C. 95, 98-99, 459 S.E.2d 858, 860 (Ct. App. 1995) (contention that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found appellant guilty of the lesser offense of simple assault and battery did not entitle her to have the lesser offense submitted to the jury where appellant presented no evidence she committed some act that could be viewed by the jury as a simple assault); State v. Hartley, 307 S.C. 239, 241-42, 414 S.E.2d 182, 184 (Ct. App. 1992) (where there was no evidence that showed defendant killed victim without malice, trial judge did not err in refusing to charge the jury on the crime of manslaughter as a lesser-included offense of the crime of murder); State v. Foxworth, 269 S.C. 496, 499, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial and on the remaining evidence found appellant guilty of the lesser offense of simple assault and battery did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of assault and battery of a high and aggravated nature).

Because the record is devoid of evidence that Fields was guilty only of the lesser-included offense, we hold that the trial court did not err by refusing to charge the jury with ABHAN. Accordingly, the trial court's decision is

AFFIRMED.

GOOLSBY and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cox & Floyd Grading, Inc., a South Carolina corporation, Appellant,

v.

Kajima Construction Services, Inc., a Delaware corporation, Respondent.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 3698
Submitted October 6, 2003 – Filed November 24, 2003

AFFIRMED

Gordon G. Cooper and Matthew E. Cox, both of Spartanburg, for Appellant

R. Daniel Douglas, of Atlanta and Thomas H. Coker, Jr., of Greenville, for Respondent.

KITTREDGE, J.: Cox & Floyd Grading, Inc., (Cox & Floyd) appeals the circuit court's order granting summary judgment to Kajima Construction Services, Inc., (Kajima) on Cox & Floyd's action seeking payment of the retainage[1] from a construction project in which Kajima acted as the general contractor and Cox & Floyd acted as a subcontractor. We affirm.

FACTS

In May 1999, Kajima contracted with Cox & Floyd for the latter to perform excavation, backfilling and compacting services on a construction project of Kajima's in Greenville County. The contract also specifically required arbitration of all disputes between the parties.

Early in the construction process, disputes arose between the parties. They attempted mediation in January 2000, prior to the mandated arbitration. Mediation was partly successful, resulting in a substantial payment to Cox & Floyd. In addition, a $70,902.03 "retainage" due to Cox & Floyd was determined.

Next, the matter proceeded to arbitration, where an arbitration panel awarded Cox & Floyd $539,806.70. According to the panel's report, "[t]his award includes all rock cost, performance and payment bond, and retainage for the project." (emphasis added).

Kajima concluded the matter with Cox & Floyd through delivery and execution of all documents, including releases and payment of the arbitration award. For example, Kajima wrote Cox & Floyd Grading, through counsel, in March 2000, stating in pertinent part:

> The payment of the arbitration award will constitute final payment to Cox & Floyd Grading on the Tennessee Metals project, since it includes both the rock dispute and retainage. Therefore, in accordance with the Subcontract,

[1] "Retainage" is the portion of the contract price withheld to assure the contractor or subcontractor satisfies its obligations.

> Kajima will need to receive the standard project documents for final payment, which includes the final waivers and releases and warranty.
>
> …
>
> The final waiver and warranty documents are required of every subcontractor on the project and should not be a surprise to your client. I am simply forwarding the documents now so they can be exchanged for payment within the time frame provided by the arbitration award.

Kajima provided Cox & Floyd an "Affidavit and Unconditional Waiver and Release Upon Final Payment." (Release) The Release contained a provision confirming "full retainage received." Cox & Floyd's president signed the Release and initialed the section entitled "full retainage received." The other required documents were also executed uneventfully and returned to Kajima. Among these documents, Cox & Floyd provided a "Consent to Surety of Final Payment." Kajima tendered payment of the arbitration award, which Cox & Floyd accepted.

Eight months later, following payment of the arbitration award in exchange for a complete and final release of all claims under the parties' subcontract, Cox & Floyd filed this action seeking to recover retainage pursuant to the subcontract. The circuit court granted Kajima's motion for summary judgment. Cox & Floyd's argument to avoid summary judgment is unavailing.

Cox & Floyd's President, George R. Floyd, Sr., asserts that:

> 9. Nearly a month after the arbitration, Kajima submitted to Cox & Floyd an ultimatum, either execute the "Affidavit and Unconditional Waiver and Release Upon Final Payment" as prepared by Kajima or Kajima would not pay Cox & Floyd the amount of the Arbitration Award thereby forcing Cox & Floyd to file an action to enforce the Arbitration Award.

> 10. As Cox & Floyd was in financial despair, with outstanding loans to be paid as a direct result of the withholding of payment by Kajima, George R. Floyd, Sr. on behalf of Cox & Floyd executed the documents because there was no alternative.

This, according to Cox & Floyd, creates a question of fact as to its claim of duress to defeat summary judgment.

SCOPE OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; South Carolina Prop. & Cas. Guar. Assoc. v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). To determine whether any material fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id. Evidence, however, is not sufficient to overcome summary judgment if it is introduced "solely in a vain attempt to create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. See Yensen at 345 S.C. at 512, 548 S.E.2d at 880.

LAW/ANALYSIS

Cox & Floyd maintains that following arbitration, Kajima gave it an "ultimatum" to either sign the Release or Kajima would not pay the arbitration award. Alleging it was in "financial despair" at the time, Cox & Floyd contends it signed the Release under duress in response to Kajima's purported ultimatum. On appeal, Cox & Floyd contends that because the existence of duress presents a question of fact, the trial court erred in granting summary judgment. We disagree.

"Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." Willms Truck Co. v. JW Constr. Co., 314 S.C. 170, 178, 442 S.E.2d 197, 202 (Ct. App. 1994). We find such circumstances are absent here as a matter of law. The purported duress and "ultimatum" arise from Kajima's written request to execute standard release documents in exchange for payment of the arbitration award. This straightforward communication, controlled by counsel for each party, falls far short of creating a legitimate question of fact on the duress issue.

The unambiguous report of the arbitration tribunal included retainage in the award, which Cox & Floyd acknowledges. The ensuing, uneventful exchange of settlement documents, through counsel, forecloses this belated attempt to resurrect the retainage issue and thwart the arbitration process and final award.[2] Cox & Floyd's claim of an "ultimatum" is vague, conclusory, and lends it no support. See Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (S.C. 2003) (citing Rule 56(e), SCRCP for the proposition that affidavits "shall set forth such facts as would be admissible in evidence.") Construing all facts in the light most favorable to Cox & Floyd, we find nothing from the settlement documents or the written communications between the parties' counsel that creates a question of fact upon the claim of duress.

Summary judgment serves an important function "to expedite disposition of cases which do not require the services of a fact finder."

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[2] South Carolina's policy is to favor the arbitration of disputes. Zabinsky v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). If Cox & Floyd desired to challenge the arbitration panel's consideration and inclusion of retainage, it should have done so in a timely and proper manner following receipt of the report of the arbitration tribunal. To permit this action to proceed, under the transparent guise of duress, would contravene the state's policy favoring alternative dispute resolution and foster meritless challenges to arbitration awards.

George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). This case illustrates well the utility of summary judgment in disposing of a meritless claim.

AFFIRMED.

STILWELL and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Rich d/b/a Sunshine Recycling, Respondent,

v.

Gary Walsh and Bank of America, N.A., Appellants.

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

VACATED AND REMANDED

Opinion No. 3699
Heard October 9, 2003 – Filed November 24, 2003

David Clay Robinson, of Columbia, for Appellant Gary Walsh

John T. Moore, Steven A. McKelvey, Jr., Elizabeth A. Shuffler, all of Columbia, for Appellant Bank of America, N.A.

Jeffrey Scott Holcombe, of Orangeburg, for Respondent.

CURETON, A.J.: Bank of America, N.A., and Gary Walsh appeal an order of the Circuit Court denying their motion to compel arbitration. The trial court held appellants waived their right to arbitration by their use of the trial litigation machinery. We vacate and remand.

FACTS

In September 2000, Joseph B. Rich filed his complaint in this case alleging fraud, breach of fiduciary duty and various other causes of action arising out of a series of loan transactions between him and Bank of America, N.A., and its employee, Gary Walsh. Bank of America and Walsh (collectively "the Bank") each answered the complaint and asserted a counterclaim against Rich for violation of the Frivolous Civil Proceedings Sanctions Act, S.C Code Ann. §§ 15-36-10 to -50 (Supp. 2002).

The security agreements Rich executed in connection with the loan transactions contained an arbitration clause providing that "[a]ny controversy or claim between or among the parties . . . arising out of or relating to this instrument . . . shall be determined by binding arbitration in accordance with the Federal Arbitration Act (or if not applicable, the applicable state law)." The Bank first sought an order compelling arbitration on September 24, 2001.

Limited discovery was conducted in the interval between the filing of the complaint and the motion to compel arbitration. The Bank took the deposition of Rich on September 21, 2001. However, the deposition was limited in duration and scope, lasting only 15 minutes, and confined largely to questions regarding Rich's business background and the loan documents at issue. During the deposition, Bank's counsel informed Rich's counsel that the Bank intended to move to compel arbitration. In light of the bank's intentions, the parties agreed to forgo further testimony and concluded the deposition.

Prior to Rich's deposition, the parties each exchanged one set of interrogatories. In response to Rich's interrogatories the Bank refused to answer them in full and only answered the standard interrogatories allowed under Rule 33(b)(1)-(7), SCRCP.[1] Each party also submitted one set of requests for production, and Rich served one set of requests to admit. The Bank also filed a motion to compel discovery responses, but the parties resolved the matter prior to any action by the trial court.

The record does not reveal any further discovery requests were submitted. The Bank did not depose anyone other than Rich. Rich took no depositions of the Bank, and except for the motion to compel arbitration, the parties did not require the intervention of the court.

In its order filed December 4, 2001, the trial court concluded the Bank had waived its right to compel arbitration because of its use of the pretrial litigation process. The Bank and Walsh appeal.

STANDARD OF REVIEW

The denial of a motion to compel arbitration, based on a finding of waiver, is reviewed on appeal de novo. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999). The appellate court will, however, grant deference to the trial court's factual findings underlying its conclusion if there is any evidence reasonably supporting them. Id.

[1] The Bank objected to those interrogatories that exceeded the standard questions permitted under the Rules on the grounds they were propounded and served in violation of Rule 33(b)(8), SCRCP, which limits interrogatories to seven standard questions when the amount in controversy is less than $25,000.

LAW/ANALYSIS

The trial court ruled the Federal Arbitration Act (FAA) preempts application of the South Carolina Uniform Arbitration Act (SCUAA) in this case because the transactions at issue involve interstate commerce. See 9 U.S.C. §§ 1-2 (2002). This finding is not disputed in the present appeal, so the propriety of the trial court's determination is not before this court. Accordingly, we apply the provisions of the FAA as interpreted under federal law and the laws of this state.[2]

Under the FAA, "a party may demand a stay of [] judicial proceedings pending exercise of a contractual right to have the subject matter of the [] action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." Microstrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001) (quoting Maxum Found., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985)). "Default" under this statutory scheme has been equated with the contract law principle of "waiver." Id. Although the right to enforce an arbitration clause may be waived, federal and state courts have recognized a strong policy favoring arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) ("The policy of the United

[2] Though applying substantive federal law in this case, subject matter jurisdiction is proper in this court because the FAA provides for federal jurisdiction of an order compelling arbitration only when the federal district court would have jurisdiction over the suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction. See 9 U.S.C. § 4.

