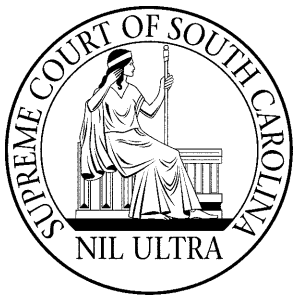

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 4, 2002

ADVANCE SHEET NO. 36

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2002-UP-669 - Philadelphia Church of God v. John Keister
(Florence, Judge B. Hicks Harwell, Jr.)

2002-UP-670 - The State v. Michael Bunnell
(Richland, Judge William P. Keesley)

PETITIONS FOR REHEARING

3533 Food Lion v. United Food	Pending
3545 - Black v. Patel	Pending
3547 - Mathis v. Hair	Pending
3550 - St v. Williams Donvoan	Pending
3551 - William Stokes v. Metropolitan	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3555 - Cowan, K. Et al. V. Allstate Ins. Co	Pending
2001-UP-522 - Kenney v. Kenney	Pending
2002-UP-478 - St v. Eldridge Hills	Pending
2002-UP-509- Baldwing Const. V. Graham	Pending
2002-UP-513 - E'Van Frazier v. Athaniel Badger	Pending
2002-UP-514 - Frank McCleer v. City of Greer	Pending
2002-UP-516 - State v. Angel Parks	Pending
2002-UP-517 - Rabon v. Todd	Pending
2002-UP-522 - State v. Herbert Baker	Pending

2002-UP-537 - Walters v. Austen	Pending
2002-UP-538 - State v. Richard Ezell	Pending
2002-UP-546 - State v. Larry Moseley	Pending
2002-UP-547 - Stewart v. Harper	Pending
2002-UP-549 - Davis V. Greenville Hospital	Pending
2002-UP-570 - Hartzog v. Revco	Pending
2002-UP-574 - State v. Tarone Johnson	Pending
2002-UP-586 - Ross v. USC	Pending
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-588 - State v. Fate McClurkin	Pending
2002-UP-589 - Joan Black v. William Black	Pending
2002-UP-599 - Florence v. Flowers, Gillian	Pending
2002-UP-609 - Brown, Gerald v. Shaw, Adger	Pending
2002-UP-611 - Allgood, V., et al. v. GE Capital	Pending
2002-UP-613 - Summit Con v. General Heating	Pending
2002-UP-614 - Bannum v. City of Columbia	Pending
2002-UP-615 - The State v. Kintrell Floyd	Pending
2002-UP-620 - Quantum Varde v. Limerick Wood	Pending
2002-UP-622 - McCray v. R.H. Moore	Pending
2002-UP-662 - The State v. Jermiah Morgan	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3250 - Alice Pilgrim v. Yvonne Miller	Pending
3314 - State v. Minyard Lee Woody	Pending
3362 - Johnson v. Arbabi	Pending
3393 - Vick v. SCDOT	Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3406 - State v. Yukoto Cherry	Pending
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3420 - Brown v. Carolina Emergency	Pending
3466 - State v. Kenneth Andrew Burton	Pending
3468 - United Student Aid v. SCDHEC	Pending
3476 - State v. Terry Grace	Pending
3477 - Adkins v. Georgia-Pacific	Pending
3479 - Converse Power Corp. v. SCDHEC	Pending
3481 - State v. Jacinto Antonio Bull	Pending
3485 - State v. Leonard Brown	Pending
3486 - Hansen v. United Services	Pending
3488 - State Auto v. Raynolds	Pending
3489 - State v. Sharron Blasky Jarrell	Pending
3491 - Robertson v. First Union National	Pending

3494 - Lee v. Harborside Café	Pending
3495 – Ferrell Cothran v. Alvin Brown	Pending
3497 - Paresha Shah v. Richland Memorial	Pending
3500 - The State v. Reyes Cabrera-Pena	Pending
3501 - State v. Demarco Johnson	Pending
3503 - State v. Benjamin Heyward	Pending
3504 - Wilson v. Rivers	Pending
3505 - L-J v. Bituminous	Pending
3511 - Maxwell v. Genez	Pending
3512 - Cheap O's v. Cloyd	Pending
3515 - State v. Robert Garrett	Pending
3516 - Antley v. Nobel	Pending
3520 – Alice Pilgrim v. Yvonne Miller	Pending
3521 - Pond Place v. Poole	Pending
3523 - State v. Eddie Lee Arnold	Pending
3525 - Arscott v. Bacon	Pending
3527 - Griffin v. Jordan	Pending
3535 - State v. Ricky Ledford	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-461 - Storage Trailers v. Proctor	Pending

2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2002-UP-478 - State v. Leroy Stanton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending
2002-UP-012 - Gibson v. Davis	Pending
2002-UP-029 - State v. Kimberly Renee Poole	Pending
2002-UP-038 - State v. Corey Washington	Pending
2002-UP-064 - Bradford v. City of Mauldin	Pending
2002-UP-098 - Babb v. Summit Teleservices	Pending
2002-UP-151 - National Union Fire Ins. v. Houck	Pending
2002-UP-160 - Fernanders v. Young	Pending
2002-UP-171 - State v. Robert Francis Berry	Pending
2002-UP-174 - RP Associates v. Clinton Group	Pending
2002-UP-198 - State v. Leonard Brown	Pending
2002-UP-220 - State v. Earl Davis Hallums	Pending
2002-UP-223 - Miller v. Miller	Pending
2002-UP- 241 - State v. Glenn Rouse	Pending
2002-UP-256 - Insurit v. Insurit	Pending
2002-UP-266 - State v. John Lipsky	Pending
2002-UP-281 - State v. Henry James McGill	Pending
2002-UP-284 - Hiller v. SC Board Architectural	Pending

2002-UP-288 - Yarbrough v. Rose Hill Plantation	Pending
2002-UP-290 - Terry v. Georgetown Ice. Co.	Pending
2002-UP-313 - State v. James S. Strickland	Pending
2002-UP-319 - State v. Jeff McAlister	Pending
2002-UP-326 - State v. Lorne Anthony George	Pending
2002-UP-363 - Curtis Gibbs v. SCDOP	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-381 - Rembert v. Unison	Pending
2002-UP-393 - Wright v. Nichols	Pending
2002-UP-395 - State v. Tommy Hutto	Pending
2002-UP-401 - State v. Robert Warren	Pending
2002-UP-411 - The State v. Leroy Roumillat	Pending
2002-UP-412 - Hawk v. C&H Roofing	Pending
2002-UP-448 - State v. Isaac Goodman	Pending
2002-UP-477 Gene Reed v. Farmers	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of A. Shedrick Jolly, III, Respondent.

Opinion No. 25547
Submitted September 24, 2002 - Filed October 28, 2002

DISBARRED

Henry B. Richardson, Jr., and Susan M. Johnston, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia and James W. Seeley, of Spartanburg, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent.[1] The facts as admitted in the agreement are as follows.

[1] Respondent was placed on interim suspension by order of this Court dated August 30, 2001. In re Jolly, 350 S.C. 201, 565 S.E.2d 758 (2001). Respondent's request that the period of

Facts

I. Chicago Title Insurance Matter

Respondent was employed as an agent by Chicago Title Insurance (CTI). CTI conducted a routine audit of respondent's accounts and discovered two questionable checks made payable to respondent. Respondent admitted that he had written two checks, made payable to himself and drawn upon his trust account, in the amounts of $5,000 and $17,000. Respondent admitted that he had converted client funds for his personal use.

II. Client Matters

Respondent represented a client during a real estate transaction in 1998. The property cost $22,000, and client intended to place a mobile home on the property. Respondent conducted a title search of the property; however, he failed to discover that a restriction on the property precluded client from placing a mobile home on the property. Upon learning of the restriction, respondent purchased the property from client for $22,430. Respondent was able to purchase the property because he misappropriated and converted funds from his trust account.

Respondent also represented another client from 1973 until 1998. Respondent held a power of attorney and was entrusted with the management of client's finances. Respondent failed to properly document financial transactions. Furthermore, respondent misappropriated and converted unidentified funds from other clients in favor of client and himself.

In another matter, respondent represented a client in multiple real estate transactions. Respondent did not handle the real estate transactions in

---

disbarment be made retroactive to the date respondent was placed on interim suspension is denied.

a timely manner, which caused client to suffer additional expenses in the amount of $17,000. As a result, respondent paid client $17,000. Respondent was able to pay client because he misappropriated and converted funds from his trust account.

In yet another matter, respondent represented another client during a real estate transaction. Respondent received approximately $72,459.39 from Wells Fargo Home Mortgage. Respondent wrote a check in the amount of $62,370.67 as payment to satisfy client's mortgage; however, respondent never issued the check. Instead, respondent misappropriated and converted the funds to his personal use.

Furthermore, in twenty-six other matters, respondent received a total of $71,654.34 and converted the funds to his personal use. As of August 21, 2001, respondent's trust account had a negative balance of approximately $111,000 to $148,000.

Respondent admitted to ODC that he began misappropriating funds in 1995. Respondent informed ODC that the funds were used to pay law firm expenses; however, ODC discovered that the funds were converted for respondent's personal use. Furthermore, respondent informed ODC that he deposited an unspecified amount of funds into his trust account as restitution for the converted funds. However, ODC discovered that respondent's statement was untrue.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.5 (a lawyer's fee shall be reasonable); Rule 1.8 (a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a

client); Rule 1.14 (a lawyer shall maintain a normal client-lawyer relationship with a client who is impaired); Rule 1.15 (a lawyer shall hold property of clients that is in the lawyer's possession in connection with representation separate from the lawyer's own property); Rule 4.1 (a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 4.4 (in representing a client a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person); Rule 8.4(a) (a lawyer shall not violate the Rules of Professional Conduct): Rule 8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (a lawyer shall not engage in conduct involving moral turpitude); Rule 8.4(d) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

In addition, respondent has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Respondent shall not be entitled to seek reinstatement or readmission to the practice of law until he has fully repaid all funds owed clients and/or the trust, including reasonable interest, and until he has reimbursed the Lawyer's Fund for Client Protection for any and all amounts paid, including reasonable interest, in connection with these matters. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James G. Longtin, Respondent.

Opinion No. 25548
Submitted September 26, 2002 - Filed October 28, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Barbara M. Seymour, both of Columbia, for the Office of Disciplinary Counsel.

James G. Longtin, of Walterboro, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from an admonition to a thirty day suspension. We accept the agreement and find a thirty day suspension from the practice of law is the appropriate sanction. The facts, as set forth in the agreement, are as follows.

Facts

I. Collection Matter

Client A retained respondent to handle twelve collection matters; however, respondent failed to take legal action on behalf of Client A. Respondent also failed to keep Client A informed regarding the status of the collection matters and failed to respond to numerous requests from Client A for information regarding the status of the matters.

II. Bankruptcy Matter

Client B retained respondent to handle a bankruptcy matter. Client B paid respondent $400 of an $1,800 retainer fee. Thereafter, respondent failed to adequately communicate with Client B regarding the status of his bankruptcy matter. Respondent also failed to timely and diligently return telephone calls from Client B and failed to appear in court on behalf of Client B.

III. Failure to Cooperate with Disciplinary Counsel

By letter dated June 20, 2000, the Office of Disciplinary Counsel notified respondent of a complaint filed by Client A; however, respondent failed to respond or otherwise communicate with the Office of Disciplinary Counsel in response to that letter, a subsequent letter sent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), or a Notice of Full Investigation. Respondent finally responded to the allegations set forth in the complaint on May 31, 2001, after being compelled by subpoena to appear before Disciplinary Counsel and respond to questions under oath. Respondent also failed to respond to letters and a Notice of Full Investigation regarding the complaint filed by Client B, finally responding to allegations set forth therein on January 22, 2002, after once again being compelled to do so by subpoena.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a)(a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5(a)(a lawyer's fee shall be reasonable); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to willfully fail to respond to a lawful demand from a disciplinary authority); and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

In our opinion, respondent's misconduct warrants a thirty day suspension from the practice of law. Respondent shall not be entitled to seek reinstatement to the practice of law until he has paid $271.03 to the Commission on Lawyer Conduct for costs incurred in this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with

the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Matthew
Edward Davis, Respondent.

Opinion No. 25549
Submitted September 20, 2002 - Filed October 28, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent conditionally admits misconduct and consents to a definite suspension from the practice of law for a period of up to sixty days.[1] We

[1] In 2000, this Court publicly reprimanded respondent for improperly handling a trust account while he was an associate at another law office. In the Matter of Davis, 338 S.C. 459, 527 S.E.2d 358 (2000).

accept the agreement and suspend respondent for sixty days.[2] The facts as admitted in the agreement are as follows.

Facts

Respondent was appointed to represent a client in a post-conviction relief (PCR) matter. Following a hearing on February 13, 2002, the PCR judge granted the client relief and directed respondent to prepare an order. Respondent delayed in preparing the order and in responding to inquiries from the judge regarding the preparation of the order.

