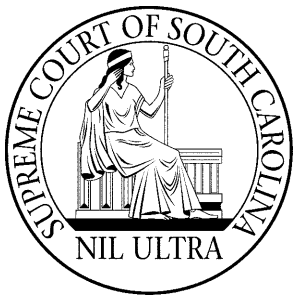


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**FILED DURING THE WEEK ENDING**

**December 22, 2003**

**ADVANCE SHEET NO. 45**

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

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## PETITIONS - UNITED STATES SUPREME COURT

None

# The Supreme Court of South Carolina

RE: Rule 406, SCACR

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ORDER

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Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 406, SCACR, is amended to read as follows:

**Rule 406**
**Disposition of Fees**

One fourth of all fees collected by the bar admissions office, to include bar application or reinstatement fees, shall be remitted by the Judicial Department to the General Fund of the State of South Carolina; provided, however, the amount remitted to the General Fund in any fiscal year shall not exceed the amount remitted in Fiscal Year 2002-2003. The remaining portion shall be deposited by the Judicial Department in an escrow account to be held by the State Treasurer, and shall be used for expenses incurred by the bar admissions office, the Committee on Character and Fitness and the Board of Law Examiners, and for such other expenses of the Judicial Department as the Chief Justice may direct.

This amendment shall be effective immediately.

IT IS SO ORDERED.

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.

Columbia, South Carolina

December 17, 2003

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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United Services Automobile Association, Respondent,

v.

Lesli Litchfield and Vernon Litchfield, Appellants.

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Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

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Opinion No. 3712
Heard November 6, 2003 – Filed December 15, 2003

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**AFFIRMED**

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Carl H. Jacobson, of Charleston, for Appellants.

William O. Sweeny, III and William R. Calhoun, Jr., both of Columbia, for Respondent.

**GOOLSBY, J.:** United Services Automobile Association ("USAA") brought this declaratory judgment action against Lesli Litchfield and Vernon Litchfield seeking a declaration that no basis exists for reforming Lesli Litchfield's automobile insurance policy to include underinsured motorist ("UIM") coverage. The trial court granted USAA's motion for summary judgment. The Litchfields appeal, contending USAA failed to make a meaningful offer of UIM coverage. We affirm.

## FACTS

USAA sent Lesli Litchfield (then Lesli Tillman) an automobile insurance policy on July 9, 1997. USAA included an offer of UIM, using form 333SC(10), a form prescribed by the Chief Insurance Commissioner of South Carolina. This form listed each and every limit of UIM coverage that USAA had filed with and had been approved to sell by the South Carolina Department of Insurance, instructed Litchfield how to select UIM coverage if she wished it, and told her how she could later increase or decrease the limits of such coverage. The coversheet of the policy contained the following notice: "Important Notice! SC law requires us to add . . . UIM to your policy in the same limits as your liability unless you sign the attached offer of optional . . . UIM Form 333SC and return it to us within 30 days."

When Litchfield failed to respond, USAA issued her a policy on August 19, 1997, that included UIM coverage in the amount of her liability coverage. Six months later, Litchfield telephoned USAA and asked that it drop the UIM coverage from her policy.

USAA sent her a form annotated with the words "Rejection of UIM per phone conversation" written across the bottom and asked her to sign, date, and return it by mail. Litchfield did so, returning the form on February 2, 1998. USAA then prepared and sent to Litchfield an amended declaration that reflected the deletion of the UIM coverage and the prorated, decreased premium for the remainder of the policy period.

On October 5, 1999, while driving a rented automobile in Hawaii, Litchfield's husband was injured in a motor vehicle collision. Litchfield's husband then presented a claim for UIM benefits against her USAA policy because the damages he sustained allegedly exceed the $100,000.00 liability coverage of the at-fault driver.

USAA instituted this declaratory judgment action against the Litchfields, asserting Litchfield had effectively cancelled her UIM coverage. The latter counterclaimed, seeking to have the policy reformed to include the UIM that Litchfield, almost two years previously, had specifically asked be deleted from her policy.

The trial court granted USAA summary judgment, finding the sole reason that Litchfield's policy did not contain UIM coverage at the time of the accident was because she had voluntarily elected to drop it. The Litchfields do not challenge this finding on appeal. The Litchfields claim that USAA did not make a valid offer of optional UIM coverage when she purchased her coverage.

## LAW/ANALYSIS

We do not view this as an "offer of UIM coverage" case.[1] We are beyond the point of having to decide whether USAA made a valid offer of

[1] Because we do not consider this an "offer" case, we do not reach the issue of whether the offer made by USAA to Litchfield was valid to begin with. Cf., however, Norwood v. Allstate Ins. Co., 327 S.C. 503, 506-507, 489 S.E.2d 661, 663 (Ct. App. 1997) (holding an automobile insurer made a valid offer of UIM coverage under a policy with liability limits of 25/50/25 where insured offered UIM coverage of 15/30/5, 15/30/10, and 25/50/10, and offer form indicated insured could purchase UIM coverage "up to" her liability limits and instructed her how to increase or decrease her limits of UIM coverage); cf. also S.C. Code Ann. § 38-73-470 (Supp. 2002) ("There is no requirement for an insurer or an agent to offer underinsured motorist coverage at limits less than the statutorily required bodily injury or property damage limits.").

UIM coverage to Litchfield. This is because Litchfield did in fact enjoy such coverage and in an amount up to the limits of her liability coverage; however, she later, on her own initiative, voluntarily decided to drop it. Because Litchfield once had UIM coverage and later changed the policy by dropping the UIM coverage from her policy, USAA was under no obligation to make another offer of UIM coverage.[2] Moreover, we agree with the trial court that "[i]t would make no sense . . . for an insurer to be required to 'offer' a given coverage to an insured who had contacted the insurance company for the specific purpose of dropping that coverage."

Indeed, if Litchfield were allowed to prevail in this instance, then anyone whose policy currently includes UIM coverage in an amount less than his or her liability coverage would be able to question later the sufficiency of the offer of UIM coverage and seek to have the policy reformed in an attempt to increase the limits thereof. The opportunity for fraud would be enormous.

**AFFIRMED.**

**STILWELL, J., concurs. HUFF, J., dissents in a separate opinion.**

**HUFF, J. (dissenting) :** I respectfully dissent. I disagree with the majority's conclusion affirming the trial court's decision. The trial court granted USAA's motion for summary judgment. The Litchfields appeal. I believe the main issue on appeal concerns whether USAA made a valid offer of UIM coverage. I would hold that USAA did not make a valid offer and reverse the trial court's ruling.

## FACTUAL/PROCEDURAL BACKGROUND

[2] See S.C. Code Ann. § 38-77-350(c) (2002) ("An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.").

In light of the fact that a determination as to the existence of a valid offer is critical to this case I find it necessary to provide a separate factual statement. In July 1997, USAA issued an automobile insurance policy to Lesli Litchfield, then known as Lesli Tillman, effective July 10, 1997 through January 10, 1998. The policy did not include UIM coverage. The automobile policy packet sent to Litchfield did, however, include an offer of UIM coverage. The offer provided, in pertinent part:

> Your automobile insurance policy does not provide any underinsured motorists coverage. You have, however, a right to buy underinsured motorists coverage in limits up to the limits of liability coverage you carry under your automobile insurance policy. Limits of underinsured motorists coverage, together with the additional premiums you will be charged are shown upon this Form.

The policy coversheet and the UIM offer both indicated that, if the offer form was not completed and returned within thirty days, UIM coverage would automatically be added to the policy at the same limits as Litchfield's liability limits, as required by law.

The offer form gave the option of purchasing or rejecting UIM coverage, and listed ten levels of bodily injury limits ranging from $15,000/$30,000 to $1,000,000/$1,000,000 and seven levels of property damage limits ranging from $5,000 to $500,000. To select the desired levels of coverage the applicant had to check the boxes next to the appropriate limits. The parties do not dispute that USAA's offer form listed every limit of UIM coverage USAA is authorized by the South Carolina Department of Insurance to sell.