States and this State is to favor arbitration of disputes.") (quoting Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995)).

The Bank's primary argument in this appeal is that the trial court applied the wrong standard for determining whether arbitration has been effectively waived. Some confusion exists in this area because the various federal circuit courts of appeal have adopted different standards to determine whether arbitration rights have been waived under the FAA.

A number of circuits require the party opposing arbitration to demonstrate it has suffered "actual prejudice" as a result of the delay in seeking arbitration. See United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 765 (9th Cir. 2002) (holding that "arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that party inconsistent with such existing right; and (3) there must be prejudice resulting from the waiving party's inconsistent acts") (citing Hoffman Constr. Co. of Oregon v. Active Erectors and Installers, Inc., 969 F.2d 796, 798 (9th Cir. 1992)); Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002) (finding that "[i]n determining whether a party has waived its right to arbitrate . . . we decide if, 'under the totality of the circumstances,' the party 'has acted inconsistently with the arbitration right,' and . . . we look to see whether, by doing so, that party 'has in some way prejudiced the other party'") (quoting S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990)); Microstrategy, 268 F.3d at 249 (4th Cir. 2001) (finding that "[a] party may waive its right to insist on arbitration if the party 'so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay'"); Wood v. Prudential Ins. Co., 207 F.3d 674, 680 (3d Cir. 2000) ("In order to obtain a finding that arbitration is waived, a party seeking to avoid arbitration must demonstrate prejudice."); Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 925 (3d Cir. 1992) (holding that "prejudice is the touchstone for determining whether the right to arbitrate has been waived"); Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987) (opining that "[t]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice"); In re Mercury Constr.

Co., 656 F.2d 933, 939 (4th Cir. 1981) ("[I]t is only when . . . delay results in actual prejudice that it may amount to 'default' within the [Federal Arbitration] Act."), aff'd sub nom. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Not all of the circuits hold prejudice to be an indispensable requirement. See Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 756 (7th Cir. 2002) (holding that the court must "determine whether based on all of the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate") (alteration in original) (quoting Grumhaus v. Comerica Sec., Inc., 223 F.3d 648, 650-51 (7th Cir. 2000)); General Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 438 (6th Cir. 2002) (finding that "[a]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon") (quoting Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973)); National Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987) ("This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration."); Southern Sys., Inc. v. Torrid Oven Unlimited, 105 F. Supp. 2d 848, 853 (W.D. Tenn. 2000) (holding that "[i]n light of the Sixth Circuit's emphasis on inconsistent conduct and no mention of prejudice, this court will treat prejudice as a significant factor but not a dispositive one").

South Carolina has primarily, though not exclusively, followed the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver. See Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985) (finding that "[f]ederal decisions require a showing of prejudice when waiver is asserted. . . . it is not inconsistency, but the presence or absence of prejudice which is determinative"); Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003) ("A party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration."); Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753 (holding same). But see Hyload, Inc. v. Pre-

Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992) (holding that appellant "waived its right to compel arbitration under the contract by refusing to execute the papers necessary to commence arbitration and electing instead to sue on the contract," thus finding that "[t]his is simply a particular instance of the general rule that acts inconsistent with the continued assertion of a right may constitute waiver"). Though not entirely consistent on this point of law, we find our courts' most recent precedent has required the party opposing arbitration to demonstrate actual prejudice. Accordingly, we apply that standard in the present case.

There is, however, no set rule as to what constitutes sufficient prejudice to warrant finding the right to arbitration has been waived. Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753-54. "Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate." Evans, 352 S.C. at 550, 575 S.E.2d at 76-77. "Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration. However, delay and the extent of the moving party's trial-oriented activity are material factors in assessing a plea of prejudice." Microstrategy, 268 F.3d at 249 (quoting Fraser, 817 F.2d at 252).

The party seeking to establish waiver has the burden of showing prejudice. Sentry Eng'g & Constr., 287 S.C. at 351, 338 S.E.2d at 634. Rich argues there was sufficient evidence which reasonably supported a finding that he suffered actual prejudice as a result of the Bank's delay in seeking arbitration. The record, however, does not contain sufficient evidence demonstrating such prejudice.

In its order denying the Bank's motion, the trial court found that "Defendants' decision to 'file [counterclaims], participate in pretrial discovery, and engage in procedural maneuvering for [thirteen months] is sufficient to find that Defendant[s] ha[ve] waived [their] right to arbitrate.'" In so holding, the trial court cited and quoted (with alterations) this Court's prior decision in Liberty Builders. There, we found the party opposing arbitration had proven it had suffered actual prejudice as a result of the moving party's delay in seeking arbitration. Liberty Builders, 336 S.C. at 667-68, 521 S.E.2d at 754. In that

case, Liberty, the party seeking arbitration, pursued active litigation against the Hortons for two and one-half years and availed itself of the Circuit Court's assistance on forty separate occasions. Id. at 666, 521 S.E.2d at 753. We therefore held "Liberty waived its right to enforce the arbitration clause by submitting the dispute to the court and availing itself of that system for two and one-half years." Id. at 668, 521 S.E.2d at 754.