In the course of investigating the complaint made against respondent by the client, Disciplinary Counsel issued and served, pursuant to certified mail, a subpoena requiring respondent to appear before Disciplinary Counsel on July 17, 2002. Respondent signed the postal service form acknowledging service on June 5, 2002, but failed to appear before Disciplinary Counsel. Respondent also failed to respond to a telephonic inquiry placed to his principal office by the Commission on Lawyer Conduct. Further, respondent failed to contact the Office of Disciplinary Counsel to seek a postponement or to advise Disciplinary Counsel that he would be unable to appear in accordance with the subpoena.

Respondent also failed to timely respond to a letter dated July 2, 2002, sent to him by the Chief Justice of the South Carolina Supreme Court regarding another of respondent's clients, even though the letter required a response by July 8, 2002. An officer of the Bureau of Protective Services personally served respondent with another copy of the letter on July 10, 2002. However, respondent did not reply to the letter until July 12, 2002, nor did he notify the Chief Justice, the Clerk of the Supreme Court, or the Office of Disciplinary Counsel that his response would be delayed.

Further, prior to receiving notice of his interim suspension, respondent placed a telephone call to the Department of Social Services

[2] Respondent was placed on interim suspension by order of this Court dated July 17, 2002. Respondent's request that his sixty day suspension be made retroactive to the date he was placed on interim suspension is denied.

(DSS) on behalf of a former client seeking information regarding the amount of arrearages owed by the former client. Respondent and the attorney for DSS exchanged telephone calls for several days and respondent admits that he continued to communicate with DSS after he learned of his interim suspension. Respondent contends that he did not intend this request for information to constitute the practice of law, but acknowledges that his continued communications with DSS could be construed as the practice of law while he was under interim suspension.

Additionally, respondent acknowledges that at the time of his interim suspension, his trust account reconciliations were several months behind schedule. All funds deposited into the trust account have since been properly identified and accounted for, and respondent is working diligently with his accountant to bring the reconciliations current. Respondent also affirms that they will remain current after his reinstatement to the practice of law.

Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4 (failing to keep a client reasonably informed about the status of a matter and failing to promptly comply with requests for information); Rule 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 5.5 (engaging in the unauthorized practice of law); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent also admits that he violated Rule 7(a)(3), RLDE, Rule 413, SCACR, (willfully violating an order of the Supreme Court and failing to appear pursuant to a subpoena issued by Disciplinary Counsel) and Rule 417, SCACR (failing to maintain current financial records).

Conclusion

We find that respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for sixty days. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James A. Franklin, Jr., Respondent.

Opinion No. 25550
Submitted September 24, 2002 - Filed October 28, 2002

DISBARRED

Henry B. Richardson, Jr., Barbara M. Seymour, and Senior Assistant Attorney General Nathan Kaminski, Jr., all of Columbia, for the Office of Disciplinary Counsel.

James A. Franklin, Jr., of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

On October 4, 2000, respondent pled guilty in the United States District Court for the Eastern District of Michigan to laundering monetary instruments.[1] He was sentenced to thirty-two months in prison followed by two years of supervised release. In addition, respondent was ordered to pay a fine of $10,000.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (client funds shall be appropriately safeguarded); Rule 4.1 (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or

[1] Respondent was placed on interim suspension on March 9, 2000, as a result of these charges. In the Matter of Franklin, 339 S.C. 350, 529 S.E.2d 274 (2000).

to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the period of disbarment be made retroactive to the date of his interim suspension is denied. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wendell Dawson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Charleston County
Marc H. Westbrook, Trial Judge
Paul E. Short, Jr., Post-Conviction Judge

Opinion No. 25551
Submitted September 29, 2002 - Filed October 28, 2002

REVERSED

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the denial of petitioner's application for post-conviction relief (PCR). We reverse.

ISSUE

Did the PCR judge err by concluding trial counsel was not ineffective for failing to object to a portion of the Allen[1] charge?

FACTS

During deliberation, the trial judge received a note from the jury requesting permission to speak with him. The jury returned to the courtroom and the foreman stated: "We have - - there are eleven of us who feel one way and one that feels another way."

After inquiry by the trial judge, the foreman stated he did not know whether the jury could reach a unanimous verdict. The trial judge instructed the jury to determine whether further deliberation would be helpful and excused the jury.

When the jury returned to the courtroom, the foreman stated the jury's "status" was "the same." The judge responded, "Okay, and I understand eleven jurors - - without telling me who feels which way, eleven jurors feel one way and one juror feels another way." The foreman replied, "Yes, sir."

The trial judge gave the following Allen charge:

> Mr. Foreman and ladies and gentlemen, in the trial of a case in this Court, as I've told you, you are the sole judges of the facts. As Judge of the law in this case, I'm not permitted to even give you a hint as to how I feel about what verdict you should write in this case.

[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed.2d 528 (1896).

It is my duty to take the law and state it to you, and it is your duty to write the verdict in the case, but I can say this, that when a matter is in dispute I realize it is not always easy for even two persons to agree. When twelve men and women must agree, it is correspondingly more difficult. We certainly understand that, but it is important that litigation be ended if it may be ended without a juror doing violence to his or her own conscience.

Of course, at the same time no juror should be expected to give up an opinion based on reasoning satisfactory to himself or herself merely for the purpose of being in agreement.

I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

At the same time, of course, I charge you that every juror has the right to his or her own opinion and need not give it up merely for the purpose of being in agreement.

It was never intended that the verdict of the jury should be the view of any one person. On the other hand, the verdict of the jury is supposed to be the collective reasoning of all the men and women together.

That's why we have the jury, so that we may have that benefit of your collective thought and reasoning. It becomes your duty and it was always your duty to tell other jurors how you feel about a case, and why you think as you do, but on the other hand, it is also your duty to exchange views and the duty of the other jurors to exchange views with you, and you should listen to each other and give to the other such thought and meaning as you think it should have.

So to some degree it can be said that - - and it always is the case, that jury service can be a matter of give and take.

Now, if a Defendant is entitled to a verdict, then he is entitled to a verdict now. If the State is entitled to a verdict, then the State is entitled to a verdict now.

Neither of them are entitled to a verdict at some later time. The trial of any case in this Court is an expensive proposition and it costs the taxpayers substantial amounts of money to try a case.

But a mistrial of a case is an unfortunate thing for if you do not agree on a verdict then you must understand that it does not mean that any body will win. It just means that at some future term of Court before some other Judge then some other jury is going to sit where you sit now.

The same participants will come back and the same lawyers will come back, and they will ask basically the same questions again.

I guess they will get basically the same answers, and we will go through the entire process again.

Now, I have no reason to think that any other twelve men and women are more capable of solving this controversy than you are. So, Mr. Foreman and ladies and gentlemen, I'm going to ask you to deliberate further on this matter and see if you cannot write a verdict.

With that in mind, I will ask you to return to the jury room and continue deliberations and see if you can write a verdict in this case.

(Underline added).

Trial counsel did not object to the Allen charge.

The jury continued deliberating and returned with a verdict convicting petitioner of both offenses.[2]

The PCR judge concluded trial counsel was not ineffective for failing to object to the Allen charge.

ANALYSIS

To prove ineffective assistance of counsel, the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of trial. Id. If there is any probative evidence to support the findings of the PCR judge, those findings must be upheld. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). The Court will not uphold the PCR court's findings if there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

The trial judge has the duty to urge, but not coerce, a jury to reach a verdict. Green v. State, Op. No. 25515 (S.C. Sup. Ct. filed August 12, 2002) (Shearouse Adv. Sh. No. 28 at 43). An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views. Id.

Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001), citing Lowenfield v. Phelps, 484 U.S. 231, 237, 108 S.Ct. 546, 550, 98 L.Ed.2d 568, 577 (1988). The Tucker Court considered various factors to determine whether the given Allen charge was unconstitutionally coercive. One factor addressed whether the trial judge

[2] Petitioner was sentenced to consecutive terms of imprisonment totaling 35 years and fined a total of $60,000.

inquired into the jury's numerical division; another considered whether the charge spoke specifically to the minority jurors.

Under the circumstances, we conclude the underlined portion of the Allen charge was coercive. Depending on the context, the contested language could be perceived as being directed toward the minority juror. Here, the jury initially volunteered its numerical division to the trial judge. Not only did the trial judge not instruct the jury not to state its division in the future, but he later inquired as to the jury's continued numerical division. This inquiry was improper. Lowenfield v. Phelps, 484 U.S. 231, 239, 108 S.Ct. 546, 552, 98 L.Ed.2d 568, 578 quoting Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 136, 71 L.Ed.2d 345, 346 (1926) ("the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and always brought to bear 'in some degree, serious although not measurable, an improper influence on the jury'."); State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951) (improper for judge to require jury to reveal nature or extent of its division). Given the trial judge confirmed the existence of one minority juror immediately before the Allen charge, we conclude the underlined language was clearly directed to the "holdout" and, under these circumstances, was coercive. Accordingly, trial counsel's failure to object to the charge was unreasonable. But for counsel's failure to object, there is a reasonable probability the outcome of trial would have been different.

Because the PCR judge erred by holding counsel was not ineffective for failing to object to the Allen charge, we **REVERSE**.

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

The Supreme Court of South Carolina

In the Matter of Gerald P. Konohia, Respondent

O R D E R

On July 23, 2001, Respondent was suspended from the practice of law for a period of sixty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: Daniel E. Shearouse
Clerk

Columbia, South Carolina

October 30, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Dale F. Follin,

Appellant.

Appeal From Sumter County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3559
Heard September 12, 2002 – Filed October 28, 2002

AFFIRMED

M. M. Weinberg, Jr., and M. M. Weinberg, III, of Sumter, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Robert E. Bogan, Chief Attorney, State Grand Jury, all of Columbia, for Respondent.

ANDERSON, J.: Dale F. Follin was convicted of aiding and abetting embezzlement, conspiracy, and obtaining goods and services by false pretenses. She was sentenced to ten years, suspended upon the service of four years and five years probation, for aiding and abetting embezzlement. On the conspiracy charge, she was sentenced to three years, to run concurrent with the aiding and abetting sentence. She was sentenced to three years for obtaining property by false pretenses, to run concurrently with the other sentences.

Follin argues on appeal that the trial court: (1) lacked subject matter jurisdiction; (2) punished her for exercising her right to a jury trial; (3) erred in denying her motion for judgment notwithstanding the verdict and motion in arrest of judgment as to the charges of criminal conspiracy, aiding and abetting embezzlement, and obtaining goods and services by false pretenses; and (4) erred in denying her motions for directed verdict as to the charges of criminal conspiracy, aiding and abetting embezzlement, and obtaining goods and services by false pretenses. We affirm.

FACTS/PROCEDURAL BACKGROUND

The charges against Follin stemmed from an investigation into the diversion of nearly $2.5 million from Sumter County School District 17 (District 17) by Adolph Joseph Klein, the Assistant Superintendent in charge of Financial Affairs for District 17. Follin, a travel agent and owner of Follin Travel, handled the travel arrangements for District 17 from 1988 to 1997. Follin dealt exclusively with Klein. She made a commission on every trip she booked which was actually taken.

Klein had two methods of diverting funds. First, with the assistance of James Benjamin "Benji" Adams, Klein directed over $1.5 million of District 17 funds as payment to fraudulent corporations created by Adams. Klein's second scheme involved having District 17 pay for nearly $1.5 million in

personal travel expenses for Klein, his friends, and his family to travel to Mardi Gras, to go skiing in Colorado, to go on cruises, and to go to various sporting events around the country. As part of his travel scheme, from 1987 to 1995, Klein booked luxury vacations, which he termed "junket travel," through Follin for himself, friends, and people from out of state. He then filed a requisition of funds form with District 17, which appeared to request payment for legitimate District 17 business. No invoice for this travel existed. After District 17 issued a check to Follin Travel without an invoice number listed on it, Klein attached a note instructing Follin to apply those funds to an invoice number representing Klein's junket travel.

In 1995, Klein learned that if travel plans made one week were cancelled before the Friday of that same week, no payment would be required on the trip, the invoice would be voided, and the invoice number would no longer appear in Follin's computerized accounting system. He began using invoices to get District 17 to pay for his junket travel. Klein would request an invoice from Follin for what appeared to be legitimate travel for a school group or a District 17 employee. Klein would then request that Follin void the invoice prior to the Friday of that week. Follin would cancel the trip in her computer and stamp "void" on her copy of the invoice. However, Klein submitted his clean copy of the invoice to District 17 for payment. Klein called these invoices "special invoices" for the junket travel. After the check was issued to Follin on the special invoice, Klein would attach a note to the check identifying for Follin the invoice number to which she should apply the check. The invoice number did not match the number on the special invoice submitted to District 17 for payment but matched the invoice number of another of Klein's junket trips.

Philip K. Davis, the accountant for District 17, assisted Klein in his scheme by not reporting the payments for junket travel. However, Davis' accounting firm's contract with District 17 ended after the 1994-95 school year and a new accounting firm was hired. Klein, as the person in charge of the district's financial matters, had sole approval of invoices and access to the check-signing machine, which generated his and the superintendent's

signatures on the checks. Thus, the checks had the appearance of being approved by both parties.