Litchfield did not respond to the initial offer of UIM coverage, so on August 19, 1997 USAA automatically added the coverage to her policy, effective July 10, 1997. On January 26, 1998, Litchfield telephoned USAA and asked that the UIM coverage be dropped from her policy. USAA informed Litchfield that, to properly document her request, it needed to have

a statement in writing. USAA sent Litchfield a standard form offer of underinsured motorist coverage with the handwritten annotation "Rejection of UIM per phone conversation." Litchfield promptly executed the form declining coverage and mailed it back to USAA. Shortly thereafter, USAA prepared and sent Litchfield an Amended Declaration, reflecting the deletion of the UIM coverage.

On October 5, 1999, Litchfield's husband, Vernon Litchfield, was seriously injured in an automobile collision in Hawaii. The liability carrier for the at-fault vehicle tendered its limits of liability coverage. Mr. Litchfield subsequently presented a claim for UIM benefits against his wife's USAA policy, asserting the policy should be reformed to include $50,000 in UIM coverage because USAA failed to make a meaningful offer of UIM coverage.

USAA denied there was any UIM coverage, asserting that Lesli Litchfield had changed her policy to delete UIM coverage and USAA was not required to make any further UIM offers following the change. The Litchfields sought reformation of the policy to include UIM coverage on the grounds that USAA failed to make a meaningful offer of UIM coverage.

The trial court granted summary judgment to USAA finding that the sole reason the policy did not provide UIM coverage at the time of the accident was that Litchfield voluntarily elected to drop it, and USAA was not required to offer Litchfield that same coverage when she telephoned them requesting that UIM coverage be deleted. The court further found that the form offering UIM coverage sent to Litchfield in July 1997, when her policy was initially issued, complied with South Carolina law such that the offer was meaningful and effective.

## LAW/ANALYSIS

The Litchfields assert that USAA's offer of UIM coverage was not a meaningful offer under South Carolina law, and because no meaningful offer

was made to Mrs. Litchfield, it is irrelevant that she rejected the UIM coverage.[3] I agree.

In finding USAA was not required to offer Mrs. Litchfield UIM coverage after she elected to drop the coverage, the trial court relied on § 38-77-350(C) of the South Carolina Code, governing the offer of optional coverages. This section provides, "An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supercedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350 (C) (2002). It is clear, however, that this subsection envisions that an effective past offer has already been made. See Antley v. Nobel Ins. Co., 350 S.C. 621, 635, 567 S.E.2d 872, 879-80 (Ct. App. 2002) (while an insurer is not required to make a new offer of optional coverage where the policy renews an existing policy, the insurer still bears the burden of demonstrating a meaningful offer of the optional coverage was made at some point in the past); McDonald v. S.C. Farm Bureau Ins. Co., 336 S.C. 120, 125, 518 S.E.2d 624, 626 (Ct. App. 1999) ("Where Section 38-77-350(C) states the insured is not required to make a 'new' offer, it clearly envisions the circumstances where the insurer has already made an 'old' offer."); Ackerman v. Travelers Indem. Co., 318 S.C. 137, 142, 456 S.E.2d 408, 411 (Ct. App. 1995) ("[T]he only reasonable way to interpret the language in § 38-77-350(C) is to recognize that the insurer may rely on the **effective** past offers it has given to its insureds when these insureds continue coverage with the same insurer.") (emphasis added).

We thus turn to the question of whether USAA made a meaningful offer to Litchfield in the past. The Litchfields argue USAA's offer did not

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[3]USAA asserts the Litchfields failed to address the trial court's finding "that the sole reason that [Mrs. Litchfield's] policy did not provide coverage at the time of the accident was that she had voluntarily elected to drop it." It therefore contends the Litchfields have abandoned this issue. However, after review of the Litchfields' brief, I find they have sufficiently challenged this ruling by maintaining that Mrs. Litchfield's rejection or deletion of the UIM coverage is irrelevant because there was no meaningful offer made by USAA in the first instance.

comply with the requirements of S.C. Code Ann. § 38-77-160 (2002) and pertinent South Carolina case law. We agree.

Section 38-77-160 requires automobile insurance carriers to offer, at the option of the insured, UIM coverage "up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code Ann. § 38-77-160 (2002). This statute has been construed to mandate that the insured "be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." Burch v. S.C. Farm Bureau Mut. Ins. Co., 351 S.C. 342, 345, 569 S.E.2d 400, 402 (Ct. App. 2002) (quoting State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987)). Specifically, our courts have interpreted this section as requiring insurers to offer UIM coverage to the insured **in any amount** up to the insured's liability coverage. Id. at 345, 569 S.E.2d at 402.

To determine whether an insurer has complied with its duty to offer optional coverages and thus make a meaningful offer of UIM coverage, the court must consider the following factors: (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556.

The insurer bears the burden of establishing it presented a meaningful offer of UIM coverage. Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). If the insurer fails to make a meaningful offer of UIM coverage, the court will reform the insured's policy to include UIM coverage up to the limits of the insured's liability coverage. Dewart v. State Farm Mut. Auto. Ins. Co., 296 S.C. 150, 153, 370 S.E.2d 915, 916 (Ct. App. 1988). A noncomplying offer has the legal effect of no offer at all. Hanover

Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990).

USAA claims its offer of UIM coverage satisfied the requirements for a meaningful offer because its form listed every level of coverage the company was authorized by the South Carolina Department of Insurance to sell. I disagree.

In Bower v. National General Insurance Co., our supreme court ruled that an offer of UIM coverage must inform the insured "that **any** limits up to the liability limits could be purchased." 351 S.C. 112, 119, 569 S.E.2d 313, 316 (2002) (emphasis in original). In that case, the insurer's offer form stated, in language virtually identical to the language in USAA's form, that the insured had the "right to buy underinsured motorist coverage in limits up to the limits of liability coverage you will carry under your automobile insurance policy." The form further provided, "The limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form." Id. at 114-15, 569 S.E.2d at 314. The form listed four bodily injury limits and four property damage limits with the applicable premiums. Id. at 115, 569 S.E.2d at 314. The form then included blank spaces to fill in requested UIM bodily injury limits and UIM property damage limits. Id. The supreme court concluded, because the language of National General's form failed to inform the insured that UIM coverage **in any amount** up to the insured's liability coverage could be purchased, the offer could not be considered meaningful. Id. at 119, 569 S.E.2d at 316. Though the form did not explicitly state that "all" of the available limits of UIM coverage were listed, the court found that a reasonable person would conclude that the options listed were the only ones available. Id. at 118, 569 S.E.2d at 316.

As in Bower, the offer of UIM coverage in the instant case did not inform Litchfield of her right to purchase the coverage **in any amount** up to the limits of her liability coverage. The supreme court in Bower clearly held that the offer must "inform an insured that 'underinsured motorist coverage **in any amount** up to the insured's liability coverage' is what is actually being offered." Id. at 119, 569 S.E.2d at 316 (emphasis in original).

USAA's form failed to provide this explicit information to the insured, listing only the fixed levels of coverage it had obtained authorization from the Department of Insurance to sell.

USAA argues Bower is distinguishable because, unlike USAA's offer, the UIM coverage offer at issue in Bower only listed examples of the levels of coverage, not all of the limits the insurer was authorized to sell. We find a careful reading of Bower shows no distinction between the two cases, as Bower specifically relied on this court's decision in Wilkes v. Freeman, 334 S.C. 206, 512 S.E.2d 530 (Ct. App. 1999). In Wilkes, this court found a meaningful offer of UIM coverage was not made where, as in the present case, the offer form listed **all** of the limits the insurer was authorized to sell. The offer of UIM coverage in Wilkes stated that "**[a]ll** of the limits of underinsured motor vehicle coverage we sell, together with the additional premiums you will be charged, are shown on this form." Id. at 210, 512 S.E.2d at 532 (emphasis in original). Although the insurer's offer form listed all the limits of UIM coverage the insurer sold, the court found that the form failed "to provide any indication that applicants may request other coverage amounts." Id. Because the insurer failed to provide the insured an opportunity to request UIM coverage at alternate coverage amounts, the insurer failed to "offer UIM coverage 'up to' the limits of [the insured's] liability coverage." Id. at 212, 512 S.E.2d at 533.[4]

I am mindful that, by explicitly listing each level of UIM coverage it was authorized to sell, USAA was likely attempting to make the insured's choice of UIM coverage limits easier rather than more difficult to understand. I am constrained, however, by recent precedent which requires that an offer of UIM coverage clearly inform the insured that UIM coverage may be purchased **in any amount** up to the limits of liability coverage. No exception has been carved out for cases such as the present, in which the offer lists

[4]It should further be noted that, unlike the form in this case, the form in Bower included a blank space for the insured to specify the exact limits the insured desired. The Bower dissent partially relied upon this distinction in maintaining that a meaningful offer of UIM coverage was made. Bower, 351 S.C. at 121, 569 S.E.2d at 317.

every limit of UIM coverage the insurer is legally authorized to sell. As noted above, our courts declined to provide for such an exception when those circumstances arose in the Wilkes case.