We find Liberty Builders inapposite to this case. Though a significant period of time did elapse between the filing of the complaint and the Bank's motion to compel arbitration (approximately 13 months), mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions. In Liberty Builders, the party seeking arbitration had engaged in extensive litigation throughout the two and one-half year period. In this case, the period in question was marked mostly by inactivity or otherwise minimal discovery efforts, especially when focusing upon the extent of the Bank's participation in the pretrial litigation, as we must do when considering the question of waiver. As already noted, the Bank only submitted one set of interrogatories and one set of requests to admit. The Bank only provided responses to the standard interrogatories allowed by the Rules. The Bank's only motion to compel discovery responses was resolved between the parties before court intervention was required. Only one brief deposition was taken by the Bank which did not involve any testimony on the merits of the case. Also, unlike Liberty Builders and most cases where waiver is found, in this case the party seeking arbitration, the Bank, did not initiate the litigation that chose the forum. It answered the complaint with a perfunctory counterclaim allegation under the Frivolous Claims Act.[3]

3. We note that consideration of the Frivolous Claims Act is appropriate only after the Bank can show the proceedings have terminated in its favor. See S.C. Code Ann. § 15-36-10(2).

In its order, the Circuit Court noted that the Bank might have been provided information in pretrial discovery to which it might not have been entitled in arbitration. However, Rich has made no effort to establish what discovery would or would not be available to the Bank in an arbitration proceeding. Concrete facts rather than speculative assertions are germane to a determination of waiver. See Microstrategy, 268 F.3d at 252-53 (finding a bare assertion that the discovery obtained in pretrial litigation would be unavailable in arbitration was insufficient to establish waiver of the right to arbitrate, opining that such "proof must be concrete, not merely speculative") (citing Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)).

Accordingly, we hold the Bank has not waived its right to arbitration. The trial court thus erred in denying the Bank's motion to compel arbitration. We therefore vacate its order and remand with direction that the proceedings at the trial level be stayed pending arbitration of the claims between the parties.

VACATED AND REMANDED

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ervin Williamson, Appellant.

Appeal From Aiken County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3700
Submitted September 8, 2003 – Filed November 24, 2003

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Teresa A. Knox, Deputy Director for Legal Services, Tommy Evans, Jr., Legal Counsel, J. Benjamin Aplin, Legal Counsel, S.C. Dept. of Probation, Parole and Pardon, for Respondent.

BEATTY, J.: Ervin Williamson pled guilty to second-degree burglary (non-violent) and received a sentence of ten years imprisonment, suspended upon the service of three years imprisonment and five years probation.

Williamson appeals the trial court's decision to revoke his probation based, in part, on a subsequent charge. We affirm.

FACTS

In November 1994, Williamson pled guilty to second-degree burglary in Edgefield County and was sentenced to ten years confinement, suspended to service of three years confinement and five years probation. In September 2001, Williamson was arrested on a criminal domestic violence of a high and aggravated nature ("CDVHAN") charge. As a result, Williamson was charged with violating the conditions of his probation. At the revocation hearing, Williamson proclaimed his innocence to the court, but his attorney advised him not to discuss the charge. The circuit court, relying largely on the alleged victim's affidavit and pictures of her injuries, found that Williamson had violated his probation and that he was "guilty of actual violence" and "in violation of his financial responsibility." The court revoked 120 days of Williamson's suspended sentence. The written order stated that the reasons for revocation were: (1) violation of a "Federal, State, or Local Law," (2) failure to obey conditions of supervision – including payment of fines, restitution, and other payments, and (3) failure to follow the advice and instructions of his supervising agent. Williamson appeals.

ISSUE

Did the trial court abuse its discretion when it revoked Williamson's probation where Williamson was arrested for criminal domestic violence but had not been convicted?[1]

STANDARD OF REVIEW

The decision to revoke probation is in the discretion of the circuit court judge. State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999). "This [C]ourt's authority to review such a decision is confined to correcting errors of law unless the lack of legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious." Id.

[1]The additional alleged violations are either directly related to the alleged CDV charge or the record does not reflect a finding of a willful violation.

LAW/ANALYSIS

Williamson argues there was an insufficient evidentiary basis to establish that he had violated conditions of his probation because he had not been convicted of the CDVHAN charge. We disagree.

"Probation is a matter of grace; revocation is the means to enforce the conditions of probation." Id. at 648, 511 S.E.2d at 97. However, "the authority of the court … to revoke [probation] may not be capriciously or arbitrarily exercised, but should always be predicated upon an evidentiary showing of fact tending to establish violation of the conditions." State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950). "Before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions." Hamilton, 333 S.C. at 648-49, 511 S.E.2d at 97.

At the probation revocation hearing, the state explained that Williamson had been arrested on a CDVHAN charge involving his mother. To support its claim that Williamson had committed the act, the state introduced the mother's affidavit, her voluntary statement, and photographs of her injuries. In the documents, she stated that Williamson had cut her on the arm with a knife. The state also produced evidence that Williamson had stopped making restitution payments.[2]

[2] The trial court did not find that Williamson's failure to make restitution payments was willful, so Williamson's probation could not have been revoked on that ground. See Hamilton, 333 S.C. at 649, 511 S.E.2d at 97 ("[P]robation may not be revoked solely for failure to make required payments of fines or restitution without the circuit judge first determining on the record that the probationer has failed to make a bona fide effort to pay. In the absence of such a determination, a defendant's due process rights are contravened by the deprivation of his constitutional freedom. Therefore, in those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.").

