The Supreme Court of South Carolina

In the Matter of Kimla C. Johnson, Respondent.

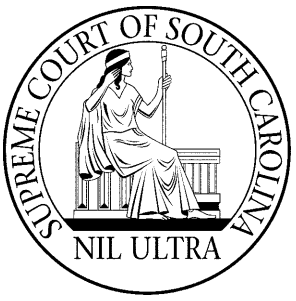
ORDER

By order dated October 11, 2001, respondent was placed on interim suspension because she had been charged with various crimes related to a stolen vehicle, including possession, sale or disposal of a vehicle with the knowledge that the identification number of the vehicle had been removed or falsified with intent to conceal or misrepresent the identity of the vehicle; obtaining a loan using a stolen vehicle as collateral; and conspiracy to obtain title, secure a loan, remove the lawful VIN number or possess a stolen 1995 Lexus. On September 19, 2002, the charges were dismissed. Respondent has now filed a petition in which she seeks to be reinstated to the practice of law. The Office of Disciplinary Counsel does not object to the petition. The petition is granted.

IT IS SO ORDERED.

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
November 12, 2002



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 18, 2002

ADVANCE SHEET NO. 38

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

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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Hal J. Warlick, Respondent.

Opinion No. 25556
Heard September 18, 2002 - Filed November 12, 2002

DISBARRED

Attorney General Charles M. Condon, Senior Assistant Attorney General James G. Bogle, Jr., and Henry B. Richardson, Jr., Disciplinary Counsel, all of Columbia, for the Office of Disciplinary Counsel.

Hal J. Warlick, of Georgetown, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent,[1]

[1]Respondent was placed on interim suspension on February 5, 1999. *In re* Warlick, 334 S.C. 243, 513 S.E.2d 352 (1999). Previously, respondent was indefinitely suspended from the practice of law based on his conviction of contempt in federal court. *In re* Warlick, 287 S.C. 380, 339 S.E.2d 110 (1986). *See also* United States v. Warlick, 742 F.2d 113 (4th Cir. 1984). He was later readmitted. *In re* Warlick, 296 S.C. 350, 372 S.E.2d 910 (1988).

regarding numerous matters of misconduct.[2] We agree with the Panel's recommendation that respondent be disbarred from the practice of law.

FACTS

Account Matters

In many of the Formal Charges, respondent has admitted that he failed to maintain a proper trust account and that he commingled personal funds with client funds and other funds in his possession. The records of respondent's Greenville National Bank Special Account[3] show the account had a negative balance on at least six occasions. Throughout the time period covered in these charges, the Subpanel found that respondent continuously violated Rule 1.15, of Rule 407, SCACR, regarding the safekeeping of property. In seventeen separate matters, respondent violated Rule 1.15 and Rule 8.4, of Rule 407, SCACR, regarding attorney misconduct.[4]

Mildred Burgess Matter

Respondent settled Mildred Burgess's case for $18,000. He prepared a settlement sheet that showed a receipt of $18,000, deductions for attorney's fees of $4,500 and other expenses, and a net to the client of $12,328.50. On

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[2]Upon motion of the prosecutor, three matters were dismissed for lack of evidence. After the hearing, the Subpanel dismissed four matters and portions of five different matters for lack of evidence.

[3]Respondent used the Special Account for a variety of purposes, including the processing of client funds, bills, family expenses, and the payment of operating expenses. The account was not a trust account. The Special Account was opened with funds received from a client, Ernest Galloway (see Ernest and Edna Galloway Matter *infra*), through an initial deposit on September 23, 1998, of $94,625.11. This account dropped to a negative balance on November 4, 1998.

[4]In ten matters, respondent's only rule violations were Rules 1.15 and 8.4.

the settlement sheet, respondent offered his client three options as to how she would receive the money.

After some discussion, Burgess elected to take a different option of receiving a portion of the settlement immediately and $11,000 via a post-dated check. Burgess testified she believed she was loaning money to respondent that would be repaid at ten percent interest. Respondent testified he did not advise Burgess of her right to seek independent counsel regarding the loan transaction. Respondent issued a counter check to Burgess drawn on his Greenville National Bank Special Account. Burgess negotiated the check. Respondent also gave her a post-dated check, drawn on the same account; however, Burgess was unable to negotiate this check because respondent's accounts were frozen.