Based on the standing case law, I would hold USAA's offer of UIM coverage did not sufficiently inform Mrs. Litchfield of her right to purchase UIM coverage in any amount, and I am thus compelled to rule the offer was not meaningful. I would reverse the trial court's order granting summary judgment and remand the case with the instruction that Mrs. Litchfield's USAA policy be reformed to include UIM coverage at the appropriate limits.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State, Respondent,

v.

Jeremy Bryson, Appellant.

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Appeal From Richland County
John L. Breeden, Jr., Circuit Court Judge

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Opinion No. 3713
Heard November 6, 2003 – Filed December 15, 2003

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**VACATED**

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Assistant Appellate Defender Tara S. Taggart, of the South Carolina 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; Assistant Attorney General Melody J. Brown; and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

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**HOWARD, J.:** Jeremy Bryson was indicted and tried for multiple charges, including assaulting a law enforcement officer while resisting arrest in violation of South Carolina Code Annotated section 16-9-320(B) (2003) and pointing a firearm in violation of South Carolina Code Annotated section 16-23-410 (2003). On appeal, Bryson argues the circuit court lacked subject matter jurisdiction for these two offenses because the court allowed the amendment of both indictments immediately prior to trial, changing the identity of the law enforcement officer named as the victim in each. We agree with Bryson and vacate the two convictions.

## FACTUAL/PROCEDURAL BACKGROUND

Jeremy Bryson and a co-defendant robbed a man and woman at gunpoint. Bryson and the co-defendant then forced the female victim into a vehicle where the victim was sexually assaulted by Bryson while the co-defendant pointed a gun at her.

Shortly after the female victim was released, law enforcement officers initiated a chase of the vehicle in which Bryson was riding. The chase ended when the co-defendant wrecked the vehicle. Bryson exited the vehicle carrying a gun. After a brief struggle with Deputies Richardson and Brantly, Bryson was arrested.

The arrest warrant for assaulting an officer while resisting arrest listed both deputies as assaulted officers, and the arrest warrant for pointing a firearm listed both as victims. However, the indictments for these two charges list only Deputy Richardson and read as follows:

> RESISTING ARREST – ASSAULT ON OFFICER
>
> That Jeremy Bryson did in Richland County on or about April 25, 2000, knowingly and willfully assault, beat or wound one **M.S. Richardson, RCSD,** a law enforcement officer

> of this State, while resisting the efforts of the said officer to make a lawful arrest of the said defendant, in violation of § 16-9-320(b), Code of Laws of South Carolina, (1976), as amended.
>
> . . . . .
>
> POINTING A FIREARM
>
> That Jeremy Bryson did in Richland County on or about April 25, 2000, point or present a firearm, to wit: Beta Arms .380 Caliber Pistol SN#B08830 at one **Deputy Micah Richardson**.

(emphasis added).

Before jury selection, the state moved to amend each indictment by substituting Deputy Brantly for Deputy Richardson as the officer against whom the offense was committed.[1] Bryson objected to the amendments, asserting the changes would deprive him of notice of what he was required to defend. The circuit court allowed the amendments, ruling the change of the victim's name did not change the nature of the offenses charged.

Bryson was also indicted and simultaneously tried for the other charges stemming from his conduct on the day of his arrest, including kidnapping, criminal sexual conduct in the first degree, possession of a

[1] According to the record, Deputy Richardson was no longer employed by the sheriff's department at the time of trial and was unavailable as a witness.

pistol by a person under the age of twenty-one, carrying a pistol, and two counts of armed robbery.[2]

Bryson was convicted of all charges except the charge of assaulting an officer while resisting an arrest. On this charge, the jury found Bryson guilty of the lesser-included offense of resisting arrest.[3]

Bryson was sentenced to thirty-year concurrent terms for kidnapping, criminal sexual conduct in the first degree, and for each of the two counts of armed robbery. He was sentenced to one year in prison for carrying a pistol and resisting arrest, to run concurrently with the thirty-year sentences. He was sentenced to five-years imprisonment each for possession of a firearm and pointing a firearm, both to run consecutively to the thirty-year concurrent sentences. Bryson appeals his convictions for resisting arrest and pointing a firearm.

## LAW/ANALYSIS

### I. Subject Matter Jurisdiction for Assaulting an Officer while Resisting Arrest

Bryson argues the circuit court did not have subject matter jurisdiction to try him for assaulting an officer while resisting arrest.[4]

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[2] Prior to trial, the state *nolle prossed* one count of possession of a stolen vehicle and a second count of possession of a pistol by a person under the age of twenty-one.

[3] See State v. Ritter, 296 S.C. 51, 53, 370 S.E.2d 610, 610-11 (1988) (holding resisting arrest is a lesser-included offense of assaulting an officer while resisting arrest).

[4] Because Bryson was indicted for assaulting an officer while resisting arrest, we begin our inquiry by examining the amendment to the indictment of that offense to determine whether the circuit court had subject matter jurisdiction to try Bryson. We will then consider the circuit court's jurisdiction over the lesser-included offense of resisting arrest for which Bryson was convicted.

We agree and vacate his conviction for the lesser-included offense of resisting arrest.

The subject matter jurisdiction of a court is fundamental and can be raised at any time. Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001).

A trial court acquires subject matter jurisdiction to hear a criminal case by way of a legally sufficient indictment or a valid waiver thereof. State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999); see S.C. Const. art. I, § 11 (Supp. 2002) (stating "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed").

An amendment to a legally sufficient indictment does not divest the trial court of subject matter jurisdiction so long as the amendment does not change the nature of the offense charged. See S.C. Code Ann. § 17-19-100 (2003) ("If . . . there be any defect in form in any indictments . . . the court before which the trial shall be had may amend the indictment . . . if such amendment does not change the nature of the offense charged . . . [; however, if] such amendment shall operate as a surprise to the defendant, . . . the defendant shall be entitled, upon demand, to a continuance of the cause.").

Conversely, an amendment to an indictment that changes the nature of the offense charged or charges a different offense divests the trial court of subject matter jurisdiction. 41 Am. Jur.2d Indictments and Informations § 174 (1995) ("An indictment is impermissibly amended if the altered indictment charges a different offense or changes the nature of the offense."); State v. Lynch, 344 S.C. 635, 640-41, 545 S.E.2d 511, 514 (2001) (holding the nature of the offense changed when an indictment for first-degree burglary was amended to change the aggravating circumstance from entering during darkness to causing physical injury because "the proof required for each aggravating circumstance [was] materially different"); Hopkins v. State, 317 S.C. 7, 9, 451 S.E.2d 389, 390 (1994) (holding the nature of the offense

changed because the amendment to the indictment increased the maximum penalty for the crime); State v. Riddle, 301 S.C. 211, 212, 391 S.E.2d 253, 253 (1990) (holding the nature of the offense was changed when an indictment was amended from assault with intent to commit third-degree criminal sexual conduct to assault with intent to commit first-degree criminal sexual conduct because the punishment for the amended offense was different from the punishment for the original offense); State v. Sowell, 85 S.C. 278, 283-84, 67 S.E. 316, 317-19 (1910) (holding when an amendment to an indictment substituted a different and distinct offense from the one charged, the trial court is divested of subject matter jurisdiction because the grand jury had not indicted the defendant on the substituted offense); see also State v. Gunn, 313 S.C. 124, 132-36, 437 S.E.2d 75, 80-82 (1993) (holding the scope of the jurisdiction conferred by an indictment is limited to the charged offense).

After carefully considering the indictment in this case, we conclude the amendment replaced the properly indicted count of assaulting an officer while resisting arrest with a second unindicted count of the same crime. Our analysis is predicated on the wording of South Carolina Code Annotated section 16-9-320(B). That section states: "It is unlawful for a person to knowingly and willfully . . . assault, beat, or wound an officer when the person is resisting an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not." S.C. Code Ann. § 16-9-320(B).