Williamson proclaimed his innocence as to the domestic violence charge but admitted that he was in arrears on his restitution payments due to a prior period of incarceration. He then invoked his right to silence on the advice of his counsel. On appeal, Williamson argues that the trial court erred in revoking his probation because he had not been convicted of the CDVHAN charges. However, that fact is not decisive.

In State v. Gleaton, 172 S.C. 300, 174 S.E. 12, 14 (1934), our Supreme Court, when faced with similar circumstances, reasoned:

> If the defendant's breach of the conditions appears by the record of his conviction, the circuit judge may act upon the production of this record, unless the defendant shall deny his identity or allege nul tiel record. If it does not appear as a matter of record, but has to be determined upon an investigation of the facts, the circuit judge would have the right to take testimony and determine the question himself, or frame an issue to be decided by a jury, or hold the matter in abeyance until the defendant shall have been tried upon the charge.

(citing State v. Sullivan, 127 S.C. 186, 121 S.E. 47, 52 (1923) (Cothran, J. dissenting)). The Court, however, cautioned "that the circuit judge [should] hesitate to take upon himself the responsibility of deciding the guilt of the defendant under these circumstances, and … that the safest course to pursue would be to hold the matter in abeyance until a jury shall have passed upon the charge." Id.

Here, the trial court heard testimony and determined that Williamson committed an act of violence against his mother. Since there was a sufficient evidentiary basis to support the finding, we conclude that the trial court did not abuse its discretion when it revoked Williamson's probation. See State v. Clough, 220 S.C. 390, 400, 68 S.E.2d 329, 334 (1951) (sustaining the revocation of the appellant's probation, where appellant had not been officially charged with assault and battery because "there [was] sufficient evidentiary showing of fact tending to support the conclusion reached by [the trial court] that the appellant committed an assault and battery … thereby violating … his suspended sentence.").

Having decided that the trial court did not err when it revoked Williamson's probation because of the CDVHAN charge, we need not address the additional revocation grounds.

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul Sherman, Appellant/Respondent,

v.

W & B Enterprises, Inc., Respondent/Appellant.

Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 3701
Heard June 12, 2003 – Filed November 24, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Gerald F. Smith and James B. Richardson, Jr., both of Columbia, for Appellant-Respondent.

Thomas B. Bryant, III, of Orangeburg, for Respondent-Appellant.

BEATTY, J.: These cross-appeals arise from a suit Sherman brought against W & B Enterprises, Inc. (W & B) alleging breach of

contract and violation of the Payment of Post-Termination Claims to Sales Representatives Act, S.C. Code Ann. § 39-65-10 to -80 (Supp. 2002). Sherman sought commissions for sales W & B made to K-Mart during his tenure with W & B. Following a non-jury trial in the circuit court, the trial court awarded Sherman the commissions he sought, but only for orders delivered before W & B terminated him. Additionally, the trial court refused to award Sherman attorney fees.

Sherman appeals. He argues the trial court's finding he is not entitled to commissions for sales made to K-Mart before his termination, but not delivered, is erroneous. He further argues the trial court erred in failing to award him attorney fees under S.C. Code Ann. § 39-65-10 to -80 (Supp. 2002), contending such a statutory award is mandatory. In a cross-appeal, W & B argues the trial court erred in finding it entered an oral contract with Sherman. We affirm in part and reverse in part.

I. FACTS/PROCEDURAL BACKGROUND

Sherman joined W & B as a sales representative in either 1992 or 1993. Initially, he represented two accounts, Southern States and Wal-Mart stores. His agreement with W & B provided he would receive a ten percent commission on all sales he made to Southern States and a five percent commission on all sales he made to Wal-Mart.

In September 1993, Sherman contacted Joe Antonini, the president and chief executive officer of K-Mart Corporation (K-Mart). Antonini and Sherman's brother had been fraternity brothers in college, through which Sherman became familiar with Antonini. In his letter, Sherman sought to sell W & B's products to K-Mart stores. In response to the letter, Antonini promptly had a K-Mart merchandise buyer contact Sherman regarding the prospect of a business relationship, which soon developed. After a small test order in 1994 succeeded, Sherman proceeded to sell approximately $5 million to $6 million of W & B's merchandise to K-Mart in 1995. He received a commission of three percent of these sales from W & B.

After a dispute with W & B, Sherman resigned in late 1996. The following spring, W & B made overtures to Sherman in an effort to resume their business relationship. He returned to the company in March or April of 1997, on the condition that, among other things, he receive a three percent commission on all K-Mart sales.

W & B made no sales to K-Mart in 1997. Sherman, along with Jeffrey Watford, a son of W & B's owner Woody Watford, met with K-Mart buyers in 1998 about resuming their business relationship. As a result, W & B received "some orders" for merchandise from K-Mart in 1998.

In the meantime, Sherman was increasing his sales to Wal-Mart, and began spending more time on the account. Consequently, Jeffery Watford increased his role in W & B's sales relationship with K-Mart.

Sherman discovered in January 1999 that his commission on K-Mart orders had been reduced to two percent. No agreement had been made to reduce his commission from three percent. After Sherman brought the change to W & B's attention, Watford assured Sherman he would receive the balance due to make his compensation equal to three percent of his sales to K-Mart. W & B also failed to pay Sherman any commission on the Valentine's Day 2000 sale to K-Mart, but not shipped until after W & B terminated Sherman. Sherman would have earned an $18,960.48 commission on that sale, based on a three percent rate of commission.

II. Sherman's Appeal

A. Issues

1. Did the circuit court err in finding that Sherman was not entitled to receive a commission on the K-Mart order booked before his employment was terminated but not shipped until afterwards?