The investigation began in September 1997 when District 17 officials learned that Klein approved travel and funding for School Board member Ione Dwyer to travel to New York to watch the chorus perform. Because the School Board had previously refused Dwyer's request for funding, District 17 Superintendent Dr. Andrena Ray investigated Klein. The investigation revealed that Klein approved invoices requesting travel funds for school groups and individuals working within District 17. However, after questioning the sponsors of the school trips, Dr. Ray learned that, despite the fact that District 17 paid Follin Travel for the trips, many of the school groups never went on the trips. An auditor began reviewing Klein's travel files for 1997.

Klein learned of the audit and contacted Follin at her home on a Sunday in October 1997. The two met at Follin's office. At Klein's request, Follin created false, back-dated records which indicated that District 17 was owed a credit of approximately $70,000 because several of the school-related trips paid for by the district were cancelled. Klein and Adams later delivered several cashier's checks to Follin totaling $52,000. Follin put the cashier's checks in her safety deposit box at her bank.

Sumter High School Principal Kay Raffield and District 17 attorney Bruce Davis went to Follin's business to discuss various invoices amounting to nearly $70,000 for school trips in 1997 that were never taken**.** Follin admitted District 17 had a $70,000 credit. She told Raffield and Davis that whenever a trip was paid for but later canceled, Klein would inform her to keep the money as a credit towards future District 17 travel. Follin agreed to give the money back to District 17 but informed Davis that she did not have access to it at the moment because it was in a separate account. After the meeting, Follin retrieved the cashier's checks from her safety deposit box and deposited them into her business account. District 17 did have a legitimate credit owed to them from Follin Travel. However, the cashier's checks and

the genuine credit did not amount to the $70,000 owed to the district. Thus, Follin transferred $17,000 from her grandmother's IRA account to her business account. She then wrote District 17 a "refund" check of $70,389.10.

After further investigation, Klein, Follin, and other individuals connected to the scheme were indicted by the State Grand Jury. Klein and most of the other individuals charged in the scheme pled guilty to the charges. Follin proceeded to trial.

LAW/ANALYSIS

I. SUBJECT MATTER JURISDICTION

Follin argues the State Grand Jury[1] was without power to issue the indictments against her because the investigation lasted longer than two years and was transferred from one State Grand Jury to two subsequent State Grand Juries in violation of the statute. Thus, she asserts, the indictments were invalid and the trial court lacked subject matter jurisdiction. We disagree.

The extensive investigation by the State Grand Jury into this matter began in 1997 and numerous people were ultimately indicted for defrauding District 17. The investigation against Follin was before several different panels of the State Grand Jury. The 1998 State Grand Jury heard evidence in the case, but was discharged in 1999 before issuing an indictment. On October 13, 1999, Follin was initially indicted for criminal conspiracy by the 1999 State Grand Jury. The State Grand Jury issued a first superseding indictment on January 11, 2000, charging Follin with criminal conspiracy; larceny by trick; embezzlement; obtaining goods and services by false pretenses; receiving stolen goods; and obstruction of justice.

[1] Follin erroneously refers to this entity as the "Statewide Grand Jury." As clearly indicated in the statute, this judicial body is known as the State Grand Jury. See S.C. Code Ann. § 14-7-1600 (Supp. 2001).

Follin, along with two co-defendants, moved to quash the indictment. She argued the General Assembly intended a particular State Grand Jury to investigate allegations of criminal conduct for up to two years before it must be discharged. Follin maintained the legislature did not intend for an investigation to be transferred from one grand jury to a successive grand jury if the initial panel could not issue an indictment upon an investigation. She complained the grand jury that heard her testimony on May 5, 1998, did not issue an indictment, and the subsequent grand jury which issued indictments in October 1999 and January 2000 did not hear her testimony. The trial court denied the motion to quash.

Follin contends the trial court erred in failing to find that the statute governing the State Grand Jury does not allow a subsequent grand jury to issue an indictment if the original grand jury failed to issue one at the expiration of its term.

Although there have not been any recent cases discussing the rules regarding the transfer of investigations to a subsequent county grand jury, the common law allows such transfers. In Fitch v. State, 11 S.C.L. (2 Nott & McC.) 558 (Ct. App. 1820), the defendant appealed the referral of the investigation against him to a new grand jury after the initial grand jury returned a "no bill." The Court noted:

> As a legal principle, there can be no doubt but that a prosecutor may prefer a new bill where a grand jury has returned "no bill." 4 Black. 305, is in point, and I have known no time when this practice in our courts has not prevailed. Blackstone says, that where the bill is returned, "not found," the party is discharged without farther [sic] answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. There is no inconsistency in those sentences. He may be discharged from farther [sic] answer; but from what? The meaning is evident, from the bill which has been thus returned, not from the charge for

> which he was recognized to appear; on this, if essential to public justice, a fresh bill may be given out. The proofs may have been defective on the first bill, and this deficiency may be supplied on the preferment of another. It is the verdict of a petty jury alone, which can operate as a discharge of the defendant from the accusation against him. If, on trial, they find the party not guilty, he is then, says Blackstone, forever quit and discharged of the accusation. The implication is clear, that before then he is not so discharged. It is not to be supposed that the solicitor, in the exercise of a discretion with which he is invested, would use it in an arbitrary or oppressive manner, nor would it be consistent with justice, that an offender should be permitted to withdraw himself from an accusation where, in the opinion of the solicitor, his guilt might be made to appear more fully before another grand jury.

Fitch, 11 S.C.L. at 559.

We must determine whether the legislature intended to abrogate this common law rule in enacting the State Grand Jury statute. To that end, we must ascertain the intent of the legislature and give the words of the statute their plain and ordinary meaning. State v. Johnson, 343 S.C. 693, 541 S.E.2d 855 (Ct. App. 2001). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(citation omitted).

The General Assembly created the State Grand Jury to detect and investigate multi-county crimes involving narcotics, dangerous drugs, controlled substances, obscenity, and crimes involving public corruption and election laws. S.C. Code Ann § 14-7-1610 (Supp. 2001); State v. Wilson, 315 S.C. 289, 291, 433 S.E.2d 864, 866 (1993) ("The State Grand Jury was created to improve the State's ability to 'detect and eliminate' multi-county criminal activity . . . . To this end, the Grand Jury has statewide authority but its jurisdiction is limited to certain offenses.") (citation omitted). After the impaneling judge considers the Attorney General's petition and orders the

impanelment, a State Grand Jury is impaneled for a term of twelve months. S.C. Code Ann. § 14-7-1630(B)-(C) (Supp. 2001). Upon petition by the Attorney General, the chief administrative judge of the circuit in which the State Grand Jury was impaneled may order the term of that Grand Jury extended for a six month period. S.C. Code Ann. § 14-7-1630(C) (Supp. 2001). However, the total term of a particular State Grand Jury, including extensions, shall not exceed two years. Id.

The proceedings of the State Grand Jury are secret and a witness's testimony may not be disclosed by anyone except where directed by a court for the purpose of:

> (1) ascertaining whether it is consistent with the testimony given by the witness before the court in any subsequent proceeding;
>
> (2) determining whether the witness is guilty of perjury;
>
> (3) assisting local, state, other state or federal law enforcement or investigating agencies, **including another grand jury**, in investigating crimes under their investigative jurisdiction;
>
> (4) providing the defendant the material to which he is entitled pursuant to Section 14-7-1700;
>
> (5) complying with constitutional, statutory, or other legal requirements or to further justice.

S.C. Code Ann. § 14-7-1720(A)(1)-(5) (Supp. 2001) (emphasis added).

The statute does not specify that a matter may be referred to subsequent grand juries for investigation. Unequivocably, the legislature intended to allow such referrals. Although the legislature limited the time period for which a single State Grand Jury may investigate a particular matter to two years, nothing in the statute purports to forbid a subsequent referral to another

State Grand Jury or to limit the number of grand juries which may investigate a matter. The legislature granted prosecutors the authority to disclose matters before one State Grand Jury to a **subsequent** State Grand Jury to assist in the investigation. S.C. Code Ann. § 14-7-1720(A)(3) (Supp. 2001). This authority to disclose the secret information presented to one State Grand Jury to a subsequent State Grand Jury evidences the legislature's intent to allow the continuation of the common law practice of referring matters to subsequent grand juries when one fails to return an indictment at the end of its term.

Further credence is given to this view by referring to the federal rule regarding grand juries. Federal Rule of Criminal Procedure 6(e) is very similar to our statute regarding disclosure of secret information to subsequent grand juries. It provides that disclosure of the grand jury proceedings otherwise prohibited by the rules may be made "when the disclosure is made by an attorney for the government to another Federal grand jury." Fed. R. Crim. P. 6(e)(3)(C)(III). Where one federal grand jury returns a "no bill," prosecutors may submit the investigation to a subsequent grand jury after obtaining government approval. 24 James Wm. Moore et al., Moore's Federal Practice § 606.01[2][b][iv] (3d ed. 2002).

"At one time, it was regarded as potentially abusive for the prosecutor to submit a case to a second grand jury when a first refused to indict." Id. § 606.06[4][c]. "However, it is now regarded as acceptable practice. Presentation of an investigation to a second grand jury occurs most frequently **when the first grand jury's term has expired prior to completion of the investigation**." Id. (emphasis added).

This position has been followed by the United States Court of Appeals for the Fourth Circuit. See United States v. Penrod, 609 F.2d 1092 (4th Cir. 1979) (matter was referred to a second grand jury where first grand jury failed to indict); see also United States v. Thompson, 251 U.S. 407, 413, 40 S.Ct. 289, 292, 64 L.Ed. 333, 342 (1920) ("[T]he power and duty of the grand jury . . . is continuous and is therefore not exhausted or limited by adverse

action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.").

Other jurisdictions allow referral to subsequent grand juries, although some impose a statutory limit to the number of times a charge can be referred to a grand jury or require prosecutors to seek court approval prior to resubmitting the matter to the grand jury. See, e.g., United States v. Contenti, 735 F.2d 628 (1st Cir. 1984) (holding it is acceptable to transfer an investigation to a subsequent grand jury where the original grand jury did not complete the investigation before the term ended); United States v. Shane, 584 F. Supp. 364 (E.D.Pa. 1984) (ruling transfer of investigation, without a court order, from one grand jury to another in the course of continuing in the same investigation did not warrant dismissal of the indictment); Ephamka v. Alaska, 878 P.2d 647 (Alaska Ct. App. 1994) (stating prosecutor must seek court permission to resubmit a charge to a grand jury where the first grand jury failed to issue an indictment); New Mexico v. Isaac M., 34 P.3d 624, 627 (N.M. Ct. App. 2001) (declaring the state constitution "does not expressly limit the 'power of the district attorney either to resubmit a matter to a grand jury or to proceed by information after a grand jury has returned a no[-] bill'"); New York v. Gelman, 712 N.E.2d 686 (N.Y. 1999) (holding statute was enacted to prevent abuse resulting from common law rule that prosecutor could repeatedly resubmit a charge to successive grand juries; it provided that a charge may only be resubmitted to a subsequent grand jury once).

Indubitably, the statute does not limit the number of times the State may submit a matter for investigation to the State Grand Jury. In contrariety, there is clear indication the legislature intended the State to have the ability to resubmit a matter to a subsequent grand jury, especially in cases such as this where the investigation is very complex. This interpretation comports with the verbiage of the statute, the common law, and federal law. Although Follin argues the legislature intended the two year term to mean that one State Grand Jury could not be dismissed until it had served an entire two years, we disagree. We do not read the statute that narrowly and reject this contention.

We hold the State Grand Jury has subject matter jurisdiction to issue indictments in factual scenarios involving:

(1) an investigation lasting longer than two years; or
(2) an investigation transferred from one State Grand Jury to a subsequent State Grand Jury.

II. SENTENCING

Follin maintains the trial court erroneously considered her exercise of the right to a jury trial by sentencing her more severely than the co-defendants who pled guilty. We disagree.

Klein pled guilty to several charges and was sentenced to a total of ten years imprisonment. Other individuals were indicted for their involvement with Klein's scheme. Benji Adams helped Klein create fraudulent corporations that provided no services to District 17, and Klein directed $1.5 million in District 17 funds to the corporations. Adams pled guilty to embezzlement as a principal in the second degree, principal in the first degree, and accessory before the fact of embezzlement. Adams received a sentence of ten years imprisonment, suspended on the service of three years and five years probation and restitution.

James A. Perry pled guilty to receiving stolen goods and conspiracy to commit embezzlement. He received a sentence of seven years imprisonment, suspended with five years probation and an obligation to pay $100,000 in restitution on the stolen goods charge. Perry was sentenced to five years, suspended with five years probation, on the conspiracy to commit embezzlement charge.

George Kurzenberger pled guilty to receiving stolen goods and was sentenced to three years imprisonment, suspended with five years probation, and restitution in the amount of $2,700.

George E. "Eddie" Myers pled guilty to official misconduct in office and was sentenced to five years imprisonment, suspended with five years probation and payment of $15,000 in restitution.

Troy Phillips pled guilty to official misconduct in office. He was sentenced to five years imprisonment, suspended with five years probation and payment of $18,000 in restitution.