The Subpanel found respondent did not maintain his client's funds in a trust account and commingled the funds with other funds. The Subpanel found respondent entered into a business transaction with Burgess, the terms of which were not fair and reasonable to the client and were not fully disclosed and transmitted in writing in a manner that the client could reasonably understand. Further, respondent failed to give his client a reasonable opportunity to seek the advice of independent counsel regarding this transaction.

The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 1.4 (communication), Rule 1.5 (fees), Rule 1.8 (prohibited transactions), Rule 1.15 (safekeeping property), Rule 2.1 (advisor), and Rule 8.4 (misconduct).

Fred Howard Matter

Respondent represented Fred Howard in a workers' compensation matter. During the course of representation, Howard received payments, routed through respondent's office, from an insurance company.

In October 1998, the insurance company issued a check in the amount of $6,101.21 payable to Howard. Respondent allegedly forged his client's

name to the check. SLED Agent Joyce A. Lauterbach testified that, in her expert opinion, respondent "probably wrote" Howard's name to the check. In determining whether a signature was written by the actual person, the highest degree of certainty is identification, the second is highly probably, the third probable, the fourth is indications, and the fifth is no conclusion. Therefore, the possibility respondent forged Howard's name was in the median range.

Respondent testified he saw Howard at a gas station and happened to have his checks with him. Respondent gave a $265 check and the $6,101 check to Howard to sign. He told Howard he needed the check for the larger amount back because his attorney's fee had not been paid out of the settlement yet. Respondent left the checks with Howard while he paid for his gas, and, therefore, did not see Howard sign the check. He retrieved the check that had already been placed back in its envelope from Howard, who indicated respondent could mail the balance from the check to him later. Respondent stated he did not forge Howard's name to the check.

The Subpanel found that Howard did not endorse the check. However, the Subpanel found the evidence was not clear and convincing that respondent signed Howard's name to the check or caused another to do so.[5] The Subpanel found the check was deposited into respondent's Special Account, which was not a proper trust account and was commingled with respondent's funds and others. By November 4th, that account had a negative balance and no intervening disbursements had been made to Howard.

The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 1.1 (competence),[6] Rule 1.3 (diligence),

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[5]Following the hearing, respondent was tried and acquitted of forgery.

[6]We disagree with the Subpanel's finding that respondent violated Rule 1.1, which states "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." Nowhere was it alleged or proven that respondent did not provide Howard competent representation in his workers' compensation case.

Rule 1.4 (communication), Rule 1.5 (fees), Rule 1.15 (safekeeping property), and Rule 8.4 (misconduct).

Ernest and Edna Galloway Matter

Ernest Galloway was 89 years old at the time this matter arose.[7] He maintained an investment account, through MFS/Sun Life of Canada (hereinafter referred to as Sun Life), in his wife's name with a balance of approximately $100,000.

The Galloways consulted respondent concerning their unhappiness with the amount of income they were receiving from their investment. Respondent suggested he could borrow their funds and pay them $800 per month in interest. As a result, the Galloways cashed in the Sun Life account and delivered a $94,625.11 check to respondent. The Galloways incurred a Sun Life surrender charge of $5,067.33.

Respondent executed a handwritten document acknowledging receipt of the check, and promising to return the principal plus 10.2% interest payable monthly at the rate of $800 per month. Respondent indicated he entered into the agreement, which he acknowledged was an extremely unwise thing to do, in an effort to alleviate some of his financial problems.

The Subpanel found respondent entered into a business transaction with his client.[8] The Subpanel found the terms on which respondent acquired his interest were not fair and reasonable to the client, and were not fully disclosed and transmitted in writing in a manner in which the client could understand. Further, respondent failed to give his client a reasonable opportunity to seek the advice of independent counsel regarding the transaction.

Respondent used the Galloways' check to open his Warlick Law Office Special Account at Greenville National Bank on September 23, 1998. After depositing those funds, the balance never again rose above the amount of the

[7]Mr. Galloway passed away on June 26, 1999.

[8]Respondent's office had represented Mr. Galloway in the past.

check. By October 1, 1998, the Special Account balance dropped to about $7,000. From September 23rd through October 1st, no funds were issued from that account to the Galloways.

Respondent paid what he described as "loan payments" to the Galloways, in the initial amount of $400 and two subsequent $800 payments, all in cash. Thereafter, he made five payments, two of which were drawn from the Special Account, one drawn on an operating account at BB&T, one drawn on respondent's wife's account, and one drawn on respondent's mother's account.