2. Did the circuit court err in holding that the award of an attorney's fee to the prevailing party under S.C. Code Ann. § 39-65-30 (Supp. 2001) is discretionary rather than mandatory?

B. Standard of Review

An action for breach of contract is an action at law. Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). An ordinary suit to recover attorney fees is also an action at law. Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The rule is the same whether the judge's findings are made with or without a reference." Id. The judge's findings are equivalent to a jury's findings in a law action." Id.

C. Law/Analysis

1. Commissions

Sherman maintains no evidence exists in the record to support the trial court's finding that he was not entitled to receive a commission on orders booked before his employment ended but not shipped until afterward. We agree.

This issue concerns the trial court's decision not to award Sherman a commission for the Valentine's Day 2000 sale. In its order, the trial court stated:

> It is standard practice in the industry to only pay commissions when goods are shipped as quite often orders are changed, sometimes cancelled and the transaction is effectively not completed until shipment. As a result,

> [Sherman's] claim on the Valentine's Day 2000 order, being shipped after [Sherman] left [W & B], would not be covered.

However, the record contains no evidence to support the trial court's finding that this is a "standard practice in the industry." In fact, the record indicates that W & B's practice was just the opposite, since W & B undisputedly paid Sherman commissions on Wal-Mart accounts for sales he made before he was terminated that were not delivered until after his termination.

2. Attorney's Fees

Sherman contends that an award of reasonable attorney fees to the prevailing party is mandatory under S.C. Code Ann. § 39-65-30 (Supp. 2001). We agree.

The relevant South Carolina statutes in this case regarding post-termination claims to sales representatives provide:

> When a contract between a sales representative and a principal is terminated for any reason, the principal shall pay the sales representative all commissions that have or will accrue under the contract to the sales representative according to the terms of the contract.

S.C. Code Ann. § 39-65-20 (Supp. 2002).

…

> A principal who fails to comply with the provisions of Section 39-65-20 **is liable** to the sales representative in a civil action for:
> (1) All amounts due the sales representative plus punitive damages in an amount not to exceed three times the amount of commissions due the sales representative; and

(2) attorney's fees actually and reasonably incurred by the sales representative in the action and court costs.

S.C. Code Ann. § 39-65-30 (Supp. 2001) (emphasis added).

Sherman contends the use of the language "is liable" makes the attorney's fee provision of this statute mandatory, rather than within the trial court's discretion.

"The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation." Elmore v. Ramos, 327 S.C. 507, 510-511, 489 S.E.2d 663, 665 (Ct. App. 1997). The "use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute." Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (2001).

Here, the statute's use of the term "is liable," instead of "may be liable" reflects a mandate rather than an option. Thus, we find that the statute's language providing "[A] principal who fails to comply with the provisions of Section 39-65-20 is liable to the sales representative in a civil action for … attorney's fees actually and reasonably incurred by the sales representative in the action and court costs" can only reasonably be construed to mandate an award of attorney fees where a violation of the statute is found. Accordingly, we find the circuit court erred in failing to award reasonable attorney's fees and related costs pursuant to the statute, and remand for further proceedings to determine the amount of attorney's fees and expenses to which Sherman is entitled.

III. W & B Enterprise's Appeal

A. Issue

Did the circuit court err in finding an oral contract existed between Sherman and W & B?

B. Standard of Review

When the existence of a contract is questioned and the evidence either conflicts or gives rise to more than one inference, the issue of the contract's existence becomes a question for the finder of fact. See Small v. Springs Indus., Inc., 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987) (stating that under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence either conflicts or admits of more than one inference). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The judge's findings are equivalent to a jury's findings in a law action." Id.

C. Law/Analysis

W & B argues Sherman failed to prove he formed an oral contract with W & B. We disagree.

Although the record conflicts, Sherman testified that he and Watford, Sr., agreed that Sherman would be paid a full three percent commission on K-Mart orders after he resumed working for W & B. Further, Sherman was in fact paid three percent commission on some of the K-mart orders. This provides "any evidence" to support the trial court's findings that W & B and Sherman agreed to compensate Sherman at a rate of three percent in commissions for sales W & B made to K-Mart after Sherman returned to W & B in 1998. Although Sherman's testimony conflicts with other evidence in the record, our

standard of review only allows us to look for the *existence* of evidence, and not to weigh its credibility. Accordingly, we find evidence to support the trial court's finding that Sherman and W & B entered an oral contract, and affirm the circuit court's finding on this matter.

CONCLUSION

For the forgoing reasons, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HOWARD, J., and JEFFERSON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Anthony Jerome Brown,

Appellant.

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

Opinion No. 3702
Heard November 4, 2003 – Filed November 24, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Norman Mark Rapoport, all of

Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

ANDERSON, J.: Anthony Jerome Brown was convicted of second degree burglary. He was sentenced to life without parole. Brown appeals his conviction asserting the trial court erred in admitting the witness's identification of him. We affirm.

FACTS/PROCEDURAL BACKGROUND

At approximately 2:40 a.m. on January 30, 2001, Rolston Smith was sleeping in his downtown Charleston condominium when he was awakened by the sound of breaking glass. After getting out of bed and putting on his glasses, Smith looked out his second floor bedroom window to see the source of the noise. At the Prescription Pharmacy Center approximately "three car lengths diagonally across the street" from his bedroom window, Smith "saw an individual straddling a bicycle at the front door of the Prescription Center, and this individual was finishing off the breaking of a large window pane to the right of the front door of the Prescription Center." Smith noticed that the individual was a black male wearing a light blue jacket and a black backpack. Smith testified that, while watching the individual reach through the broken window of the Prescription Pharmacy Center, he called 911 and gave a "blow-by-blow account to the operator who received [his] phone call." Smith described to the operator "what [the individual] was wearing, that he was on a bike, that he was headed the wrong way on Rutledge Avenue, the blue coat, the hat, the backpack that he had on." Smith indicated he "thought [the individual] was stealing something from inside the Prescription Center because this white object was being brought from within out . . . so that [Smith] thought he was already in the process of taking things from inside that building."