Samuel G. Lovell, III, pled guilty to criminal conspiracy to commit official misconduct. He received a sentence of three years imprisonment, suspended with five years probation, and payment of $40,000 in restitution.

Mark J. Clifford pled guilty to receiving stolen goods and was sentenced to five years imprisonment suspended with five years probation and payment of $30,000 in restitution.

Edward Thomas Lewis pled guilty to criminal conspiracy, common law official misconduct in office, and receiving stolen goods. He received three years imprisonment suspended with five years probation on the criminal conspiracy charge. Lewis was sentenced to ten years imprisonment on the official misconduct charge, suspended upon the service of ninety days with five years probation, plus restitution of $45,000. Lewis was sentenced to three years imprisonment suspended on five years probation for receiving stolen goods. The sentences ran concurrently.

Johnny M. Martin was charged with receiving stolen goods, common law official misconduct in office, and criminal conspiracy. He was found guilty of all three offenses after a jury trial. He was sentenced to concurrent terms of ten years, suspended upon the service of one year with five years probation and payment of $50,000 in restitution; ten years imprisonment,

suspended upon five years probation; and five years, suspended upon five years probation, respectively.

James Michael Hicks pled guilty to official misconduct in office and receiving stolen goods. He was sentenced to concurrent terms of five years imprisonment, suspended upon five years probation and payment of $32,000 in restitution, and five years imprisonment, suspended upon five years probation, respectively.

Ellison Lawson, Jr., pled guilty to criminal conspiracy, common law official misconduct in office, and receiving stolen goods. He was sentenced to two years imprisonment, suspended with one year probation on the criminal conspiracy charge. Lawson received a concurrent sentence of two years imprisonment, suspended upon one year probation, on the official misconduct in office charge. He received a concurrent sentence of five years imprisonment, suspended with one year probation, on the charge of receiving stolen goods.

Philip K. Davis, the former accountant for District 17, was charged with criminal conspiracy; two counts of breach of trust with fraudulent intent; receiving stolen goods amounting to $48,000; receiving stolen goods amounting to $37,784; receiving stolen goods amounting to $45,635; and receiving stolen goods amounting to $34,166. Davis pled guilty to all the charges and was sentenced to five years imprisonment, suspended to five years probation, on the criminal conspiracy charge. He was sentenced to two concurrent terms of seven years, suspended upon the service of three years with five years probation and restitution on the breach of trust charges. Davis was sentenced to four concurrent terms of seven years, suspended with five years probation on the four charges of receiving stolen goods.

In sentencing Follin, the trial judge noted she had been an asset to the community, and stated:

> But none of those things in any way suggests to me that I should give you a straight probationary sentence because I can't, because there is no way in this world that I can view you in the same light that I view the persons that have been involved in the school. There were other forces at play on that.
>
> I know that plenty of people in the community don't agree with that and I respect their right to think that. That's fine. But in this case, you are not at that level. You are – I agree you are not where Joe Klein is and you probably are not where Benji Adams was.
>
> But as I mentioned in sentencing Johnny Martin and I have said throughout and I will continue to say I can't ignore Benji Adams admitting his guilt, and I am not punishing you and will not punish you for your jury trial in no way, shape or form, but I don't have an admission of guilt nor do I want one.
>
> I'm not asking you for one. I'm not asking for – just simply saying that's not a factor for me to consider. I will consider your cooperation. I think you were very very instrumental in helping pull this together.

Follin received a sentence of three years on her conviction for criminal conspiracy. She was sentenced to ten years imprisonment, suspended upon the service of four years with five years probation and payment of $20,000 in restitution for her conviction of aiding and abetting embezzlement. Finally, Follin was sentenced to three years for her conviction of obtaining property by false pretenses. All sentences ran concurrently.

Follin filed a post-trial motion for reconsideration of her sentence. She claimed her sentence was disproportionate to the sentences received by others involved in the scandal. Further, Follin asserted that the trial judge, in imposing the sentences, improperly considered Follin's exercise of her right

to a jury trial in violation of Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999).

The trial judge addressed the argument regarding the improper consideration of the defendant's failure to plead guilty at Johnny Martin's sentencing.[2] The judge referenced his reasoning given in the Martin hearing and the following exchange took place:

---

[2] The same judge presided over Martin's jury trial and sentenced him to three concurrent terms of ten years, suspended upon the service of one year and five years probation. At the hearing on Martin's motion for reconsideration, the trial judge noted that he was not punishing Martin for exercising his right to a jury trial, but he gave consideration to the others who pled guilty:

> No one should be punished because they have exercised their right to have a trial by jury.
>
> . . . .
>
> It occurred to me in sentencing not as a punishment, but what do you use as a minimum sentence? How is that – how can that be for the person who admits their guilt versus a person for trial? If everybody is to be treated the same, then we – there would never be any distinction. And none of the case law that we have had or none of the things that we have all said throughout the practice of law would have no meaning at all.
>
> . . . .
>
> He didn't stand up and admit as the other persons did admit that I did something wrong and not only did I admit that I'm doing something wrong, but I admit and I'm willing to pay "X" number of dollars. Those are factors . . . .

The Court: There's no need for me to restate that here. As I stated then in basically summary fashion I'll say, I do not, will never, and pray I never, I should say that, I hope I never – if I do I hope I'm reversed

---

If those aren't factors that a court should consider then the Supreme Court needs to come out and say so and I would urge them to do so . . . .

Restitution is a part of it. It's a part that I will consider.

. . . .

. . . I have to fashion a sentence given that set of circumstances, then I have to fashion a sentence for somebody that comes up and says I'm guilty, I admit my guilt, I'm wrong, and not only am I guilty but, Your Honor, I – I cost the State or I cost the victim in this situation "X" number of dollars and I want to repay that.

That is the distinction, not what he is saying to me, but that is the distinction that I have to determine. Is that person entitled to some consideration?

. . . .

. . . The other people got consideration for their sentence because they entered a guilty plea.

. . . .

. . . I gave credit for admitting guilt.

immediately, I should be – penalize a person for exercising something that I consider very dearly and that is those rights that are given to us as citizens of this country in the constitution and that to me is her right.

And I would not penalize her for that and nor have I done so.

As I stated and he – no question the court alludes to this same language in the Davis case. As I stated, and I incorporate the Martin [sic], I asked the court again, if I – if I as a trial judge in sentencing and fashioning a sentence am I not at liberty to consider in mitigation and in trying to mitigate the sentence the fact that a person admits their guilt and give some consideration for that, then tell me so.

Tell me I can't do that and I'll stop. I'll stop.

But as a trial lawyer and as a trial judge, I know as a trial lawyer for 21 years, that was the first thing. Judge, my client is standing before you admitting their guilt. That should – you should consider that and I ask for your mercy because they are admitting their guilt. They are admitting they are wrong.

I don't fault Ms. Follin for that. She chose to – and she made the statement and I don't fault the statement she made before sentencing because I believe her. I don't think she was telling an untruth. This is truly how she felt. And I understand that. I really do.

But my – what I had was a person a jury had convicted. I didn't have that factor to consider. I considered, as I've already stated, the limit or the extent of her participation in it in trying to fashion a sentence which I thought was just for both sides and just and proper.

And I didn't think it was – I frankly think it was fair and it had nothing to do with her – her exercising her jury right.

You have that position in this record and you have what is here before us and we'll see if need be what they – what they – persons who review this will say.

But I wish to state again, I did not consider that and penalize her for – for not pleading guilty or exercising her right to a jury trial.

Mr. Weinberg: Your Honor, just point of information, so I understand the court's ruling.

The Court stated in Davis or the trial judge stated in Davis, I'm quoting from the record, they admitted what they had done to me and that's the first step toward rehabilitation.

In other words, he was admitting – he was stating that they had admitted that – they stood before him and said what they did wrong. If that's what you're saying, if I can't do that anymore, tell me, is that –

The Court: I'm just saying to you that if that is volitive [sic] of Davis, if that is what the Court is saying, then we can never – and I asked [Martin's attorney], and I would ask you, in giving a guilty plea, do you expect the court to give credit or give some consideration for the fact that a person is admitting their guilt?

Mr. Weinberg: Judge, I think probably – probably pre-Davis we all did. But I think now –

The Court: So you think now that there's no need to state that before me now that I should consider the fact that a person is pleading guilty?

Mr. Weinberg: Whether you should or not, Judge, I don't know. I think the Supreme Court has said you can't.

The Court: All right. I appreciate that and we'll find out. But I don't think that's what they are saying. I think that in that case you're talking that language, and it was just like – it was just like I told [Martin's attorney] – when you're trying to argue it for Mr. [sic] Follin's back (sic) it's much easier – it's more difficult to explain than it is going the other way.

Because when you sit there and ask for some consideration I don't think the court has ever said that sentence ought to be overturned because you considered the fact that they pled guilty and you gave a sentence in giving consideration for admission of the guilt. That's not there.

This case there was indication and suggestion and there are other facts of that case that will suggest

> possibly, not just that language, that that judge may have in that situation imposed a stiffer sentence. And I wasn't there. Don't know. I just know what the Supreme Court said he did. But thank you very much.
>
> Your motion is noted and the Davis case is clearly there. I hope we framed it properly for review should that become necessary.

In recent years, our state appellate courts have addressed the problem of trial judges improperly considering the defendant's failure to plead guilty in imposing sentence. In State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995), the defendant was convicted of possession with intent to distribute crack cocaine. During the sentencing proceeding, the defendant requested a sentence under the Youthful Offender Act, and the trial judge noted:

> Well, it's one thing if he'd pled guilty, I'd have considered that, but taking into consideration the age and where he was and the time it was, the sentence of the court is you be confined to the State Board of Corrections for a period of fifteen years and pay a fine of twenty-five thousand dollars.

Id. at 369, 453 S.E.2d at 879.

Our Supreme Court reversed the defendant's sentence, finding the trial judge improperly considered the defendant's exercise of his right to a jury trial. The Court recognized "'[c]ourts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of his constitutional right to a jury trial as an influential factor in determining the appropriate sentence.'" Id. at 370, 453 S.E.2d at 880 (citations omitted).

In Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999), the defendant was convicted by a jury and later moved to have his sentence reduced. In denying the defendant's motion, the trial judge explained as follows:

> Yes, Ma'am, but he didn't plead guilty. Those other two people, they pled guilty. They admitted what they had done and to me that's the first step towards rehabilitation is admitting that you did something wrong and you're pleading guilty and when a fellow wants a trial which he's entitled to as a matter of law – and that's fine.

Id. at 332, 520 S.E.2d at 802.

Davis moved for post-conviction relief based in part on trial counsel's failure to object when the trial judge considered Davis's exercise of his right to a jury trial in sentencing. The Court held that Davis was entitled to relief because his trial attorney failed to object to the consideration placed upon his exercise of his constitutional right to a jury trial.

The issue has been addressed recently by this Court in State v. Brouwer, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001). Brouwer and a co-defendant were employees of an adult video store. Both were charged with disseminating obscene materials. Brouwer was convicted. Pursuant to Davis, Brouwer asked the trial judge[3] to impose a probationary sentence similar to that imposed on his co-defendant who previously pled guilty to the same charge.[4] In denying the request and sentencing Brouwer to four years imprisonment, suspended upon the service of six months, and three years probation, the trial judge stated as follows:

---

[3] The trial judge in the present case was the trial judge in Brouwer.

[4] The co-defendant was sentenced to two years imprisonment plus a $5,000 fine, with the sentence suspended upon payment of $750 and two years probation.

> [L]et me respond to your reference to the Davis case . . . . And you are talking about where the trial judge made a reference to the fact that because he exercised his right to a jury trial, now he has to impose a certain sentence.
>
> What I indicated to you in chambers was simply what I indicate to anyone who is there. The court wishes to say that we are not going to have that involved, then let them do it and we will put it on the record in this case, and I welcome the instruction, because I see – I distinguish that Davis case from what I said, because I never said to you that if he exercises his right to a jury trial, I would punish him more severely. I said to you, as I recall, and I think I said, because I say it just about every time I talk to someone, I'm a judge that gives serious consideration for someone admitting their guilt. I think that's important. It was told to me when I first started practicing law years ago by Judge Clarence Singletary, who was the judge in my circuit, that I believe that that's the first step towards rehabilitation . . . .
>
> . . . [T]here is no way in rhyme or reason for us to ever give a sentence for someone pleading guilty the same sentence for a jury trial. Then we have ignored the fact that a person has admitted their guilt.
>
> Now, I don't think a person needs to be punished because of their jury trial, because that's a Constitutional Right. And I, as a trial judge, have never, nor will I ever, punish someone for exercising their right to a jury trial. I think that is something valuable. I take it very seriously . . . . But one of the factors that I will always consider, . . . is consider someone who admits their guilt.

Id. at 396, 550 S.E.2d at 926-27 (Anderson, J., dissenting).

Despite the trial judge's comments that he would never punish someone for exercising his or her right to a jury trial, the majority opinion found the trial judge expressly violated Davis by improperly considering that fact during sentencing, "especially since the record fail[ed] to reflect an **otherwise appropriate basis for Brouwer's disparate sentence.**" Id. at 388, 550 S.E.2d at 922 (emphasis added).