When the Galloways learned respondent had been placed on interim suspension, they expressed concerns to respondent about the loan. Respondent delivered a mortgage on property owned by him in Pickens County to the Galloways. Respondent did not record this mortgage and it had not been recorded as of March 25, 1999. At that time, there were three other mortgages on record against the same property. This property was eventually foreclosed upon and the Galloways did not receive any money from that sale.

In an effort to assure the Galloways their money would be repaid, respondent also delivered to them an Assignment, dated March 9, 1999. In this document, respondent transferred to the Galloways his anticipated fees from a workers compensation case, *Stanley Dockins v. English Homes*.

The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 1.4 (communication), Rule 1.8 (prohibited transactions), Rule 1.15 (safekeeping property), Rule 2.1 (advisor), and Rule 8.4 (misconduct).

Kathleen Kimbrough Matter

Kathleen Kimbrough came to respondent on February 6, 1999, the day after he had been placed on interim suspension, about an urgent family court matter. Respondent informed Kimbrough "we'll need a retainer." Kimbrough paid $100 to be applied towards her legal fee. Respondent

admitted he did not advise her he had been placed on interim suspension. He left the $100 he received from her for an associate with notes concerning the problem.

The Subpanel found respondent had engaged in the unauthorized practice of law in violation of Rule 5.5 of Rule 407, SCACR. The Subpanel also found he had violated Rule 8.4 of Rule 407, SCACR.

Shirley Weaver Matter

Respondent represented Grady Gillespie on a criminal matter. Respondent was paid $3,500 in legal fees.

Grady Gillespie's brother-in-law, Cecil A. Weaver, Jr., came to respondent's office on February 6, 1999, without an appointment, while respondent was clearing out his office after being informed of his interim suspension on February 5th. Weaver left some court documents with respondent that Gillespie had received. One document involved the signing up for a drug, alcohol abuse, and sexual predator program, and the other document indicated Gillespie should appear in court on February 24, 1999. Regarding the rehabilitation program, Weaver testified respondent told him Gillespie should show cooperation and attend it. As for the court hearing, Weaver testified respondent stated he would be at the hearing. He further stated that respondent did not tell him he had been suspended from the practice of law.

Respondent acknowledged receiving the documents and testified he told Weaver that someone would meet Gillespie at a court hearing. Respondent testified that he then left the documents for an associate. Respondent admitted he did not inform Weaver that he had been placed on interim suspension.

The Subpanel found respondent had engaged in the practice of law after being suspended. The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 5.5 (unauthorized practice of law) and Rule 8.4 (misconduct).

Brenda Gail Alexander Matter

Brenda Alexander and her husband retained respondent to sue the Toyota Company because of a problem with their truck. Respondent prepared a settlement statement, showing a settlement of $25,000, less attorney's fees, and also showing a deduction for a State Farm lien.

When the Alexanders retrieved their client file after respondent's suspension, they discovered a $5,000 check from respondent to State Farm. As a result, there remained $7,500 due them from their settlement.

The Subpanel found respondent failed to return the $7,500 to the Alexanders and failed to make an accounting to the Alexanders as to how the $7,500 was applied. Respondent testified the $7,500 which he did not return to the Alexanders was kept by him as a retainer on another case which he was handling for Mrs. Alexander. The Subpanel found there was no documentation to substantiate respondent's testimony.

The Subpanel found respondent failed to maintain the Alexanders' settlement check in a proper trust account and commingled the funds with his own funds and the funds of others. Respondent admitted he did not maintain a proper trust account. The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 1.4 (communications), Rule 1.5 (fees), Rule 1.15 (safekeeping property), and Rule 8.4 (misconduct).

Laazora Hutchins Matter

Respondent represented Clyde and Laazora Hutchins in a civil action, filed November 20, 1998, in the Pickens County Court of Common Pleas. The allegations were that the defendants had agreed to sell real estate to the Hutchins, that the Hutchins had placed a deposit of $250 on the sale, and the defendants had failed to complete the sale. The purchase price for the real estate was $15,000.