Criminal statutes are "construed strictly against the state and in favor of the defendant." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation . . . . When the terms of a statute are clear, the court must apply those terms according to their literal meaning." State v. Morgan, 352 S.C. 359, 366-67, 574 S.E.2d 203, 206-07 (Ct. App. 2002) (internal citations omitted).

The statute plainly states that one of the elements of assaulting an officer while resisting arrest is that "an officer" be assaulted. Because "an" is an article that modifies a singular noun, the plain language of the statute indicates the crime involves an assault on one officer. See Webster's Third New Int'l Dictionary 75 (1986). Thus, if two officers are assaulted, beaten or wounded in the course of the arrest, two separate violations of section 16-9-320(B) are committed.[5] See State v. Maybank, 352 S.C. 310, 313-14, 573 S.E.2d 851, 853 (Ct. App. 2002) ("After the officers told Maybank he was under arrest, . . . Maybank engaged in several brief fights with [two officers] . . . and [was] later indicted for . . . two counts of assaulting a police officer while resisting arrest."); see also State v. Hollman, 232 S.C. 489, 503, 102 S.E.2d 873, 880 (1958) (holding a single act constitutes two separate offenses when "there are distinct elements in one offense which are not included in the other"), rev'd on other grounds by, Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999) (overruling Hollman's holding by deciding that convictions for both assault and battery of a high and aggravated nature and resisting arrest do not constitute a double jeopardy violation).

In the present case, Bryson was the passenger in a vehicle involved in a high-speed chase. After the vehicle wrecked, Bryson exited the vehicle and fought with several sheriff's deputies who subsequently arrested Bryson. The arrest warrant listed Deputies Richardson and Brantly as assaulted officers. Based on the plain language of the statute and the facts as alleged by the state, Bryson could have been indicted for two counts of assaulting an officer while resisting arrest.

Instead, Bryson was indicted for one count of assaulting an officer while resisting arrest, with the indictment listing Deputy Richardson as the assaulted officer. At the time the grand jury convened, the state did not indict Bryson for the additional count of assaulting Deputy Brantly.

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[5] We have found no reported South Carolina cases stating there was only one charge of assaulting an officer while resisting arrest when the defendant assaulted two officers during the course of an arrest.

However, before jury selection, the state moved to amend the indictment to substitute the unindicted charge listing Deputy Brantly as the assaulted officer for the indicted charge listing Deputy Richardson as the assaulted officer. The circuit court permitted the amendment.

Because the amendment substituted a different charge from the one presented to the grand jury, we hold the amendment divested the circuit court of subject matter jurisdiction to try Bryson for assaulting an officer while resisting arrest.[6] See S.C. Code Ann. § 17-19-100 (stating it is only when an amendment to an indictment does not change the nature of the offense charged that the amendment does not divest the trial court of subject matter jurisdiction); see also S.C. Const. art. I, § 11 (stating "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a

[6] We note two cases that suggest an amendment to an indictment that changes the identity of the victim does not divest the circuit court of subject matter jurisdiction. State v. Johnson, 314 S.C. 161, 166, 442 S.E.2d 191, 194 (Ct. App. 1994) (holding an amendment that changed the name of the owner of property listed in an indictment for breach of trust did not change the nature of the offense); State v. Sweat, 221 S.C. 270, 273-74, 70 S.E.2d 234, 235-36 (1952) (holding an amendment to a larceny indictment did not change the nature of the offense when the name listed as the owner of the stolen goods was changed to the name of the actual owner). These cases are distinguishable because each involved only one count of a particular crime, while the present case involves two counts of assaulting an officer while resisting arrest, and the separate counts can be distinguished only by knowing the identity of the victim involved. See State v. Guthrie, 352 S. C. 103, 111-12, 572 S.E.2d 309, 313-14 (Ct. App. 2002) (holding an element is an essential ingredient of the crime when an amendment to that element would materially change the proof required to convict the defendant of the crime); 41 Am. Jur.2d Indictments and Informations § 168 (1995) (stating an amendment is substantive and thus not permitted unless "the same defense is available to the defendant both before and after the amendment and upon the same evidence").

presentment or indictment of a grand jury of the county where the crime has been committed").

Because the circuit court lacked subject matter jurisdiction to try Bryson on the amended indictment for assaulting Deputy Brantly while resisting arrest, the court lacked jurisdiction to convict Bryson for the lesser-included offense of resisting arrest. See Ritter, 296 S.C. at 53, 370 S.E.2d at 610-11 (holding resisting arrest is a lesser-included offense of assaulting an officer while resisting arrest).

The line of cases that state the circuit court has subject matter jurisdiction over a lesser-included offense for which the defendant was convicted involve instances where the indictment setting out the greater offense was valid. State v. Primus, 349 S.C. 576, 579-81, 564 S.E.2d 103, 105-06 (2002) (holding the circuit court had jurisdiction over the lesser-included offense of assault and battery of a high and aggravated nature, where a valid indictment for first-degree criminal sexual conduct existed); Joseph v. State, 351 S.C. 551, 555-58, 571 S.E.2d 280, 282-83 (2002) (holding the circuit court did not have subject matter jurisdiction for grand larceny, even though there was a valid indictment for robbery, because grand larceny is not a lesser-included offense of robbery). Thus, we conclude the conviction for the lesser-included offense of resisting arrest must be vacated.

## II. Subject Matter Jurisdiction for Pointing a Firearm

Bryson argues the circuit court did not have subject matter jurisdiction to try him for pointing a firearm. We agree and vacate his conviction on this charge.

The analysis of the subject matter jurisdiction conferred by the amended indictment for the charge of pointing a firearm is the same as the analysis discussed for assaulting an officer while resisting arrest in the preceding section.

South Carolina Code Annotated section 16-23-410 states: "It is unlawful for a person to present or point at another person a loaded or

unloaded firearm." The clear wording of this statute makes it illegal to point a firearm at a person. The offense is not defined as pointing a firearm at "one or more persons." It follows that if the defendant points a firearm at two people, two separate offenses are committed. Morgan, 352 S.C. at 367, 574 S.E.2d at 207 ("When the terms of a statute are clear, the court must apply those terms according to their literal meaning.").

Here, Bryson exited a wrecked vehicle holding a gun. He pointed this gun at the officers who subsequently arrested him. The arrest warrant listed both Deputies Richardson and Brantly as the victims of Bryson's pointing a firearm. Based on the plain language of the statute and the facts alleged by the state, Bryson could have been indicted for two charges of pointing a firearm. However, Bryson was only indicted on one charge that listed Deputy Richardson as the victim. Prior to trial, the circuit court allowed an amendment to the indictment that substituted the unindicted charge listing Deputy Brantly as the victim for the indicted charge listing Deputy Richardson as the victim. For the same reasons as set forth in the preceding section, the circuit court was without jurisdiction to try or convict Bryson for pointing a firearm at Deputy Brantly. See S.C. Code Ann. § 17-19-100 (stating it is only when an amendment to an indictment does not change the nature of the offense charged that the amendment does not divest the trial court of subject matter jurisdiction); Sowell, 85 S.C. at 283-84, 67 S.E. at 317-19 (holding when an amendment to an indictment substituted a different and distinct offense from the one charged the trial court is divested of subject matter jurisdiction because the grand jury had not indicted the defendant on the substituted offense).

Based on the foregoing, Bryson's convictions for resisting arrest and pointing a firearm are

**VACATED.**[7]

[7] Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

**Strom, A.J., concurring.**

**Stilwell, J., concurring in part and dissenting in part.**

**STILWELL, J.: (concurring in part and dissenting in part):** Although I agree that the conviction for pointing a firearm should be vacated for the reasons stated in the majority opinion, I am compelled to dissent as to the conviction for resisting arrest.

The indictment as originally drawn charged Bryson with assault on a police officer while resisting arrest. The jury acquitted him of that charge, but convicted him of the lesser-included offense of resisting arrest. See State v. Ritter, 296 S.C. 51, 370 S.E.2d 610 (1988) (16-9-320(B) includes all of the elements of section 16-9-320(B) — knowingly and willfully resisting a lawful arrest — subsection (A) is then necessarily a lesser-included offense of subsection (B)).