In the case sub judice, Follin was sentenced to a period of incarceration longer than any of the other individuals charged in the case, with the exception of Klein. At first glance, it would appear that the trial judge violated the mandate found in Brouwer by referencing the fact that other defendants pled guilty in the case. However, the instant case is clearly distinguishable from Brouwer.

Brouwer and his co-defendant were in the same posture: both were employees of an adult video store, both were charged with the same crime, and both faced the same potential sentence. As emphasized by the majority opinion in Brouwer, nothing in the record indicated an appropriate basis for the disparity in the sentences actually given. Id. at 388, 550 S.E.2d at 922.

By contrast, there are very few similarities between Follin and the other defendants in this case. The defendants were not in the same posture with each other because they were not all employees of District 17, they were not all charged with identical crimes, and they faced different sentences.

Adams was the single most important individual in assisting Klein in his fake corporation scheme. He was charged with embezzlement in the first and second degree and accessory before the fact and was sentenced to three years total incarceration. Davis, the accountant who assisted Klein in the fake travel scheme, pled guilty to criminal conspiracy, breach of trust, and receiving stolen goods. He was sentenced to a total of three years imprisonment. Aside from Davis, Follin was the most important individual in assisting Klein with the fake travel scheme. As Klein testified at Follin's trial, without Follin, he could not have effectuated the travel scheme.

Although Follin received a sentence of four years imprisonment, instead of the three years Adams and Davis received, she was convicted of aiding and abetting embezzlement, obtaining a signature or property by false pretenses, and criminal conspiracy. Her sentence was well within the sentencing range for her convictions.[5]

It is regrettable that the trial judge in the present case commented on Adams's guilty plea and the consideration given to him for pleading guilty. However, the trial judge repeatedly noted that he was not considering Follin's exercise of her right to a jury trial in rendering her sentence. Further, Follin's charges and potential sentences were vastly different so as to render comparison to any other co-defendant difficult. Thus, unlike Brouwer, the record before us clearly indicates that the differences in the charges Follin faced led to the disparity in her sentence, not her decision to proceed with a trial.

We rule a sentencing judge may NOT improperly consider a defendant's decision to proceed with a jury trial. We conclude that, when the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial. We caution the Bench that a trial judge abuses his or her discretion in sentencing when the judge considers the fact that the defendant exercised the right to a jury trial.

---

[5] The sentence for conspiracy is no more than five years. S.C. Code Ann. § 16-17-410 (Supp. 2001). The sentence for embezzlement of public funds is no greater than ten years where the amount of funds embezzled is $5,000 or more. If the amount is less than $5,000, the sentence shall be no more than five years. S.C. Code Ann. § 16-13-210 (1)-(2) (Supp. 2001). Finally, the sentence for obtaining a signature or property by false pretenses is no more than ten years where the property is valued at $5,000 or more. S.C. Code Ann. § 16-13-240(1) (Supp. 2001).

III. JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

After her conviction, Follin moved for JNOV. She alleged the trial court erred by failing to grant her motion for directed verdict as to all of the charges. The trial judge denied the motions. Follin argues on appeal that the trial court erred in denying her motion for JNOV. We disagree.

JNOV is a post-trial motion challenging the sufficiency of the evidence to support the judgment. See generally, Rule 50 (b), SCRCP. A motion for JNOV is a civil trial motion, and thus it is improper for a party to move for JNOV in a criminal trial. State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985); State v. Dasher, 278 S.C. 395, 297 S.E.2d 414 (1982) (it was error of law for judge to direct verdict of not guilty in criminal case after jury had returned guilty verdict); State v. Taylor, 348 S.C. 152, 158, 558 S.E.2d 917, 919 (Ct. App. 2001) (cert. granted May 30, 2002) (ruling "a motion for a JNOV in a criminal case is not recognized in this state.").

In criminal matters, a motion for a new trial is the "only available post-trial motion addressing the sufficiency of the evidence." Miller, 287 S.C. at 282 n.2, 337 S.E.2d at 884 n.2 (citing State v. Dawkins, 32 S.C. 17, 10 S.E. 772 (1890)); see also State v. Scurry, 322 S.C. 514, 518, 473 S.E.2d 61, 63 (Ct. App. 1996) ("[I]n a criminal case, a motion for a new trial is the only available post-trial motion addressing the sufficiency of the evidence."). "There is no precedent that 'gives the trial court authority to change its mind after a guilty verdict has been returned and thereafter, on its own motion, grant a directed verdict of innocence as to the same charge.'" Taylor, 348 S.C. at 158, 558 S.E.2d at 920 (citation omitted).

Because a motion for JNOV is not recognized as a valid post-trial motion in criminal cases, Follin was not entitled to JNOV.

IV. MOTION IN ARREST OF JUDGMENT

In post-trial motions, Follin made a motion in arrest of judgment as to her charges. In support of this motion, Follin first asserted the trial court erred in failing to direct a verdict as to the charge of aiding and abetting the embezzlement because there was no evidence that she was a principal in the embezzlement and she was not indicted as an accessory after the fact. Follin further contended there was insufficient evidence to support the charge of conspiracy, and there was no evidence of intent to defraud in order to support the charge of obtaining goods and services by false pretenses. We disagree.

"A 'motion for arrest of judgment' is a postverdict motion made to prevent the entry of a judgment where the charging document is insufficient or the court lacked jurisdiction to try the matter." State v. Taylor, 348 S.C. 152, 160, 558 S.E.2d 917, 920-21 (Ct. App. 2001) (cert. granted May 30, 2002). A defendant may make a motion for arrest of judgment alleging an insufficiency of the indictment. Id.; see also State v. Brown, 201 S.C. 417, 23 S.E.2d 381 (1942) (holding motion for arrest of judgment should have been granted where trial court did not have jurisdiction to impose the sentence); State v. Jeter, 47 S.C. 2, 24 S.E. 889 (1896) (concluding it was error for trial court to deny motion for arrest of judgment where indictment was insufficient). However, the defendant may not move for a verdict in arrest of judgment based on the insufficiency of the evidence to support the charges in the indictment. Taylor, 348 S.C. at 160, 558 S.E.2d at 921; see also State v. Miller, 287 S.C. 280, 286, 337 S.E.2d 883, 886-87 (1985) (Ness, J., concurring in part and dissenting in part) (stating a defendant "may **not** move for verdict in arrest of judgment based on the sufficiency of the evidence to sustain the allegations in the indictment.") (emphasis in original)(citation omitted). "[W]hen ruling on a motion in arrest of judgment, the trial court is limited to rectifying trial errors, and cannot make a redetermination of the credibility and weight of the evidence." 21 Am. Jur. 2d Criminal Law § 785 (1998); see also Taylor, 348 S.C. at 160, 558 S.E.2d at 921.

Here, Follin maintains the trial court should have granted her motion in arrest of judgment because there was no evidence to support her charges. Because she is not entitled to an arrest of judgment based on the sufficiency of the evidence, we find no error with the trial court's denial of her motion.

V. DIRECTED VERDICT

Follin claims the trial court erred in failing to grant her motions for directed verdict and new trial regarding the charges of criminal conspiracy, aiding and abetting the embezzlement, and obtaining goods and services by false pretenses. We disagree.

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001); State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). When ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983); State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct. App. 1996). "If there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Lollis, 343 S.C. at 584, 541 S.E.2d at 256. Conversely, a trial court should grant a motion for a directed verdict when the evidence merely raises a suspicion the accused is guilty. Id.

A. Criminal Conspiracy

Follin alleges there was no evidence to support the charge of criminal conspiracy because there was no evidence that she knowingly entered into an agreement with Klein to defraud District 17 of $1.4 million. We disagree.

Klein testified that the invoices for legitimate District 17 travel were handled differently from the "special" travel invoices that were used to pay

for his junket travel. According to Klein, the invoices for the legitimate travel came through the mail, and the clean copies of the illegitimate travel invoices, which were "automatically" voided by Follin, were always hand-delivered. Although the District 17 checks used to pay Follin for legitimate travel expenses were sometimes mailed and sometimes hand-delivered, the checks issued on the bogus travel invoices, which were credited to Klein's junket travel invoices, were always hand-delivered. He estimated that, from 1989 to 1994, approximately 60% of the money paid by District 17 to Follin covered his junket travel expenses.

Klein declared that Follin helped him by booking luxury travel for his family and friends. Although some of the individuals traveling worked for District 17, Klein stated that some of the individuals were from California, Las Vegas, Philadelphia, and Greenville. Klein usually took luxury trips, eventually paid for by District 17, for New Year's, Mardi Gras, and the Fourth of July. Follin booked a Royal Caribbean cruise for Klein, his girlfriend, and four other individuals, which was paid for by District 17. Trips booked through Follin Travel included a Colorado ski trip for a group of people, a trip to Atlantic City, and a gambling "cruise to nowhere." Follin accompanied the group to the Colorado ski trip and on the gambling "cruise to nowhere." At the direction of Klein, Follin mailed the tickets to the out of town individuals, although Klein testified that on some occasions he told Follin those individuals were reimbursing District 17. Klein professed that he would not have been able to succeed in the travel scheme without Follin.

Klein stated that when he realized District 17 was investigating him in 1997, he contacted Follin and warned her that she was going to be asked about the "special invoices" for trips which were never taken, but were paid for by the district. At Klein's request, Follin created false invoices indicating that the "special invoice" trips were never taken and that District 17 was owed a credit for that payment. She then accepted $52,700 in cashier's checks from Klein to make it appear that District 17 had a credit.

Klein was asked whether there was an explicit agreement between himself and Follin to defraud District 17:

Q: Did you have an agreement with Dale Follin concerning the travel scheme?

A: Say that again, please.

Q: Did you have an agreement with the [sic] Dale Follin concerning the travel scheme?

A: Only through actions.

Q: And what was that agreement?

A: The agreement that our actions did was, I knew that she - - -

On cross-examination, Klein admitted he told the State Grand Jury that he never sat down with Follin and specifically discussed how to defraud District 17. Klein reiterated, however, that he and Follin had an understanding "only through actions."

SLED Agent Johnny Bartell testified about his interviews with Follin. Initially, Follin maintained District 17 had a large credit and she kept it to apply toward future District 17 travel. Agent Bartell stated Follin first told him that she only kept records for two years, but she later admitted to him that she kept ten years' worth of records. Follin told Agent Bartell that she thought Klein was using the clean copies of the voided invoices to cover up missing money.

After the State presented its case, Follin moved for a directed verdict on the conspiracy charge. She argued there was no evidence of an agreement between herself and Klein to defraud District 17. The trial court denied the motion, and Follin presented her defense.

Dr. Adrena Ray, former District 17 Superintendent, testified regarding her investigation into Klein. During questioning by Follin, Ray described her lack of knowledge that Klein was traveling at the expense of District 17:

Q: Okay. Now, did you have any knowledge that District personnel were going with him on these trips such as Tom Lewis, Sonja Sepulveda, Debbie Elmore, people like that?

A: The only thing I ever heard rumors about – and didn't have any actual proof of – was this Mardi Gras thing. He would be gone in February.

Q: Uh-huh.

A: And as I said, people began to say don't you know where he is, he is in Mardi Gras. Of course he would have told me something else.

Q: Right.

A: But I confronted him about that and he finally said, yes, he did like to go to Mardi Gras and he has a son who was in college and he liked to take the son and his friends.

Q: Did you know he was billing these Mardi Gras trips?
A: No, of course not.

Ray admitted that she had traveled to New Orleans for national conventions twice.

Ray testified regarding the individuals who traveled with Klein to New Orleans:

Q: I'm going to show you an – out of State's exhibit number 4, a document that is a December 27 through January 2nd trip to New Orleans. It's got [sic] 12, 14 people listed on it. Is your name on there?

A: No, I don't see it. It certainly shouldn't be on here.

Q: Mr. Lewis' name is on there, isn't it?

A: Yes.

Q: Mr. Klein?

A: Yes.

Q: Who else?

A: Mark Harris, Ed Thomas, John Martin, . . . Tom Lewis, Joe Klein, Sharon Wills, Mary Mueller, Tom Rich, . . . Alicia Sissons.

Q: All those folks don't even work for the school district, do they?

A: I never heard of some of them.

. . . .

Q: Here is [the] February 14th through 22nd trip to New Orleans booked through Follin Travel. Read that list of names for the jury. Tell me if your name is on that.

A: Johnny Martin, Mark Clifford, Joseph Klein, Marvin Haley, Mike Hicks, Alexandria Cruickie, Bob –

Q: Is she – has Alexandria Cruickie to your knowledge ever worked in the school district?

A: Never heard of her.

Q: Okay.

A: Linda and Chris Green York.

Q: They ever work in the school district?

A: Never heard of them. Jim and Cindy Monise.

Q: Ever worked in the school district?

A: No, never heard of them. Christopher Mueller, Mark Harris, George and Pat Krane.

Q: Ever worked in the school district?

A: No.

Follin presented two expert witnesses who stated that it was not unusual for an agency to issue a voided invoice, called an "information only" invoice, to a client who wanted to consider taking a trip and needed the pricing information. The two experts testified it was normal for an agency to have only one agent handling corporate accounts and it was not unusual for an agent to hand-deliver tickets.