The Prescription Pharmacy Center's twenty-four hour internal lights and its four external lights across the front of the store cast what Smith described as "certainly ample lighting so that you can see what is going on without any trouble." Regarding additional lighting, Smith stated:

> Well, they also have security lights on the right-hand side of the building which illuminate that entire side of the building. And there is an overheard street light just right across on the same side of the street of the Prescription Center which illuminates that intersection. And then we also have security lights on our building so that at the back of our building sort of shining into the street is yet another light source. So there's plenty of light right there at that particular part of Rutledge Avenue.

Smith testified that, while he observed the individual across the street, his degree of attention was "100 percent because I couldn't believe that I was actually seeing this attempted break-in. I could not believe it. I just was stunned. So I was 100 percent focused to it."

As Smith talked to the 911 operator, the individual left the storefront and rode north toward Calhoun Street going the wrong way on Rutledge Avenue. In doing so, the individual biked directly in front of Smith, "as [he] stood [at his] second floor window looking down at him bike by." While watching the individual ride by, Smith conveyed to the 911 operator a description of the individual's attire and direction of travel.

"[W]ithin just a matter of again a few more seconds," the police called Smith back, asking him to make an identification of "an individual that had been found a few blocks over." An officer arrived at Smith's house about two minutes later. The officer drove Smith to the intersection of Vanderhorst and Smith Streets, where the police had detained Brown. When Smith arrived in the patrol car, Brown was standing and facing in Smith's direction. Brown's bicycle was located near where Brown was standing. Smith told the officer that if the individual turned around and was wearing a black backpack, he would recognize him as the perpetrator. As Smith spoke, Brown turned around, revealing a black backpack. Smith then told the officer that Brown was the man he had seen at the Prescription Pharmacy Center just "two minutes or three minutes prior to that."

Brown was charged with second degree burglary. Prior to trial, Brown moved to suppress the pre-trial identification made by Smith. He claimed the

identification procedure was unduly suggestive. He further maintained that, under the totality of the circumstances, the identification was unreliable and, thus, inadmissible. The judge held an in camera hearing to determine the admissibility of the identification by Smith.

During the in camera hearing, Smith testified that when he made the identification on the night of the crime, he "was 100 percent certain that [he] was seeing the same individual that [he] had just seen breaking--or trying to break into the Prescription Center." When asked if the police said or did anything that would have suggested Brown "as a suspect that would have swayed [his] opinion either way," Smith answered, "[d]efinitely not." On redirect, the Solicitor asked Smith if he was "sure that the man in court today, the man that was stopped that evening at Smith and Vanderhorst is the man that broke into the Prescription Center." Smith responded, "yes," and that there was no "doubt in [his] mind about that."

Officer Steven Jones, with the Charleston Police Department, testified at the hearing. Officer Jones responded to the scene and drove Smith to the intersection of Smith and Vanderhorst Streets to confirm the identity of the person the police had stopped. Officer Jones testified that Smith "confirmed the identity of the person [the police] had stopped as being the same person that he had seen attempting to break into the pharmacy." Officer Jones questioned Smith as to whether "he was certain that this was the person." Smith said "he was absolutely certain." According to Officer Jones, Smith did not hesitate when identifying Brown as the perpetrator.

While driving to the crime scene, Officer Grady Epps observed Brown "going north up Smith Street . . . [j]ust minutes" after the "burglary call came over the radio." Officer Epps stopped Brown because he "fit the description that was given out by the witness at the scene."

The judge ruled the pre-trial identification was reliable under the totality of the circumstances. He denied the motion to suppress the identification. At trial, Smith explained that he based his identification on the fact that Brown "was a black individual, his bicycle, the blue jacket, the black backpack and the fact that he was where I thought he would about be given the amount of time that they had to get over in that neighborhood and look

for him." Smith focused on the clothing to "see if in [his] memory what th[e] individual had on matched what [Smith] had just seen at the Prescription Center." He declared the body size of the person found by the police matched the body size of the person he had seen at the Prescription Pharmacy Center. Smith identified Brown as the man he "observed breaking into the Prescription Center."

ISSUE

Did the trial court err in admitting the witness's identification of Brown?

STANDARD OF REVIEW

Generally, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); see also State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) (admissibility of evidence is within sound discretion of trial judge; evidentiary rulings of trial court will not be reversed on appeal absent abuse of discretion or commission of legal error which results in prejudice to defendant).

LAW/ANALYSIS

Brown argues "the trial court erred by failing to suppress Smith's identification of [him] where the identification [procedure] was suggestive and unreliable." We disagree.

A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293 (1967); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable

misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. The Moore Court explained:

> Only if [the procedure] was suggestive need the court consider the second question--whether there was a substantial likelihood of irreparable misidentification. Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure. [The] inquiry, therefore, must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Moore, 343 S.C. at 287, 540 S.E.2d at 447-48 (quoting Jefferson v. State, 425 S.E.2d 915 (1992)) (internal quotations omitted).

Identifications resulting from single person show-ups have been upheld by the United States Supreme Court and our Supreme Court. "'While a showup in which a witness views a single suspect is generally suggestive, and hence suspect or disfavored, and less preferable than a lineup, even if requested by accused, a showup may be proper in some circumstances.'" State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (quoting 22A C.J.S. Criminal Law § 803 (1989)).