That is of no moment, however, because if the court was deprived of subject matter jurisdiction on the indictment because of the amendment prior to trial, it could not have convicted Bryson of the lesser-included offense. However, both subsections (A) and (B) are specific in that the prohibited conduct is limited to and must involve a particular class of individual, i.e., a law enforcement officer. The original indictment identifies the victim as a law enforcement officer of this state in addition to naming him. In my view, under the statute in question, it is not necessary to include the name of the law enforcement officer as long as the victim is clearly identified as such. Naming him would be mere surplusage. State v. White, 338 S.C. 56, 525 S.E.2d 261 (Ct. App. 1999).

The majority opinion reasons that the amendment changing the identity of the officer deprives the trial court of subject matter jurisdiction because if more than one officer is assaulted, each assault is a separate offense and therefore the identity of the victim is necessary. If this indictment, as originally drafted, charged Bryson with assaulting several officers, I might be inclined to agree. However, I do not

believe we have to address that issue because that is not the case before us. Bryson was charged with assaulting "a" police officer, and he was sufficiently apprised of what he had to defend against.

I do not believe that amending the indictment merely to change the name of the victim deprived the court of subject matter jurisdiction because it did not change the nature of the offense charged. I would therefore affirm the conviction for resisting arrest.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Virginia Burgess, Appellant.

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Appeal From Clarendon County
Marc H. Westbrook, Circuit Court Judge

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Opinion No. 3714
Heard November 5, 2003 – Filed December 15, 2003

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**AFFIRMED**

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Deputy Chief Attorney Joseph L. Savitz, III and Senior Assistant Appellate Defender Wanda H. Haile, both of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Sr., Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

**GOOLSBY, J.:** Following an almost daylong drinking episode, Virginia Burgess killed her intoxicated husband sometime during the evening of August 7, 1998. She stabbed him forty-seven times. At trial, Burgess claimed not to remember anything about the evening after the two had argued. A jury convicted her of murder and possession of a weapon during a violent crime. The trial court sentenced her to thirty years imprisonment for murder and five years for the weapons charge, the sentences to run concurrently. On appeal, Burgess argues the trial court abused its discretion by not ordering a psychiatric examination pursuant to section 44-23-410 of the South Carolina Code[1] to determine her competency to stand trial. We disagree and affirm.

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[1] S.C. Code Ann. § 44-23-410 (2002) provides in relevant part:

> Whenever a judge of the Circuit Court . . . has reason to believe that a person on trial before him, charged with the commission of a criminal offense . . . , is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> (1) order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs if the person is suspected of being mentally retarded or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and mental retardation or a related disability . . . ; or
>
> (2) order the person committed for examination and observation to an appropriate facility of the Department of Mental Health or the Department of Disabilities and Special Needs for a period not to

At a pretrial motions hearing held on the eve of trial in May 2000, nearly two years following the decedent's death, defense counsel, who had undertaken the defense of Burgess three months before in February 2000, moved to have the trial court order an evaluation of Burgess's competency to stand trial. Counsel asserted an inability to talk intelligently with her, stated his conversations with her led him to believe she could not assist in her own defense, and pointed to prior I.Q. tests that reflected that Burgess's I.Q. registered between 56 and 66. He offered no medical or mental health records in support of the motion and referred only to records that related to her alcoholism and mental retardation.[2]

The trial judge examined Burgess under oath to determine if she understood the pending charges, the purpose of the proceedings, and the roles of the individuals involved. Burgess said that she understood what she was charged with, that the State claimed she had killed her husband in August of that year; that her lawyer's role was "to represent" her and the prosecutor's role was to "talk against me"; and that a jury would determine her guilt or innocence. Burgess acknowledged that when she talked to her lawyer, she thought she would be able to tell him her side of the story; and that the State would offer witnesses to testify against her and her lawyer would have an opportunity to question them.

Noting that Burgess's demeanor in the courtroom "has been very appropriate" and pointing to the lack of any medical opinion regarding her competence to stand trial, the trial judge denied the request for a psychiatric examination. He found Burgess "seemed . . . able to understand everything" he had asked her, appeared to understand the proceedings and the role of trial participants, was able to identify the person whom she was alleged to have killed and to state when the killing was alleged to have occurred, and understood the charges made against her.

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exceed fifteen days. . . .

[2] The trial judge asked defense counsel, "As I understand, there have been no prior medical or psychiatric opinions issued as to the issue of competence; is that right?" Counsel responded, "That's correct, Your Honor."

Defense counsel renewed at trial the motion for a psychiatric examination of Burgess; however, the trial judge denied the motion.

The question of whether to order a competency examination falls within the discretion of the trial judge whose decision will not be overturned on appeal absent a clear showing of an abuse of that discretion.[3] Burgess made no clear showing of an abuse of discretion here.

By statute, the question of whether a defendant is fit to stand trial depends upon whether the defendant, because of a lack of mental capacity, cannot "understand the proceedings" or "assist in his [or her] own defense."[4] Factors to be considered in determining whether further inquiry into a defendant's fitness to stand trial is warranted include evidence of his or her irrational behavior, his or her demeanor at trial, and any prior medical opinion on his or her competence to stand trial.[5] In some circumstances, the presence of just one of these factors may justify a trial court's ordering a further inquiry into a defendant's competency to undergo trial.[6]

Here, Burgess had not previously been adjudicated incompetent to stand trial; the record does not belie the trial judge's observation that her demeanor during the pretrial motion appeared to be "very appropriate";[7] and the record of the pretrial motion hearing manifests she understood the proceedings, the roles of the various participants, and the charges leveled against her. Beyond defense counsel's statements regarding his inability to

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[3] State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000), cert. denied, 531 U.S. 1093 (2001).

[4] S.C. Code Ann. § 44-23-410 (2002).

[5] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

[6] Id. at 533, 273 S.E.2d at 538.

[7] Nothing in the record indicates the trial judge experienced any difficultly in conversing with Burgess. Thus, we should defer to the trial judge's finding in this regard. See, e.g., State v. Wright, 354 S.C. 48, 55, 579 S.E.2d 538, 542 (Ct. App. 2003) (stating the "evaluation of demeanor and credibility [are] matters within the peculiar province of the circuit court").

talk intelligently with Burgess and his opinion that she could not assist in her own defense, counsel offered nothing to demonstrate that Burgess's mental retardation was such as to render her unfit to stand trial.[8] Under these circumstances we are not inclined to second guess the trial judge and hold he did not clearly abuse his discretion in denying Burgess's motion for a mental examination regarding her fitness to stand trial.[9]

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[8] Indeed, during her testimony both during a Jackson v. Denno, 378 U.S. 368 (1964) hearing and before the jury, Burgess appeared able to advise the court of the medication she had taken both in August 1998, when the killing occurred, and in May 2000, when the trial took place. Although some initial confusion developed regarding whether she was taking Prozac at the time of the offense, she explained that she was not taking it. Burgess admitted that she understood what her Miranda rights meant, but claimed she did not understand them when first questioned by the police. Further, she admitted she had refused to talk to the police at some point during the questioning because "I needed a lawyer and they read me my rights," and that she had invoked her right to counsel twice on the day the offense occurred. Her testimony before the jury provided a detailed account of her activities that led up to the crime and her activities on the morning she reportedly discovered her husband had been killed. Burgess testified she did not recall what had occurred when her husband returned home because she had either passed out or fallen asleep. Burgess's testimony, therefore, seems to undercut any question of her lack of competency to stand trial.

[9] See Richardson v. State, 663 S.W.2d 111, 113 (Tex. Ct. App. 1983) (holding the trial judge did not abuse his discretion by refusing the defendant's motion for a psychiatric examination even though counsel's testimony revealed possible problems with the defendant's communication, memory, and veracity where there was no psychiatric testimony and the defendant's testimony refuted counsel's representations); see also State v. Chapin, 424 N.E.2d 317, 319-20 (Ohio 1981) (finding "good cause" was not shown to grant a motion made during trial for a competency hearing where the defendant had previously been found competent to stand trial after a pretrial hearing and no objective indication of the defendant's unfitness for trial was demonstrated by the defendant's conduct, the defendant's medical

**AFFIRMED.**

**ANDERSON, J., concurs.**

**CONNOR, J., dissents in a separate opinion.**

**CONNOR, J.**: I respectfully dissent. In my opinion, the trial judge abused his discretion by failing to order a psychological evaluation of Burgess where there was reason to believe Burgess could not assist her attorney.