Follin explained the process of booking travel at trial. Once a travel agency obtains information from a client regarding a trip, the agency issues an invoice and an airline ticket. At the end of the week, the agency must make a report to the Airline Reporting Corporation ("ARC"), and within ten days, the ARC drafts the cost of the trip from the agency's checking account. If the client cancels the trip by the Friday of that same week, the ticket and

invoice are voided, ARC never drafts the cost of the ticket from the agency, and the record does not appear in the accounting system. If the client cancels after Friday, the ARC will still draft the cost of the trip from the agency and the agency must later obtain a refund. Follin declared that, before 1996, travel agents made a commission of 10% on airline tickets, but the commission was capped at $50 for a roundtrip ticket and $25 for a one-way ticket after 1997.

Follin professed that she was almost always the travel agent from Follin Travel who handled District 17 travel arrangements with Klein. She set up four accounts related to District 17 travel and Klein: (1) Account number 2099 for District 17's "Leisure/Incentive Travel"; (2) Account number 2022 for general District 17 travel; (3) Account number 214 for District 17 school group travel; and (4) Account number 209 for Klein's personal travel. Follin admitted that all four accounts were funded by payments from District 17. District 17 accounted for between 8% and 15% of Follin Travel's total business from 1989 to 1997.

Follin believed the Leisure/Incentive travel account covered leisure trips organized by District 17 as incentives. Klein told her the District 17 employees would reimburse the district for the cost of the trip through payroll deductions. Follin stated she believed that the individuals traveling on all of the leisure trips paid for by District 17, including the skiing trip to Colorado and both cruises, were reimbursing the district. Follin went on the skiing trip and the "cruise to nowhere" as an escort, but her expenses were complimentary to her as a travel agent and nothing was billed to District 17, other than the costs of things not complimentary.

Follin denied knowing anything about Klein's scheme to defraud District 17. Although Klein instructed her to deal exclusively with him, it was not unusual to have one contact on a corporate account. Follin said that Klein periodically would request an invoice for a school group's travel and would request her to void it the same week. Because the travel was voided and no longer appeared in her accounting system and the checks would be

issued days to weeks later and may include payment for several voided invoices, it was not possible for her to recognize or recall that an amount included in the check from District 17 matched the amount on a particular voided invoice. Further, as the checks did not list the invoice number on them, Follin received instructions from Klein as to which invoice number to apply the funds. Because the checks were signed by Klein and the superintendent, Follin testified that she did not suspect anything was out of the ordinary with the checks. Follin denied on cross-examination ever getting a check from District 17 the day after drafting a voided invoice. However, when shown copies of voided invoices with checks issued in that amount by District 17 the next day, Follin stated she could not recall those incidents.

Follin stated she first suspected Klein might have been involved in wrong-doing in September 1997 when she requested a deposit for a cruise he had booked and he immediately asked her for a voided invoice in the same amount for a school group. Follin testified that she created the invoice, but no longer handled travel arrangements with Klein after that time.

Follin described the events leading to the creation of the "credit." According to Follin, Klein called her on a Sunday sometime in early October and requested that she meet him at her office. Klein asked her to create false statements, back-dated to June 30, 1997, which indicated that District 17 had a large credit due to purchased trips that were canceled. Reviewing Follin's copies of District 17's voided invoices, Klein deduced which of the 1997 trips would be audited and he told Follin she would be asked about them. Klein instructed Follin to tell District 17 officials that he directed her to maintain the credit instead of issuing a refund check. Follin declared that Klein commented about her grandson, whom she had custody of, during the meeting. Because he had never done that before, Follin said she felt Klein was threatening her life and her grandson's life if she did not create the false credit statements as he asked. However, Follin refused to shred the documents concerning District 17 travel as Klein requested. Follin kept the

cashier's checks Klein and Adams brought later that week in her safe deposit box at her bank.

Follin testified regarding her conversations with Principal Raffield and District 17 Attorney Davis during their investigation of District 17 travel. Follin admitted telling them that District 17 had a credit and showing them the false statements. She stated that, when asked for the refund, she told them the money was at an out-of-town bank. Follin later wrote a check for $70,389.10 to District 17. Although Follin initially pretended District 17 was owed a "refund," she eventually admitted to SLED that Klein had given her the money and turned over all her documents. However, Follin denied conspiring with Klein to defraud District 17 and denied receiving anything from the transactions other than her normal commission.

Criminal conspiracy is "a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (Supp. 2001). To constitute conspiracy, there must be an agreement or a mutual understanding. State v. Horne, 324 S.C. 372, 478 S.E.2d 289 (Ct. App. 1996). Proof of an express agreement or direct evidence of the agreement is not essential, but the conspiracy may be shown by circumstantial evidence and the actions of the parties. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). "The substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." State v. Gosnell, 341 S.C. 627, 636, 535 S.E.2d 453, 458 (Ct. App. 2000).

Viewing the evidence in the light most favorable to the State, Klein would not have been able to proceed with his travel scheme without Follin's assistance. Despite the fact that there was not a spoken agreement between the two to defraud District 17, the uncontradicted evidence showed that Follin knowingly assisted Klein by creating false records indicating District 17 had a credit. Klein testified that he and Follin conspired through their actions. Although the agreement was not written or verbalized, evidence was

presented that an arrangement was reached between Klein and Follin to defraud District 17. Because there was evidence that reasonably tended to prove Follin conspired with Klein, the trial judge properly denied Follin's motion for a directed verdict as to this charge.

B. Aiding and Abetting

Follin contends the trial court should have granted her motion for a directed verdict as to the charge of aiding and abetting embezzlement because there was no evidence that she had the intent to defraud District 17. She asserts the evidence shows at most that she was an accessory after the fact. We disagree.

Follin was indicted for aiding and abetting embezzlement in violation of S.C. Code Ann. § 16-13-210 (Supp. 2001). Section 16-13-210 provides that it is "unlawful for an officer or other person charged with the safekeeping, transfer, and disbursement of public funds to embezzle these funds."

At the close of the State's case, Follin moved for a directed verdict on the embezzlement charge. The trial judge denied her motion. At the close of all the evidence, Follin renewed her motion. The trial court found that Follin's act of knowingly creating false invoices at Klein's request to help him avoid detection was evidence of aiding and abetting the embezzlement. The trial court denied Follin's directed verdict motion.

When the factual presentation is viewed in the light most favorable to the State, the evidence was sufficient to go to the jury. Follin knowingly assisted Klein in hiding his fraud. Klein testified Follin implicitly agreed to assist him by submitting false invoices and then crediting the amounts paid on the invoices to his personal travel. Because there was sufficient evidence to submit the matter to the jury, the trial court did not err in denying Follin's directed verdict motion.

C. Obtaining Goods and Services by False Pretenses

Follin argues the trial court erred by denying her motion for a directed verdict on the charge of obtaining goods and services by false pretenses. We disagree.

After the State presented its case, Follin moved for a directed verdict on the charge of obtaining property by false pretenses, which was denied by the trial court. At the close of all the evidence, Follin renewed her motion, which was denied.

Section 16-13-240 provides that it is a felony for a person to, "by false pretense or representation[,] obtain[] the signature of a person to a written instrument or obtain[] from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property." S.C. Code Ann. § 16-13-240 (Supp. 2001).

Although Follin claims no evidence was presented which showed she made any false representations to District 17 in order to obtain money, the evidence, when viewed in a light most favorable to the State, lends a different conclusion. Follin provided voided invoices to Klein and accepted payment for them from District 17. This was evidence of a false representation. Accordingly, we find there was sufficient evidence to deny the motion for a directed verdict and to submit the matter to the jury.

CONCLUSION

Based on the foregoing, Follin's convictions and sentences are

AFFIRMED.

STILWELL, J., concurs in a separate opinion.

CONNOR, J., dissents in a separate opinion.

STILWELL, J.: (Concurring)

I concur in Judge Anderson's opinion, but write separately to focus on what I consider to be an extremely difficult task faced by an appellate court in passing upon the acceptability of the sentence imposed in this case.

It is an undeniable fact that for generations trial courts have not only been allowed but actually encouraged to consider the entry of a guilty plea as an ameliorating factor in structuring an appropriate sentence. In stark contrast, it is now and has been for many years totally unacceptable to impose a harsher sentence because a defendant demands a jury trial rather than entering a guilty plea. These two concepts are almost irreconcilable.

> Here, the sentencing judge made statements that clearly indicated his motivation for imposing a somewhat harsher sentence upon this defendant than upon other defendants who entered guilty pleas was based upon acceptable considerations. At the same time, the sentencing judge made remarks that can be and have been interpreted as being violative of recent decisions of this court and the supreme court.
>
> The question, then, is which of the two diametrically opposite statements are we to consider as controlling in judging his motivation? Are we to look exclusively at those statements that are unacceptable, disregarding the acceptable, or do we do just the opposite and disregard the unacceptable in favor of the acceptable?

Under the circumstances of this case, perhaps the best thing if not the only thing to do is to disregard the statements altogether or consider them neutral on the issue of his motivation, and determine whether, on the record, the sentence imposed is justified in comparison to the more lenient sentence imposed on other defendants. Using that as the criteria, this sentence is unquestionably justified.

CONNOR, J. (dissenting): I respectfully dissent from Issue II in the majority opinion and would reverse Follin's sentence and remand for resentencing. The trial judge committed an error of law by improperly considering Follin's decision to proceed with a jury trial. As noted by the majority, the trial judge made it quite clear by his statements that he was giving Follin a harsher sentence because she had not pled guilty, as most of her co-defendants had.

He specifically stated he gave consideration to the defendants who entered guilty pleas and admitted their guilt.[6[1]] The judge further asserted he could not ignore another defendant's admission of guilt.[7[2]] Such sentencing comments have been expressly disapproved and warrant reversal. See Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) (disapproving the trial judge's statements regarding other defendants' guilty pleas and admissions of guilt); State v. Brouwer, 346 S.C. 375, 387, 550 S.E.2d 915, 922 (Ct. App. 2001) (disapproving the trial judge's "serious consideration for someone admitting their guilt" as being "the first step towards rehabilitation").

Furthermore, I disagree with the majority's interpretation of Brouwer. Specifically, the majority's conclusion that "when the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial" is troubling. In my opinion, a sentencing review pursuant to Brouwer requires us to confine our analysis to the judge's comments on the record at

---

6[1] For example, in Johnny Martin's case, the trial judge stated "[t]he other people got consideration for their sentence because they entered a guilty plea. . . . I gave credit for admitting guilt." The trial judge specifically incorporated these statements during Follin's sentence reduction hearing.

7[2] The trial judge stated, "as I mentioned in sentencing Johnny Martin and I have said throughout and will continue to say I can't ignore [co-defendant] Benji Adams admitting his guilt . . . ."

sentencing. I do not believe the language of Brouwer permits a de novo review of whether there is an "appropriate basis" for a sentence, especially where, as here, to do so would negate a judge's comments which are clearly based on an improper consideration of a defendant's decision to exercise her right to a jury trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Brent P. Guthrie,

Appellant.

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

Opinion No. 3560
Heard September 11, 2002 – Filed October 28, 2002

REVERSED

Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Druanne

D. White, of Anderson, for Respondent.

ANDERSON, J.: Brent P. Guthrie was convicted of first degree burglary. On appeal, he contends the trial court lacked subject matter jurisdiction because the State improperly amended his indictment at trial. We reverse.

FACTS/PROCEDURAL BACKGROUND

Guthrie, Mark Velt, and Jerry Lambert broke into Ed Tannery's fishing cabin during the evening sometime between January 13 and January 15, 1999. The three men removed beer, a tackle box, fishing rods, and several other items from the cabin. They filled their truck with these items, deposited them in Velt's hotel room, and returned to the cabin a second time to extricate more items. All three men were charged with the crime.

Guthrie was indicted for first degree burglary based on the aggravating factor of unlawfully entering the dwelling during the nighttime hours. At the beginning of Guthrie's trial, the State moved to amend the indictment to include as an additional aggravating factor Guthrie's conviction of two or more prior burglaries. Guthrie objected to the amendment and argued the presentation of his six prior burglaries would be prejudicial to his defense. The Circuit Court found Guthrie would not suffer any prejudice and allowed the amendment. Although the Circuit Court granted the amendment, it does not appear from the record that the actual indictment was altered to include the additional aggravating factor.

The State later submitted evidence of Guthrie's six prior burglary convictions. The Circuit Court instructed the jury that they were not to consider the prior convictions as proof of guilt in the present case, but that it was evidence that would satisfy an element of first degree burglary.

Velt testified at trial regarding Guthrie's participation in the burglary. The jury found Guthrie guilty of first degree burglary. The foreman signed the

verdict form on the back of the original indictment, which charged the element of entering in the nighttime.

LAW/ANALYSIS

Guthrie maintains the Circuit Court lacked subject matter jurisdiction because the amendment to the indictment added an additional element of aggravation that was not presented to the grand jury. We agree.