Prior to filing suit, respondent requested $14,750 from Mrs. Hutchins, promising to use those funds to complete the real estate transaction within a short time. On September 8, 1998, Mrs. Hutchins provided a cashier's check to respondent in the amount of $14,750. When no action was taken, Mrs. Hutchins spoke with respondent. In response, he gave her a signed written document, dated October 17, 1998, acknowledging receipt of the money, which he was holding pursuant to the pending suit. Respondent represented to Mrs. Hutchins that the $14,750 was earning interest for her at the annual rate of seven percent and would be used for the purchase of the real estate or returned to her within sixty days. The funds were not returned within sixty days.

Respondent provided a check, drawn on his wife's BB&T bank account and dated February 20, 1999, to Mrs. Hutchins in the amount of $15,750. He represented to Mrs. Hutchins that the check represented her original $14,750 plus $1,000 "interest." This check was returned for insufficient funds and Mrs. Hutchins' personal bank account was debited and resulted in her incurring a service charge.

The Subpanel found the funds that respondent attempted to deliver to Mrs. Hutchins were not her funds. Further, the Subpanel found respondent did not engage in the unauthorized practice of law by attempting to make restitution to Hutchins by delivering a check to her on February 20, 1999. However, the Subpanel concluded respondent violated the following rules of Rule 407, SCACR: Rule 1.1 (competence), Rule 1.15 (safekeeping property), and Rule 8.4 (misconduct).

Robert E. Belt Matter

Robert Belt and his wife operated a plumbing company. ProSource, Inc., a plumbing supply house, received a judgment against the Belts for about $21,000. The Belts hired respondent to attempt to reduce the judgment so that it could be paid. Respondent informed the Belts he had negotiated the judgment down to $12,000.

The Belts paid respondent $12,000 to be given to ProSource to satisfy the judgment. The money was delivered by a $2,000 check, a $8,000 check, and by $2,000 cash by August 31, 1998. Respondent did not conclude the Belt matter with the adverse party prior to his interim suspension. A review of respondent's BB&T bank statements and Greenville National Bank statements showed that respondent had not deposited the Belts' money in either of those accounts. The Subpanel found respondent did not maintain the $12,000 in a proper trust account and commingled the funds with his own funds and that of others.

The Subpanel concluded that respondent had violated the following rules of Rule 407, SCACR: Rule 1.3 (communication), Rule 1.15 (safekeeping property), and Rule 8.4 (a) – (e) (misconduct).

Eric V. Yule Matter

The Yules hired respondent to represent them in a motor vehicle accident case. Mrs. Yule sought counseling as a result of the accident. The counselor recommended Mrs. Yule keep a journal of her activities and details relating to the accident and the effect it had on her.

When Mrs. Yule was deposed, respondent and defense counsel learned of her journal. It was agreed during the deposition that a copy of the journal would be provided to defense counsel. Respondent did not read Mrs. Yule's journal prior to turning it over to defense counsel. He testified he did not realize there was sensitive material in the journal and that Mrs. Yule did not forbid him to turn over the original journal.

The Subpanel noted it had been contended the journal contained personal information, unrelated to the accident, which should not have been disclosed to defense counsel. It was further contended that Mrs. Yule did not want the original journal turned over. However, after reviewing the evidence presented and Mr. Yule's testimony, the Subpanel concluded that both Mr. and Mrs. Yule understood, or were at least aware, that a copy of the entire journal would be disclosed to opposing counsel.

The Subpanel found insufficient evidence to conclude respondent committed misconduct regarding the journal or that he made false representations to his client about possible settlement offers. Therefore, the Subpanel recommended the merits of this matter be dismissed. However, the Subpanel found respondent failed to reply to two inquiry letters from the Commission on Lawyer Conduct regarding this matter in violation of Rule 8.1(b) of Rule 407, SCACR.

Suzanne Amos Glymph Matter

During the time this matter arose, Brian K. James was an attorney working out of respondent's office. James represented Suzanne Amos Glymph in a workers' compensation case. The case was settled on November 1, 1998, for $16,500. After attorney's fees, the balance due to Glymph was $12,238.25. Respondent deposited the settlement check into the Special Account on November 16, 1998.

After the deposit of Glymph's funds, the balance in the account dropped to $322 by November 30th. No disbursement was made to Glymph in the intervening time. As admitted by respondent, the Subpanel found he failed to maintain the settlement funds in a proper trust account and commingled the funds with his own funds and that of others.

On December 4, 1998, respondent wrote a check from the Special Account, payable to Glymph, in the amount of $12,380.25, representing the proceeds from her settlement. The source of those funds, however, was not from her funds.