Burgess was represented by counsel from the time of the incident. Although counsel discussed with the solicitor the possibility of Burgess having a competency evaluation, counsel never made a motion to have the evaluation performed. Burgess obtained new counsel in February 2000, three months before trial.

During the pre-trial conference the day before trial, the solicitor recounted the procedural history of the case and noted that Burgess had a long history of alcohol abuse and blackouts. Burgess' new counsel requested a psychological evaluation. Counsel informed the judge that he requested an evaluation as soon as he was appointed to the case, but there was confusion over whether the State consented. Counsel argued Burgess had "mental health deficiencies," could not intelligently converse with him, had a recent IQ test showing an IQ of 61, and was unable to assist in her defense. Counsel could not discuss the case with Burgess because she did not understand what he was talking about. According to counsel, Burgess' only focus was when she was getting out of jail.

Counsel quoted from the December 2, 1998, affidavit by Dr. Keith. Dr. Keith opined that Burgess exhibited borderline mental retardation, behaved like a child, and posed no threat to others. Dr. Keith stated that Burgess needed medical procedures to evaluate her mental and physical problems,

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records, or defense counsel's mere assertions that the defendant's fitness was now questionable).

including an EEG, an MRI, consultation with a neurologist, and a PGI workup. It is not clear that the neurological examination was ever performed.

The only psychological evaluations ever performed on Burgess were in connection with her prior hospitalizations for alcohol abuse and in connection with her application for SSI.[10] The tests did not address the issue of competency. One test indicated Burgess had a very low survival skills quotient of 45. Because no prior competency evaluations had been performed on Burgess, counsel did not have any further medical evidence to present to the trial judge.

As the majority opinion notes, Burgess appeared to respond appropriately to the questions posed by the trial judge during questioning. However, most of Burgess' answers were a simple "yes, sir" to the judge's questions. Although Burgess identified the charge of "murder," the victim, the month of the crime, and her attorney's role, she was unclear as to the role of the solicitor. Specifically, she appeared to be guessing when answering that the solicitor's role was to "Talk against me?" Burgess also informed the judge that she had not really spoken with counsel "like we should." When asked by the judge if she could tell her side of the story to her attorney, she responded, "I think." Burgess' counsel informed the trial judge that Burgess' communication skills that day were better than they ever were when he attempted to discuss the case with her prior to that time and that he could not determine whether "guilty but mentally ill" was applicable to Burgess at that point. Citing only Burgess' apparent understanding of the roles of the parties and the charges against her, the trial judge denied counsel's motion for a competency evaluation.

Counsel requested reconsideration of his motion at the start of trial, arguing that, as appointed counsel, he did not have the funds to get a psychological evaluation of Burgess performed prior to trial. He informed

[10] Both Burgess and her counsel testified that Burgess received Supplemental Security Income from the Social Security Administration due to her mental deficiencies. The victim's aunt was the payee responsible for handling Burgess' finances.

the judge again about his difficulties in consulting with Burgess, and he argued the evaluation was necessary to determine what defenses could be pursued. Counsel stated as follows:

> I don't believe I can talk to her a little bit. She's very hard to talk to and you almost need a third party like an Ann Kirven who is at the alcohol and drug abuse department to do that because she's – over the years of dealing with [Burgess], she's earned [Burgess'] trust and she opens up a little bit more to her even though it's a little bit incoherent.

Citing State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), the judge denied the request, finding Burgess did not exhibit irrational behavior, her demeanor was appropriate, and there was no medical evidence to support further inquiry into competence.

Trial judges have a duty to order a psychiatric examination for a defendant if there is reason to believe the defendant is not fit to stand trial because of an inability to understand the proceedings or an inability to assist in her own defense. State v. Locklair, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000); S.C. Code Ann. § 44-23-410 (2002) ("Whenever a judge of the Circuit Court . . . has reason to believe that a person on trial before him . . . is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall . . . order examination of the person by two examiners designated by the Department of Mental Health . . . .") (emphasis added). "'[E]vidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors, standing alone, may, in some circumstances, be sufficient.'" Blair, 275 S.C. at 533, 273 S.E.2d at 538 (quoting Drope v. Missouri, 420 U.S. 162 (1975)). Whether to order a competency evaluation is within the trial judge's discretion, and his decision will not be overturned on appeal absent a clear showing of an abuse of that discretion. Locklair, 341 S.C. at 364, 535 S.E.2d at 426.

I am guided by the analysis in State v. Singleton, 322 S.C. 480, 472 S.E.2d 640 (Ct. App. 1996). This Court found the trial judge abused his discretion in failing to order a mental evaluation. At his probation revocation hearing, Singleton's attorney informed the trial judge that Singleton suffered from audio and visual hallucinations and was being treated by the Mental Health Commission. Singleton's mother told the judge that Singleton's odd and violent behavior stemmed from a poisoning incident as a child. Counsel informed the judge that he was seeking a mental evaluation of Singleton and moved to hold the probation proceeding in abeyance. The trial judge denied the motion, but he later urged treatment for Singleton's mental condition. After reviewing the entire record, the statements to the judge by Singleton's counsel and mother, and the trial judge's concern for Singleton's later treatment, this Court reversed the judge's failure to order an examination pursuant to section 44-23-410. Singleton, 322 S.C. at 483-84, 472 S.E.2d at 642.

Similarly, I believe Burgess' counsel presented enough information to the trial judge to give him "reason to believe" that further evaluation of Burgess' condition was warranted. The State did not dispute Burgess' history of blackouts and her low IQ of 61. Counsel repeatedly informed the judge that he had immense difficulty conversing with Burgess and that she did not understand the full ramifications of the trial. The affidavit from Dr. Keith indicated that Burgess was borderline mentally retarded, had the mentality of a child, and was in need of further neurological evaluation. Counsel also indicated the defense of "guilty but mentally ill" could not be pursued absent an evaluation. Most of Burgess' answers during the trial judge's examination of her were one or two words. Further, it does not appear from the record that Burgess was confident she could assist her attorney when she informed the judge that she thought she could tell him her story.

As the majority points out in a footnote, Burgess testified during the Jackson v. Denno hearing and, later, in her own defense. During the Jackson v. Denno hearing, Burgess stated she did not understand her Miranda warnings and she was confused. Burgess' testimony regarding her medicine

was extremely confusing, and she stated she had problems remembering things. Prior to testifying in her own defense, the trial judge questioned Burgess regarding her decision to testify. Despite her guess at the pre-trial hearing that the solicitor's role was to "Talk against me?," Burgess did not understand that the solicitor had the burden to prove her guilty and that she did not have a burden to prove her innocence. Although Burgess was able to testify regarding the events on the day of the incident, she repeatedly testified that she passed out on her couch that evening and was not aware of what was happening until she awoke the next day to find her husband deceased. Ann Kirven, Burgess' case worker from the Alcohol and Drug Abuse Commission, testified that Burgess exhibited difficulties with comprehension throughout her placement at Morris Village. There was also evidence in the record that Burgess had to defend herself against the victim with a knife on a prior occasion.

Although the majority points to Burgess' testimony as evidence that Burgess was competent to stand trial, I believe the testimony in the record raises further questions regarding Burgess' ability to comprehend the proceedings and assist in her defense. Burgess' inability to comprehend or discuss the case intelligently with her attorney prohibited her attorney from raising possible defenses, including guilty but mentally ill or battered spouse syndrome. Burgess' low IQ, inability to understand the exact role of the solicitor, history of blackouts, deficiencies with comprehension, difficulties remembering, and inability to intelligently discuss her case with her attorney certainly gave the trial judge a "reason to believe" that Burgess needed further evaluation of her competency. Because there was evidence in the record that Burgess could not comprehend or speak intelligently with her attorney, I would find that the trial judge abused his discretion by failing to order an examination of Burgess as required by statute.