"'[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.'" Mansfield, 343 S.C. at 78, 538

S.E.2d at 263. The closer in time and place to the scene of the crime, the less objectionable is a showup. Id. A show-up may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Id. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime. See State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806 (1992).

Single person show-ups are disfavored because they are suggestive by their nature. State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. See Neil v. Biggers, 409 U.S. 188 (1972); Blassingame, 338 S.C. at 251, 525 S.E.2d at 541. Suggestiveness alone does not mandate the exclusion of evidence. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). Reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98 (1977); Blassingame, 338 S.C. at 251, 525 S.E.2d at 541.

To determine whether an identification is reliable, it is necessary to consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. See Mansfield, 343 S.C. at 78-79, 538 S.E.2d at 263. The corrupting effect of a suggestive identification is to be weighed against these factors. Id. at 79, 538 S.E.2d at 263. After the trial court determines the witness's identification is reliable, the witness is permitted to testify before the jury. Id.

Notwithstanding the suggestive nature of the identification procedure employed by police in this case, Smith's identification of Brown was reliable in light of the totality of the circumstances. First, insofar as the witness's opportunity to observe the individual at the time of the crime, Smith testified that his window was about "three car lengths diagonally across the street" from the pharmacy. Further, Smith stated the lighting was sufficient "so that

you can see what is going on without any trouble." There were lights inside the pharmacy that stayed on all of the time, four external lights across the front of the store, a street lamp near the pharmacy, and security lights on Smith's building. According to Smith, "there's plenty of light right there at that particular part of Rutledge Avenue." Smith said there were no obstructions blocking his view of the pharmacy. Smith was so stunned that he was "100 percent focused." When leaving the scene, Brown biked directly in front of Smith, as Smith stood at his second floor window looking down at Brown ride by.

While the fact that the initial observation occurred during the night rather than during the day would typically tend to weigh against admission by negatively affecting this factor, when viewed in the totality of the circumstances in conjunction with the exceptionally brief time lapse, it actually supports admission in this case. Unlike daytime when streets are bustling with throngs of persons traveling hither and thither, Smith's identification during the dead of night drastically reduces the likelihood that Smith had mistaken Brown for some other similarly clad nocturnal cyclist.

Second, Smith declared that, while he watched the individual across the street, his degree of attention was "100 percent because [he] couldn't believe that [he] was actually seeing this attempted break-in." Third, Smith was able to give the police a detailed and accurate description of the perpetrator. Smith described to the 911 operator the perpetrator's clothing, the fact that he was riding a bicycle, that he was a black male, that he was headed the wrong way on Rutledge Avenue, and that he was wearing a blue coat and black backpack. Smith's description of Brown was consistent with his appearance.

Fourth, at the confrontation, Smith explicitly stated that he "was 100 percent certain that [he] was seeing the same individual that [he] had just seen breaking--or trying to break into the Prescription Center." Smith informed Officer Jones that "he was absolutely certain" Brown was the perpetrator. According to Officer Jones, Smith did not hesitate when identifying Brown as the perpetrator. Finally, only a few minutes passed between the time of the crime and the confrontation. When Smith made the identification, he advised the officer that Brown was the man he had seen at the pharmacy just "**two minutes or three minutes prior to that**." Critically,

there was only a brief time between the crime and the identification. See State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App 2000).

We hold Smith's pre-trial identification of Brown was reliable under the totality of the circumstances. The identification satisfies the criteria of State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980), and Neil v. Biggers, 409 U.S. 188 (1972).

Brown cites State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), as controlling the instant case, thus binding us to likewise find error in the trial court's determination of admissibility. While we agree that Moore outlines the governing law in this case, the dissimilar circumstances compel us to conclude that, unlike the identification in Moore, Smith's identification of Brown was sufficiently reliable to avoid violating Brown's due process rights.

In Moore, the Supreme Court determined the trial court erred in admitting a witness's show-up identification testimony where the witness's descriptions to the 911 operator were based primarily on the suspects' clothing and race, and the fact that one was taller than the other. Id. The witness had not seen the individuals' faces. Id. The Court noted:

> Of further concern is the fact that Davis failed to recognize Wideman at the scene of the crime, notwithstanding she claimed to have seen the side of his face and knew him from her sister's apartment complex. The fact that Davis failed to recognize him until the show-up highlights both the inherent unreliability of the identification and the completely suggestive nature of the show-up procedure. Further, as to the defendant Moore, Davis gave no physical description of him other than the fact that he was shorter and wore a black hat. She did not recall if he was stocky or thin; she recognized him at the show-up only by virtue of the black hat on the ground beside him.

Id. at 289-90, 540 S.E.2d at 449.

The initial observation in the Moore case occurred during the middle of the day and the show-up identification followed 90 minutes later. Id. In the case sub judice, the time between crime and confrontation was brief, only a matter of minutes. The police called Smith to make his identification after "just the briefest time, maybe a minute or a minute and a half." This is not a distinction without meaning. This Court recently held that a "showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000). Such is the case at bar. Not only was the crime and identification close in both time and location, but also Brown was apprehended near where Smith projected Brown would be based on his direction and mode of travel. Although it does not fit neatly into one of the enumerated factors, this sort of predictive corroboration lends vast support to reliability.

CONCLUSION

The trial court properly denied Brown's motion to suppress Smith's pre-trial identification of him. Additionally, the judge did not err in allowing the in-court identification. Accordingly, Brown's conviction is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.