I. Subject Matter Jurisdiction

The jurisdiction of a court over the subject matter of a proceeding is fundamental. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). The Circuit Court does not have subject matter jurisdiction to convict a defendant of an offense unless: (1) there has been an indictment which sufficiently states the offense; (2) the defendant has waived presentment of the indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Timmons, 349 S.C. 389, 563 S.E.2d 657 (2002); State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).

The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court. State v. Brown, Op. No. 3549 (S.C. Ct. App. Filed Sept. 9, 2002)(Shearouse Adv. Sh. No. 32 at 52); see also State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time). Furthermore, lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. Brown, 343 S.C. at 346, 540 S.E.2d at 848. The acts of a court with respect to a matter as to which it has no jurisdiction are void. Id. at 346, 540 S.E.2d at 849; State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972).

II. Sufficiency of the Indictment

In South Carolina, an indictment "shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20 (1985). Thus, an indictment passes legal muster if it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002).

The indictment must state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. Browning, 320 S.C. at 368, 465 S.E.2d at 359; Reddick, 348 S.C. at 635, 560 S.E.2d at 443. An indictment phrased substantially in the language of the statute which creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981).

An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); Hamilton, 344 S.C. at 364, 543 S.E.2d at 597. Generally, an indictment is required to perform two functions: (1) it should inform the accused of the charge against him by listing the elements of the offense charged; and (2)

it should be sufficiently specific to protect the accused against double jeopardy. State v. Bullard, 348 S.C. 611, 560 S.E.2d 436 (Ct. App. 2002).

South Carolina courts have held that the sufficiency of an indictment must be viewed with a practical eye. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). All the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached. Id.

III. Amendment of Indictment

South Carolina Code Ann. section 17-19-100 (1985), states in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

An indictment may be amended provided such amendment does not change the nature of the offense charged. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001); see also Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998) (finding that, under § 17-19-100, an indictment may be amended at trial only if amendment does not change nature of offense charged). For example, an amendment which changes an offense to one with increased punishment deprives the Circuit Court of subject matter jurisdiction. Lynch, 344 S.C. at 639, 545 S.E.2d at 513; Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994); State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990). However, an amendment may deprive the Circuit Court of jurisdiction even if it does not change the penalty. See Lynch, 344 S.C. at 639, 545 S.E.2d at 514; Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999).

Amendments to an indictment are permissible if: 1) they do not change the nature of the offense; 2) the charge is a lesser included offense of the crime charged on the indictment; or 3) the defendant waives presentment to the grand jury and pleads guilty. State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993).

IV. Efficacy of Amendment

Guthrie asserts the trial court erred in allowing the State to amend his indictment at trial by adding the additional aggravating factor and, therefore, the court lacked subject matter jurisdiction over his case. We agree.

South Carolina Code Ann. section 16-11-311(A) (Supp. 2001) provides:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> > (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
> >
> > > (a) is armed with a deadly weapon or explosive; or
> > >
> > > (b) causes physical injury to a person who is not a participant in the crime; or
> > >
> > > (c) uses or threatens the use of a dangerous instrument; or
> > >
> > > (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
> >
> > (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) the entering or remaining occurs in the nighttime.

The relevant aggravating factors in the present case involve: "(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) the entering or remaining occurs in the nighttime." Id.

The case of State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001), is particularly instructive. In Lynch, the defendant was indicted for first degree burglary, with the aggravating factor being that the burglary occurred in the nighttime. At the outset of trial, the State moved to amend the indictment to strike out the words "in the hours during darkness" and to replace that phrase with "caused physical injury." The trial court allowed the amendment.

On appeal, the defendant argued that an aggravating circumstance is a required element of first degree burglary, and the aggravating circumstance upon which his burglary conviction was based had never been presented to the grand jury. Therefore, he claimed, the amendment to the indictment deprived the trial court of subject matter jurisdiction over the burglary charge. The Supreme Court agreed and held:

> The offense of first degree burglary, as defined by section 16-11-311, occurs when a person enters a dwelling without consent, with intent to commit a crime in the dwelling, and an aggravating circumstance is present. Without an aggravating circumstance, the crime committed would be second degree burglary. See S.C. Code Ann. § 16-11-312(A). Thus, although it is only one element of the crime, the aggravating circumstance is "the essence" of first degree burglary. [State v.] Sowell, 85 S.C. at 284, 67 S.E. at 318. Moreover, these aggravating circumstances are quite distinct from one another, and thus, the proof required for each aggravating circumstance is materially different from one another. Compare S.C. Code Ann. § 16-11-311(A)(1), (2) & (3).

> We find that by changing the aggravating circumstance from entering during the darkness to causing physical injury, the amendment to the indictment "substituted an entirely different [offense] for the one charged." Sowell, 85 S.C. at 284, 67 S.E. at 318. The amendment was a material change which modified what the defendant was "called upon to answer." Browning [v. State], 320 S.C. at 368, 465 S.E.2d at 359. Accordingly, the amendment deprived the circuit court of subject matter jurisdiction over the burglary charge.
>
> The State argues that the amendment was properly permitted because it came as no "surprise" to appellant. The trial court utilized a similar "prejudice" analysis when it allowed the amendment. However, in testing the sufficiency of an indictment and the propriety of amending an indictment, it is improper to look to other indictments, even if those indictments relate to the same course of conduct. A subject matter jurisdiction analysis is performed on individual charges, not the charges in the aggregate. The appropriate analysis is whether the amendment to the indictment changed the nature of the offense charged, not whether the amendment in any way surprised or prejudiced appellant. See § 17-19-100. We hold the amendment here violated section 17-19-100.

Lynch, 344 S.C. at 640-41, 545 S.E.2d at 514 (footnote omitted).

Similarly, the amendment in the instant case changed the nature of the offense charged. The two aggravating circumstances in the case sub judice are distinct from one another, and thus, the proof required for each aggravating circumstance is materially different from the other. The amendment was a material change which modified what Guthrie was called upon to answer. It was impossible for Guthrie to prepare a defense to the additional factor regarding two or more prior convictions where the aggravating circumstance was not added until trial. We rule the amendment deprived the Circuit Court of subject matter jurisdiction over the first degree burglary charge.

The dissent articulates an amendment rule with no boundaries or parameters. The rule set forth in the dissenting opinion allows for "amendment ambush" on the eve of trial. Moreover, under the rule advanced by the dissent, a multi-faceted criminal charge containing alternative grounds for aggravation is thrust upon a defendant at trial with an indictment containing only one of the alternatives. The implementation of such an amendment procedure would create evidentiary conundrums of gargantuan proportion to a defendant as the trial commences.

CONCLUSION

The Circuit Court erred in granting the State's motion to amend the indictment at trial to include as an additional aggravating factor Guthrie's conviction of two or more prior burglaries. Accordingly, the Circuit Court's decision to grant the amendment to the indictment is

REVERSED.

CONNOR, J., concurs.

STILWELL, J., dissents in a separate opinion.

STILWELL, J. (dissenting): Because I believe the trial court retained subject matter jurisdiction following the amendment of Guthrie's burglary indictment, I respectfully dissent.

In Lynch, our supreme court held that by "changing the aggravating circumstance from entering during the darkness to causing physical injury, the amendment to the indictment 'substituted an entirely different [offense] for the one charged.'" State v. Lynch, 344 S.C. 635, 640-41, 545 S.E.2d 511, 514 (2001) (quoting State v. Sowell, 85 S.C. 278, 284, 67 S.E. 316, 318 (1910)) (alteration in original). Thus the court held the substitution of one aggravating factor for another divested the trial court of subject matter

jurisdiction. Unlike Lynch, the amendment here did not substitute one aggravating circumstance for another; it added an additional one.

Subject matter jurisdiction is the power of a court to "hear and determine cases of the general class to which the proceedings in question belong." Brown v. Evatt, 322 S.C. 189, 193, 470 S.E.2d 848, 850 (1996); Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). While the amendment may have offended the law in some other particular, the only issue before us is subject matter jurisdiction. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). In my view, because the aggravating circumstance passed upon by the grand jury remained in the indictment, the trial court retained subject matter jurisdiction and the addition of another aggravating factor did not divest the trial court of that jurisdiction. Cf. State v. White, 338 S.C. 56, 525 S.E.2d 261 (Ct. App. 1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marolyn L. Baril,

Appellant,

v.

Aiken Regional Medical Centers,

Respondent.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3561
Heard October 8, 2002 – Filed October 28, 2002

REVERSED and REMANDED

Herbert W. Louthian, Sr., and Deborah R.J. Shupe, both of Columbia, for Appellant.

Richard J. Morgan and Reginald W. Belcher, both of Columbia, for Respondent.

ANDERSON, J.: Marolyn L. Baril appeals the Circuit Court's order granting summary judgment to Aiken Regional Medical Centers (Hospital) on Baril's action for breach of employment contract. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Baril joined Hospital's nursing staff in 1986. She earned a master's degree in nursing administration from the University of South Carolina in 1990. The following year, Baril was named director of Hospital's emergency department. Baril resigned from that position for personal reasons in 1992, but continued as a staff nurse in the emergency department. Holly Martinez de Andino eventually succeeded Baril as director of Hospital's emergency department. John Arnold[1] and Martinez de Andino indirectly supervised Baril.

In early 1993, Baril began teaching nursing classes on a part-time basis at the University of South Carolina's Aiken campus (USC-Aiken). She joined the faculty on a full-time basis later that year.

Baril received an "Associate Handbook" from Hospital in May of 1997. She signed an acknowledgment form provided by Hospital, indicating she would familiarize herself with the handbook and that she understood the handbook "constitute[d] the personnel policies of [Hospital] and that [she was] governed by them." The handbook and acknowledgment form contained disclaimer language:

> **PLEASE READ!**
> **Important Employment Information**
>
> The information contained in this booklet is designed to serve only as a reference to Aiken Regional Medical Centers policies

[1] John Arnold's specific job title is unclear in the record, which indicates he operated in a supervisory capacity similar to that of Martinez de Andino.

> and procedures. Aiken Regional Medical Centers reserves the right to amend this guide as necessary at any time, with or without prior notice. Current hospital policies and procedures will apply in all cases.
>
> Please remember that **this booklet does not constitute a contract** between you and Aiken Regional Medical Centers. Employment at Aiken Regional Medical Centers is on a voluntary basis and **either you or the Facility may terminate this employment relationship at any time with or without reason or prior notice.**
>
> No associate of Aiken Regional Medical Centers has the right to make verbal promises or commitments which may create a contract and thereby alter the "**employment at will**" relationship.

(Emphasis added). Additionally, the handbook's "Recruiting and Hiring" section included similar language:

> In no event shall a hiring of an associate be considered as creating a contractual [re]lationship between the associate and the Facility; and, unless otherwise provided in writing, such **relationship shall be defined as "employment at will," where either party may dissolve the relationship.** (Emphasis added).

However, the acknowledgment form states that "the information in [the] handbook is subject to change/revision" and "any change will be communicated through the usual channels."

The handbook incorporated a detailed, progressive disciplinary procedure. Two categories of offenses were specifically identified. The categories were bifurcated: (1) actions meriting immediate termination; and (2) actions warranting termination for continuous violations.

In July of 1998, Martinez de Andino disciplined Baril for allegedly slamming a door in Arnold's face and disagreeing with Hospital's

management regarding a management issue.[2] Baril was first suspended and later given a "final" written warning. Yet, the handbook's procedure mandated use of a "final" written warning only after two previous warnings. Baril had not previously been warned or disciplined.

Baril asked Hospital to change her work status from full-time to part-time in November 1998. She continued to teach full-time at USC-Aiken.

Baril initiated a grievance pursuant to Hospital policy. Hospital's chief executive officer, Richard H. Satcher, investigated Baril's complaint and found sufficient cause to purge the disciplinary action from Baril's employment file. As a condition to purging her employment file, Satcher required Baril and Martinez de Andino to meet with Hospital's director of human resources, Richard Lowe, and director of nursing, Mary Ann Angle. The purpose of the meeting was to "clarify understandings and expectations" regarding Baril and Martinez de Andino's working relationship.

In January of 1999, Baril met with Martinez de Andino, Lowe, and Angle to discuss problems between Baril and Martinez de Andino. During the meeting, Baril expressed concern that Martinez de Andino had targeted Baril for termination which Martinez de Andino intended to accomplish using the disciplinary procedure. Lowe responded that Hospital had updated pertinent portions of its employee handbook to prevent the disciplinary procedure from being abused to eliminate employees and to ensure that it would only be used to positively impact its employees.

---

[2] Shortly before Martinez de Andino initiated the July 1998 disciplinary action against Baril, a dispute arose between them concerning Martinez de Andino's decision to hire paramedics to perform nursing functions in the emergency room. Baril learned from the South Carolina Department of Health and Environmental Control that South Carolina law prohibited paramedics from performing some of the functions that Martinez de Andino intended for them to perform. Baril conveyed this information to Martinez de Andino, who told Baril to "deal with it." Baril contends Martinez de Andino resented Baril's input, leading to a souring of their relationship that motivated her to seek Baril's termination.