Accordingly, I would reverse and remand for a psychological evaluation. I would further order the circuit court to hold a hearing to determine whether Burgess was competent to stand trial. If the circuit court finds that Burgess was incompetent to stand trial, the court should issue an order reversing her conviction and granting her a new trial when she is presently competent to stand trial. If the hearing reveals Burgess was

competent, her conviction will stand. See Blair, 275 S.C. at 534, 273 S.E.2d at 538 ("[O]n remand, if the hearing reveals Blair was incompetent to stand trial, an order reversing his conviction should be entered and a new trial granted when he is presently competent to stand trial. However, if the hearing reveals Blair was competent to stand trial, the conviction will stand.").

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Mildred Green, Respondent,

v.

Jason Fritz, Appellant.

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Appeal From Orangeburg County
L. Casey Manning, Circuit Court Judge

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Opinion No. 3715
Submitted November 3, 2002 – Filed December 15, 2003

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**REVERSED**

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Donnell G. Jennings and R. Hawthorne Barrett, both of Columbia, for Appellant.

Zack E. Townsend, of Orangeburg, for Respondent.

**HEARN, C.J.:** Mildred Green sued Jason Fritz to recover damages for bodily injuries suffered during an automobile accident. The jury returned a verdict for Green in the amount of $1,500.00 in actual

damages and $500.00 in punitive damages. Green moved for a new trial nisi additur. The trial judge granted the motion, increasing the total award to $14,000.00. Fritz appeals, asserting, inter alia, the motion was improvidently granted because the trial judge failed to articulate compelling reasons to invade the province of the jury. We reverse and reinstate the jury verdict.

## FACTS/ PROCEDURAL HISTORY

Fritz was attempting to turn left out of a gas station parking lot. To execute the turn and join left-bound traffic, Fritz had to cross three lanes of right-bound traffic. A vehicle in the closest right-bound lane slowed and signaled for Fritz to proceed, which he did. After successfully crossing two lanes of traffic, however, Fritz collided with Green.

The EMS crew that responded to the accident took Green by ambulance to the Orangeburg Regional Medical Center. Green, who had a history of high blood pressure and diabetes, was kept overnight for the purpose of monitoring her blood sugar and blood pressure. During her stay at the hospital, Green did not complain of, and was not treated for, neck, back, or muscle pain.

Green took two days off from work after the accident, though she testified that the pain in her neck and back persisted after that period. Four weeks after the accident, Green sought treatment from Dr. Shay, a chiropractor. Dr. Shay diagnosed Green with cervical subluxation.[1] The treatment lasted approximately four weeks and cost a total of $1,470.00.

Green brought this negligence action against Fritz, seeking to recover damages sustained in the accident. During opening remarks at trial, Fritz's attorney admitted fault. Green's chiropractor testified about the extent of Green's back injuries. On cross-examination, defense counsel challenged the causal link between the accident and Green's subluxation diagnosis. Specifically, Dr. Shay was asked whether Green's back injury could have

[1] Subluxation is a condition where vertebrae are out of alignment.

been caused by something other than the car accident, and Dr. Shay admitted that was possible. Green did not claim to experience any accident-related problems subsequent to her treatment with Dr. Shay. She also did not claim to have sustained any permanent injuries as a result of the accident.

Following the jury's verdict, Green moved for a new trial nisi additur, arguing that the verdict was grossly inadequate and that "it had to be compassion, prejudice or something of that nature, some other outside influence." The trial court granted Green's motion for a new trial nisi additur, increasing the jury's total award from $2,000.00 to $14,000.00. The order, in its entirety, reads as follows:

> The plaintiff's motion for a new trial nisi additur or in the alternative for a new trial absolute is hereby granted.
>
> The jury returned a verdict in the amount of $1500.00 actual damages and $500.00 punitive damages. The evidence revealed that the plaintiff's actual damages were:
>
> 1. Loss [sic] Wages 118.88
> 2. Hospital Bill 1132.55
> 3. Dr. Shea [sic] 1470.00
> 4. Medical Records 21.47
> 5. Ambulance Bill 186.35
>
> Total Special Damages =2929.25
>
> It is well settled that a trial judge may add to or subtract the jury's award if it appears to be the result of passion, caprice, or something not found in the record. If [sic] find and conclude that the verdict in this case is grossly inadequate.
>
> It is therefore ordered, adjudged and decreed that the sum of $12,000.00 be added to the jury's award of $2000.00 for a total award of $14000.00.

## ISSUE

Did the trial court improperly grant Green's motion for a new trial nisi additur?

## STANDARD OF REVIEW

A trial judge may grant a new trial nisi additur whenever he or she finds the amount of the verdict to be merely inadequate. Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 438 (Ct. App. 1995). While the granting of such a motion rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages. Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 100, 522 S.E.2d 350, 352 (Ct. App. 1999). To this end, a judge must offer compelling reasons for invading the jury's province by granting a motion for additur. Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). We will only reverse if the trial judge abused his discretion in deciding a motion for new trial nisi additur to the extent that an error of law results. Patterson, 318 S.C. at 185, 456 S.E.2d at 438**.**

## LAW/ANALYSIS

Fritz argues the trial judge erred when he granted the motion without articulating compelling reasons. We agree.

A trial judge may grant a new trial nisi additur when a jury's verdict is inadequate. Bailey, 318 S.C. at 14, 455 S.E.2d at 691. However, to grant such relief, the trial judge must state compelling reasons for invading the province of the jury. Krepps v. Ausen, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996). Similarly, if inapplicable grounds are given for granting additur, the order fails by error of law. Bailey, 318 S.C. at 14-5, 455 S.E.2d at 692 (explaining impropriety of granting additur or remittitur on the basis of the "thirteenth juror" doctrine). Here, the trial court provided no compelling reasons for invading the province of the jury in granting additur.

Where, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province. The order offers no reasons upon which we can review the appropriateness of usurping the jury's decision on damages.

In support of the grant of a new trial nisi additur and his conclusory statement that the verdict was grossly inadequate, Green argues that the jury ignored evidence of bills and "undisputed pain and suffering," thereby demonstrating "passion, caprice, prejudice particularly, corruption or some other improper motive." If indeed the jury's verdict was motivated by caprice, passion, or prejudice, the appropriate remedy would be for a new trial absolute. Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000) ("If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute."). Green's only post-trial motion was for a new trial nisi additur.

We find the trial judge abused his discretion in granting a new trial nisi additur without stating compelling reasons. The trial judge's order is therefore reversed and the jury verdict is reinstated.[2]

**REVERSED**.

**HOWARD and KITTREDGE, JJ., concur.**

[2] Because we find the trial judge's order granting a new trial nisi additur was erroneous, we need not address Fritz's second argument regarding the excessiveness of the additur amount.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Jane Smith, Respondent,

v.

John Doe, Appellant.

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Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

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Opinion No. 3716
Heard November 5, 2003 – Filed December 15, 2003

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**AFFIRMED**

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H. Wayne Floyd, of West Columbia, for Appellant.

John D. Elliott, of Columbia, for Respondent.

**HEARN, C.J.:** Jane Smith brought this action against John Doe to establish paternity and award child support for her mentally disabled adult

child, Danielle.[1] A paternity test established that Doe was Danielle's father, and the family court ordered him to pay $91.00 a week in child support. Doe appeals, arguing: (1) the statute of limitations barred the paternity action, and (2) in the event the action is not time barred, the amount of child support awarded was excessive. We affirm.

## FACTS

Smith and Doe met in 1964 while Doe was working at a nightclub. Although Doe was married at the time, the two had an affair, and Danielle was born in July of 1965. Doe was aware of Danielle, but he never attempted to have a relationship with her nor did he offer any type of financial support. Smith had previously never sought support because she did not want to embarrass Doe; however, now that she has retired, she has become worried about Danielle's future. Because of this concern, Smith approached Doe and asked that he recognize Danielle as his daughter so that Danielle could receive Doe's social security benefits when he dies. According to Smith, Doe "laughed and said, 'I don't think so.'"

As a result of that conversation, Smith filed an action against Doe seeking a declaration of paternity and child support. Doe denied paternity and moved to dismiss the action as being untimely and barred by the applicable statute of limitations. A temporary hearing was held before the family court. The family court denied Doe's motion to dismiss and ordered the parties to undergo paternity testing. The paternity test established Doe as Danielle's father, and a final hearing on the merits was held.