The Subpanel noted it was alleged that respondent forged Glymph's and Brian James's signatures to the settlement check. Agent Joyce A. Lauterbach testified that she was unable to reach a conclusion as to whether respondent forged Brian James's signature; however, she concluded that respondent "probably wrote the . . . Glymph signature." Brian James testified

he did not sign the back of Glymph's settlement check and that he did not give respondent permission to do so. Glymph testified she never saw nor signed the original settlement check, and that she did not authorize anyone to sign her name to the check.

The Subpanel stated that, after careful consideration of the expert testimony presented by Agent Lauterbach, it was unable to conclude by clear and convincing evidence that respondent committed forgery. However, the Subpanel concluded respondent had violated the following rules of Rule 407, SCACR: Rule 1.15 (safekeeping property) and Rule 8.4 (misconduct).

Disciplinary Counsel Matter

Respondent drafted wills for two clients. In these wills, respondent designated himself as Personal Representative, without the necessity of securing a bond, and as Trustee. Respondent did not disclose any potential conflict of interest, nor did he seek any waiver from the clients regarding any potential conflict. The Subpanel found that respondent violated Rule 1.7 (conflict of interest).

The full Panel adopted the Subpanel's report.

DISCUSSION

The Panel found, with regard to most of the matters, violations of Rule 8.4, misconduct. The Panel further found violations of the following: (1) Rule 1.1, competent representation (one violation); (2) Rule 1.3, diligence (two violations); (3) Rule 1.4, communication (four violations); (4) Rule 1.5, fees (three violations); (5) Rule 1.7, conflict of interest (one violation); (6) Rule 1.8, prohibited transactions (two violations); (7) Rule 1.15, safekeeping property (seventeen violations); (8) Rule 2.1, advisor (two violations); (9) Rule 5.5, unauthorized practice of law (two violations); and (10) Rule 8.1(b), failure to respond to a demand from a disciplinary authority (one violation). The Panel recommended disbarment.

Further, although the Panel did not so find, we find respondent has violated the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating Rules of Professional Conduct) and Rule 7(a)(5) (engaging in conduct tending to pollute administration of justice or to bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law).

In determining the appropriate punishment, we look to the punishment given to other attorneys for similar behavior. *In re* Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). We do not regard financial misconduct lightly, particularly when such misconduct concerns expenditure of client funds or other improper use of trust funds. *In re* McMillan, 327 S.C. 98, 490 S.E.2d 1 (1997).

In light of respondent's egregious misconduct, we find the Panel correctly concluded he should be disbarred. The Court has deemed disbarment the appropriate sanction in similar cases involving financial misconduct. *See In re* Thompson, 343 S.C. 1, 539 S.E.2d 396 (2000) (disbarment for mishandling of trust account, commingling of funds, and use of trust accounts in check kiting scheme); *In re* Miller, 328 S.C. 283, 494 S.E.2d 120 (1997) (disbarment for repeated instances of misconduct regarding client funds); *In re* McMillan, *supra* (disbarment for using client trust funds and settlement proceeds for personal expenses and law firm operating expenses, and for failing to cooperate with disciplinary board); *In re* Hendricks, 319 S.C. 465, 462 S.E.2d 286 (1995) (disbarment for misappropriating funds, neglecting client matters, and practicing law while under suspension); *In re* Bowers, 303 S.C. 282, 400 S.E.2d 134 (1991) (disbarment for misappropriating funds to invest in future trading options). Here, respondent committed financial misconduct in several matters, practiced law while under suspension, and involved himself in financial transactions with his clients.

Consequently, we disbar respondent, effective as of the date of this opinion, and order him to pay the costs of the disciplinary proceedings. We also order respondent to make restitution to all injured parties, including clients and the Lawyers' Fund for Client Protection. The Office of

Disciplinary Counsel shall determine the amount of restitution and implement a plan for restitution.[9] 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, 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.

[9]In determining a restitution plan, the Office of Disciplinary Counsel shall give priority to Mrs. Burgess and Mrs. Galloway. Further, the amount owed Mrs. Galloway shall include the $5,067.33 surrender charge the Galloways incurred when the Sun Life account was cashed in.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mariano
Frank Cruz, Respondent.