Lowe delivered a copy of the new policy to Baril. Regarding its purpose, the policy stated:

> To set standard operating procedures in order to ensure that all associates are **fully aware of the conduct expected of them.** This policy will also **ensure fair and consistent treatment to associates** if violations of these standards of conduct occur.
>
> **This policy is based on the concept of increased severity in disciplining associates** who repeatedly violate hospital rules while performing work for the hospital or while on hospital premises. Written counselings are given for initial, minor infractions of rules; if the infractions continue harsher discipline is enforced. However, **situations which are so serious that they require immediate stern disciplinary action will not follow a progressive concept.** [Hospital] reserves the right to administer disciplinary action as it deems appropriate for the circumstances involved.

(Emphasis added). The new policy provided: "Discipline is an instrument for changing unacceptable performance or behavior, and for providing motivation and encouragement for disciplined associates."

The new policy described four general categories of disciplinary offenses, ranging in degree of seriousness from greatest (critical offenses) to least (minor offenses). The category of "critical offenses" included actions that constituted "serious violations of rules or associate misconduct which justify immediate termination without regard to the associate's length of service or prior conduct." The new policy contained various examples of critical offenses. It specified in section 2.2.2 of HR116 that actions of "[d]ishonesty, fraud, theft (regardless of the amount), [or] unauthorized removal of hospital property" were examples of critical offenses.

At the end of the meeting, Baril and Martinez de Andino signed a document identifying "expectations" concerning Baril's and Hospital's obligations to each other. The details of the document consisted of expectations related to performance and communications.

On July 6, 1999, Baril suffered injuries when a cabinet fell on her while at work. She immediately sought treatment for injuries involving muscle strain, subperiosteal hematoma, and an impinged nerve. Baril filed an accident report and claim for Workers' Compensation benefits at the time of the accident.

Four days after her accident, on July 10, 1999, Baril traveled to Tacoma, Washington, for a vacation. When Baril arrived, she received a telephone message indicating Hospital called her sister in an effort to contact Baril. In response, Baril called Hospital on its toll-free number and asked to speak to someone in her department. After a brief conversation with a coworker, Baril asked the coworker to transfer her call to her sister's home in Aiken. Baril informed her sister that she had arrived in Washington safely, and asked why Hospital wanted to talk to her. Baril's sister offered to call Hospital to ask why it had contacted her to try to reach Baril. However, Baril declined her sister's offer.

According to telephone company records, the call lasted thirty-two seconds. No evidence exists in the record concerning the cost of the call or whether Hospital sustained any economic loss as a result of the call.

Baril returned from vacation on July 17, 1999. When she reported to work the following day, Baril was told to meet with Arnold and Martinez de Andino. At the meeting, Baril learned that by using Hospital's toll-free number for personal use, she violated section 2.2.2 of Hospital Policy HR116, which cites "[d]ishonesty, fraud, theft (regardless of amount), unauthorized removal of hospital property," as "critical offenses" justifying immediate termination. Baril offered to pay for the telephone call, but Arnold refused to accept payment and informed her she was being terminated. Baril exited the premises a short time thereafter.

Baril filed this cause of action averring (1) Hospital created a contract of employment between Baril and itself through its written employee handbook, its amendments to the handbook, and its conduct regarding the handbook's policies, particularly the mandatory language of the disciplinary procedure in HR116 and verbal assurances provided by Lowe during the January 1999 meeting; (2) Hospital breached the contract between Baril and

itself by wrongfully terminating her; and (3) Hospital violated S.C. Code Ann. § 41-1-80 (Supp. 2001) by terminating Baril in retaliation for filing a Workers' Compensation claim. Baril sought $403,508 in actual damages, plus costs and other just and proper relief.

Hospital answered, generally denying Baril's allegations and claiming it "acted in good faith" when dealing with Baril's discipline and termination. Hospital specifically asserted that Baril was an at-will employee throughout her employment with Hospital, and denied the existence of an employment contract. Hospital further claimed that, even if any employment contract existed, Hospital never breached it and that Baril's discharge was not wrongful. Hospital cited Baril's own conduct as the source of "any and all of the employment actions that [Hospital] took against [Baril]." Additionally, Hospital maintained that Baril "failed to meet [Hospital's] established work standards, stole [Hospital's] time and possibly money when making an impermissible telephone call, and violated at least one of [Hospital's] specific written Company policies for which [Hospital's] action was a stated remedy of the violation." Finally, Hospital contended Baril failed to mitigate any damages she might have sustained.

Hospital moved for summary judgment, arguing no material issues of fact existed and Hospital was entitled to judgment as a matter of law. The Circuit Court conducted a hearing on the motion and issued an order finding: (1) Hospital's policies did not constitute an implied employment contract as a matter of law, even when viewed in the light most favorable to Baril; (2) even if Hospital's policies constituted an implied employment contract, Hospital's actions did not breach the contract because it acted pursuant to the express terms of the alleged contract and because Baril's interpretation of the alleged contract was "strained and unreasonable and would have led to absurd consequences"; (3) Hospital did not breach any alleged contract because on the date Hospital terminated Baril it had a "reasonable, good faith belief that, pursuant to the language of HR 116, it had sufficient and just cause to terminate [Baril's] employment"; (4) Baril failed to establish a retaliation claim because she "based this cause of action merely upon her own self-serving, unsupported opinions and the temporal proximity between the filing of her workers' compensation claim and her termination of employment"; and (5) Baril failed to mitigate her damages because she "did nothing to seek

employment or mitigate damages in any way." The Circuit Court dismissed all of Baril's claims with prejudice.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Lanham v. Blue Cross and Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001).

ISSUES

I. Did the Circuit Court err in granting summary judgment on the issue of whether Hospital's written policies and actual practices created an employment contract between the parties?

II. Did the Circuit Court err in granting summary judgment on the issue of whether Hospital's actions in terminating Baril's employment breached a contract between the parties?

III. Did the Circuit Court err in granting summary judgment on the issue of whether Baril acted reasonably in attempting to mitigate her damages?

LAW/ANALYSIS

I. Existence of Employment Contract

Baril maintains the Circuit Court erred in granting summary judgment because, viewing the evidence in the light most favorable to Baril as the nonmoving party, material issues of fact exist concerning whether Hospital's written policies and actual practices created an employment contract between Baril and Hospital. We agree.

South Carolina recognizes the doctrine of employment at-will. Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). This doctrine provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. Id. "At-will employment is generally terminable by either party at any time, for any reason or no reason at all." Prescott, 335 S.C. at 334, 516 S.E.2d at 925.

However, an employer and employee may contractually alter the general rule of employment at-will, thereby restricting the freedom of either party to terminate the employment relationship without incurring liability. See Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). For example, an employee handbook may create a contract altering an at-will arrangement. Id.

Because an employee handbook may create an employment contract, the question of whether a contract exists is for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference. Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) (stating summary judgment is inappropriate in most instances when handbook contains both a disclaimer and promises). The presence of promissory language and a disclaimer in the handbook make it ambiguous and subject to more than one interpretation.[3] See Fleming v. Borden, 316 S.C. 452, 450 S.E.2d 589 (1994) (stating that a handbook containing both a disclaimer and promissory language should be viewed as inherently ambiguous).

Here, the handbook states that it does not operate to change the at-will nature of employment to a contractual relationship. However, the handbook's procedures concerning progressive discipline, discharge, and grievance are couched in mandatory terms, including assurances that the procedures will be followed. As to Lowe's statements regarding the new disciplinary policy, Baril testified:

> Richard Lowe told me, guaranteed me that the new disciplinary policy was put into effect for exactly that reason because I told Richard, I said, you know, I have been a manager, and you can use a disciplinary procedure to try to eliminate people or try to help people grow and have positive behaviors and goals and grow.
>
> And Richard Lowe said that is what that policy is for, is to help you, and that is what is going to be happening from this

[3] Baril and Hospital clearly disagree about the existence of a contract.

> point forward, and I felt that that was a guarantee, was a contract, a verbal contract that I would be treated equitably, that I would be—that I would not be targeted any further, that the grievance was over, and we were to go forward. And so I felt at that time that that was a contract that was made . . . .

Thus, the Hospital's procedures and practices give rise to more than one reasonable inference concerning the creation of an employment contract. Concomitantly, we find the trial court erred in granting summary judgment on the issue of whether Hospital's policies found in its employee handbook, amendments, and actual practices created an employment contract between Baril and Hospital.

II. Hospital's Actions in Terminating Baril's Employment

Baril claims the Circuit Court erred in granting summary judgment because, viewing the evidence in the light most favorable to Baril as the nonmoving party, material issues of fact exist regarding whether Hospital's actions in terminating her employment breached an employment contract between Hospital and Baril. We agree.

When an employment contract only permits termination for cause, the appropriate test on the issue of breach focuses on whether the employer had a "**reasonable good faith belief** that **sufficient cause** existed for termination." Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002) (emphasis added). "[T]he fact finder must not focus on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably determined it had cause to terminate." Id. at 464-65, 560 S.E.2d at 611.

a. Reasonable Good Faith

In the January 1999 meeting, Baril expressed concern that Martinez de Andino disliked her and would use Hospital's disciplinary process to terminate her. Lowe responded that Hospital had updated pertinent portions of its employee handbook to prevent the disciplinary procedure from being

abused to eliminate employees and to ensure that it would only be used to positively impact its employees. Nevertheless, reasonable minds could disagree as to whether Hospital proceeded to act in reasonable good faith by using the disciplinary policy to immediately terminate Baril for using the toll-free line to transfer one possibly business-related telephone call to Baril's sister for thirty-two seconds.

Additionally, our Supreme Court has held that summary judgment should not ordinarily be used to resolve the question of whether an employer acted under a reasonable good faith belief that sufficient cause existed for termination. Conner, 348 S.C. at 465, 560 S.E.2d at 611-612. Viewing the evidence in the light most favorable to Baril, we find that reasonable minds could differ as to whether Hospital acted with good faith in terminating Baril.

b. Sufficient Cause

Hospital alleges it followed its disciplinary policies in terminating Baril. Hospital contends Baril's request that her call on Hospital's toll-free line be transferred to her sister's private residence constituted an act of "dishonesty, fraud, theft (regardless of amount), unauthorized removal of hospital property." Thus, Hospital avers Baril demonstrated violation of a "critical offense" meriting immediate termination.

However, Hospital never announced a policy against use of its toll-free telephone line by employees for personal or private business, although the written materials of Hospital purported to communicate policies and changes to Hospital employees. Furthermore, Baril declared that other Hospital employees had engaged in similar behavior without Hospital's objection, thereby raising the possibility that Hospital tacitly condoned the practice. Assuming, arguendo, that Hospital rightfully concluded such employee use of its toll-free telephone lines for private purposes constituted dishonesty, fraud, or theft sufficient to merit immediate termination under its policy, evidence exists that Baril's telephone call to her sister originated in matters related to her employment at Hospital.

Moreover, Hospital failed to produce any evidence that it suffered a loss related to the telephone call. In addition, Hospital rejected Baril's good-

faith efforts to compensate Hospital for any loss it may have sustained for the thirty-two second call, although Hospital's undisputed practice was to permit employees to reimburse it for private long-distance telephone calls.

The Circuit Court determined "no evidence showed or even suggested that [Baril] ever reimbursed or attempted to reimburse Hospital for any of these calls." A cursory reading of the record contradicts this finding. First, the phrase "any of these calls" wrongly implies that Baril made more than one call, contrary to undisputed evidence that she only made one call at issue. Next, the record is replete with testimony from Baril and Lowe that Baril immediately offered to reimburse Hospital for any expenses related to the telephone call.

Hospital maintains Baril abused her authority by ordering a subordinate to transfer the telephone call outside the Hospital. Yet, the record contains no evidence that Baril had any subordinates at the Hospital at the time she placed the call. In fact, the employee whom Baril asked to transfer the call was only considered a subordinate by the trial court because she had previously been one of Baril's nursing students. Viewing the evidence in the light most favorable to Baril, we conclude her actions constituted a mere peccadillo at worst and that reasonable minds could differ concerning whether Hospital terminated Baril with just cause.

III. Mitigation of Damages

Baril claims the Circuit Court erred in granting summary judgment because, viewing the evidence in the light most favorable to Baril as the nonmoving party, material issues of fact exist concerning whether she made reasonable efforts to mitigate her damages. We agree.

A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages. McClary v. Massey Ferguson, Inc., 291 S.C. 506, 354 S.E.2d 405 (Ct. App. 1987). Whether the party acted reasonably to mitigate damages is ordinarily a question for the jury. Id.

Baril did not seek other employment throughout this litigation. However, she attempted to justify her behavior. First, she testified she did not want to reveal to potential employers that she had been fired. Second, she testified that there were no other hospitals with emergency rooms in or near Aiken, where she resided. Thus, she would have been forced to either commute or relocate in order to perform similar work. Baril did not want to relocate because she had a home and family in Aiken, where she taught college classes on a full-time basis. Baril speculated that a lengthy commute would interfere with her teaching career.

Considering the evidence in the light most favorable to Baril, reasonable minds could disagree over whether she made reasonable efforts to mitigate her damages. The trial court should have allowed this question to be resolved by a jury.

CONCLUSION

Accordingly, the trial court's decision is

REVERSED and REMANDED.

CONNOR and STILWELL, JJ., concur.