At the hearing, Smith testified that Danielle has the mental capacity of a six-year-old and is unable to read, perform math, drive, or cook. She further testified that Danielle cannot be alone for more than a few hours at a time, and as a result Smith spends approximately $35.00 a week for childcare.

[1] The names of the parties and the child have been changed to protect their identities.

Doe again argued the action was barred by the statute of limitations, the doctrine of laches, and the theory of equitable estoppel.[2] The family court found that Doe's paternity of Danielle had been established and ordered him to begin paying child support. The family court ordered Doe to pay $91.00 per week in child support, $1,500.00 in attorney fees, and an arrearage of $6,188.00 accrued during the pendency of litigation.

Doe filed a motion to reconsider, challenging, among other things, the amount of child support awarded on the grounds that the family court failed to consider Danielle's social security benefits and her income from employment. It is undisputed that Danielle receives approximately $275.00 per month in social security disability income and between $250 to $500 a month working at a part-time job created for her through the Babcock Center. The family court denied Doe's motion and specifically noted that the court considered Danielle's income in determining the amount of child support. This appeal followed.

## STANDARD OF REVIEW

"On appeal from an order of the family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." Hopkins v. Hopkins, 343 S.C. 301, 304, 540 S.E.2d 454, 456 (S.C. 2000). Despite our broad scope of review, this court is not required to disregard the family court's findings nor ignore the fact that the family court judge, "who saw and heard the witnesses, was in a better position to evaluate their testimony." Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002).

## LAW/ANALYSIS

I. Applicability of a Statute of Limitations

Doe argues the family court erred in failing to find the paternity suit was barred by the statute of limitations. Doe asserts that once Danielle

[2] Doe does not appeal the family court's findings regarding the doctrine of laches and equitable estoppel.

reached the age of majority (eighteen), the general statute of limitations began running for the commencement of the paternity action. See S.C. Code Ann. 15-3-530 (Supp. 2002). We disagree.

The question of whether the statute of limitations would bar a paternity action by or on behalf of an adult child seeking child support has not been addressed by our courts. Although other jurisdictions have addressed the applicability of the statute of limitations to paternity actions, their review is specific to their own state statutes, most of which specifically set forth a limitations period for bringing the action. See e.g., 23 PA. Cons. Stat. Ann. § 4343(b) (2003) (requiring that a paternity action be instituted within eighteen years of the child's birth); Padilla v. Montano, 862 P.2d 1257 (N.M. Ct. App. 1993) (discussing the statute of limitations for establishing paternity in states that have adopted the Uniform Parentage Act); Oregon ex rel. Adult and Family Servs. Div. v. Keusink, 684 P.2d 1239 (Or.App. 1984) (finding that Oregon imposes no statutory time bar to a paternity action except in the context of probate proceedings); See generally 14 C.J.S. Child § 81 (2003) ("A paternity proceeding brought by or on behalf of the child may be governed by a statute of limitations of at least the duration of the child's minority, or by a general statute of limitations which is tolled during the infancy of the child, … or has no time bar.").

Turning to our own statutory scheme, we find no statute of limitations peculiar to paternity actions. S.C. Code Ann. § 20-7-952 (1985). Section 20-7-952 provides that a paternity action may be brought by a child or the natural mother of a child and expressly states that the word "child" is not limited to a person under the age of eighteen.[3]

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[3] The only other reference to paternity actions appears in the probate code. Section 62-2-109(2)(ii) of the South Carolina Code (Supp. 2002) provides that for purposes of intestate succession, a person born out of wedlock is a man's child if:

> [P]aternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a

Relying on South Carolina Department of Social Services v. Lowman, 269 S.C. 41, 236 S.E.2d 194 (1977), Doe asserts that the general three-year statute of limitations should govern paternity actions. See S.C. Code Ann. § 15-3-530 (Supp. 2002). In Lowman the Department of Social Services brought an action against Lowman seeking support for a seven-year-old child born out of wedlock. The court found that the general statute of limitations was applicable to an action involving child support, but noted that the duty of a parent to support his or her child is a "continuing obligation." Id. at 48, 236 S.E.2d at 196. The supreme court remanded the case to the family court for a determination as to whether Lowman was the child's father, and held that, if paternity was established, Lowman could be required to make future child support payments. However, because of the six-year statute of limitations,[4] Lowman could not be required to reimburse D.S.S. for support accrued more than six years prior to the commencement of the action.

Because Lowman addresses only the applicability of the general statute of limitations to an action for retroactive child support, we do not find its holding applicable to this action, especially in light of clear statutory language allowing paternity actions by and on behalf of children older than eighteen years of age. See § 20-7-952. Instead, we turn to the recent decision of Riggs v. Riggs, 353 S.C. 230, 578 S.E.2d 3 (2003), for guidance.

In Riggs, mother commenced an action in 1998 seeking child support for the parties' twenty-three-year-old daughter. The child, who still lived in the home, suffered from a genetic disease that had not been diagnosed until she was twenty years old. Father argued the family court

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> personal representative of his estate and, if after his death, by clear and convincing proof.

The probate code does not provide a statute of limitations for determining paternity.

[4] At the time of the Lowman case, the general statue of limitations was six years; the statute has since decreased to three years. See § 15-3-530.

could not order child support because section 20-7-420(17) of the South Carolina Code provided only for the "continuation" of child support for a disabled child over the age of eighteen. Because the child's disability had not been diagnosed until his child support obligation had already been terminated, father argued that any order requiring him to pay child support would not be a "continuation" of support within the terms of the statute. The supreme court disagreed, holding that "the family court is vested with jurisdiction to order child support for an unemancipated disabled adult child." Id. at 235, 578 S.E.2d at 5. The court further noted that it believed the legislature intended for "a non-custodial parent [to] share the burden of supporting a child who cannot be emancipated because of a disability that arose before majority but was diagnosed only after the child turned eighteen." Id.

In this case, Danielle was born with a mental disability that prevents her from becoming emancipated. If she were a legitimate child, her father would have a continuing obligation to support her as long as she remained disabled. Thus, if we were to impose the general statute of limitations to Danielle's paternity action, we would in effect create a procedural barrier to the rights of illegitimate children to receive child support when an action on their behalf had not been brought within a certain amount of time. In light of our statutory and case law which require non-custodial parents to support their disabled child beyond the child's eighteenth birthday, it makes no logical sense to impose a time bar on an illegitimate child's prerequisite action to establish paternity. See S.C. Code Ann. § 20-7-90 (1976) (requiring parents to provide support for their legitimate *and* illegitimate children); § 20-7-952 (allowing paternity actions to be brought by or on behalf of a child and expressly stating that the term "child" is not limited to someone under the age of eighteen); Riggs, 353 S.C. at 235, 578 S.E.2d at 5 ("[T]he family court is vested with jurisdiction to order child support for an unemancipated disabled adult child."). Thus, in the absence of a clear, statutory directive setting forth the legislature's intent to impose a statute of limitations to unemancipated adult children's paternity actions, we decline to apply a statute of limitations to the present action.

II. Amount of Child Support Awarded

Doe next argues the family court abused its discretion by using the Child Support Guidelines to determine the amount of his child support obligation. Specifically, Doe contends the family court failed to take into account the "significant income" Danielle received through her part-time job and social security disability benefits. We find no abuse of discretion.

Child support awards are addressed to the sound discretion of the family court and, absent an abuse of discretion, will not be disturbed on appeal. Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). "An abuse of discretion occurs when the court is controlled by some error of law or where the order, based upon the findings of fact, is without evidentiary support." Engle v. Engle, 343 S.C. 444, 448 -449, 539 S.E.2d 712, 714 (Ct. App. 2000).

In its order denying rehearing, the family court noted that it took into consideration Danielle's social security benefits and her modest income. The family court explained that it used the guidelines in order to take into account the parties' respective incomes, and it noted, as an additional sustaining ground, that it did not impute further income to Doe despite his extensive deductions for business travel. Because the record indicates the family court considered Danielle's income and social security benefits, we find no abuse of discretion in the amount of child support awarded.

## CONCLUSION

The family court did not err in allowing Smith to institute a paternity action on behalf of her thirty-five-year-old child, who is unemancipated due to a disability that arose during her minority. Furthermore, the child support award of $91.00 a week was not an abuse of discretion. The order of the family court is

**AFFIRMED.**

**HOWARD and KITTREDGE, J.J., concur.**