Opinion No. 25557
Submitted October 10, 2002 - Filed November 12, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Robert G. Price, of 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 eighteen months up to twenty-four months. We accept the agreement and suspend respondent for twenty-four months.[1] The facts as admitted in the agreement are as follows.

[1] Respondent was placed on interim suspension by order of this Court dated February 23, 2001. In the Matter of Cruz, 344 S.C. 27, 543 S.E.2d 536 (2001). Respondent's request that his

Facts

I. Matter A

On June 19, 1998, respondent was a partner in a law firm with another lawyer (Lawyer). During this time, the firm was retained to represent Client for injuries sustained in an automobile accident. Respondent requested that Lawyer assist him with the case. Lawyer negotiated a settlement for the insurance company to pay the policy limits of $100,000.

On July 21, 1999, respondent and Lawyer dissolved their partnership. Respondent then prepared, and had Client sign, a letter terminating Lawyer's representation of Client. Shortly thereafter, respondent contacted the insurance company adjuster stating that he and Client would settle her claims for the policy limits of $100,000 and sign mutual releases in exchange for a check written to respondent and Client. The adjuster subsequently sent a proposed settlement agreement and a release of all claims to respondent. Respondent replied by writing on the adjuster's letter, " I agree and consent to the above-listed terms," and signed the notation as "attorney for [Client]."

Despite the fact that she could not read, Client signed the release on the advice of respondent. Respondent did not read the release to Client or explain the legal significance of its terms. After executing the release, respondent contacted another insurance company regarding underinsured motorist coverage. However, the company refused to settle because the company and its insured had been released from all claims by the release signed by Client on respondent's advice. The release precluded Client from collecting underinsured coverage of up to $30,000.

Following the settlement of the claim, Lawyer filed suit against respondent, another attorney, and Client alleging that respondent failed to pay him his portion of the attorney's fee generated by the settlement of Client's

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twenty-four month suspension be made retroactive to the date he was placed on interim suspension is denied.

claim. Respondent answered Lawyer's complaint on behalf of himself and Client. Since Client had a potential claim against respondent for his failure to secure underinsured motorist coverage, respondent's answering the suit on Client's behalf was a conflict of interest. Respondent failed to inform Client of the conflict and the potential claim against him. Respondent also failed to advise Client to seek the advice of independent counsel.

On May 19, 2000, and May 20, 2000, attorneys representing Lawyer wrote respondent raising concerns about the conflict of interest respondent had in representing both Client and himself in the lawsuit. Despite the receipt of these two letters, respondent failed to advise Client of the conflict of interest and failed to withdraw as her attorney.

On July 17, 2000, respondent was removed as counsel for Client by order of the circuit court and Client was advised to retain independent counsel. Respondent and his associate refused to cooperate with Client's new counsel despite his repeated attempts to obtain Client's file.

Despite the fact that he had been removed from representation of Client by order of the circuit court, on July 27, 2000, respondent prepared and advised Client to sign a document entitled "Revocation of all Power of Attorneys." Client had previously executed a power of attorney in favor of her son. Respondent informed Client that he would file the document, but failed to do so.

Also on July 27, 2000, respondent prepared an affidavit for Client to sign, that respondent intended to submit in support of his motion for summary judgment in the lawsuit brought by Lawyer. The affidavit stated in part, "I am satisfied with the services of [respondent]. He negotiated my hospital lien of $80,000 to $40,000. Therefore, my portion of the settlement is $35,000 after paying the lien. I received more from the $100,000 than I would have received from an additional $30,000 underinsured motorist, since if I had recovered there, the hospital lien would not have been negotiated and I would have to pay the hospital $80,000." The affidavit further stated, "I have ratified the General Release."

The affidavit was an attempt by respondent to relieve himself of liability, both professional and financial, to Client. Further, respondent failed to explain the legal significance of the affidavit to Client and failed to advise her to seek independent counsel prior to signing it.

II. Matter B

Respondent was retained to represent Client in a wrongful termination case. Client paid respondent an initial retainer fee of $300, plus $148 for the cost of a deposition. Respondent filed the action in federal court. However, respondent did not notify Client that he would be leaving his practice in South Carolina and relocating to North Carolina, and then California. Respondent failed to return telephone calls to Client and failed to communicate with her. Respondent closed his practice and subsequently moved without informing Client.

Respondent failed to return Client's file to her; however, Client eventually obtained her file from respondent's assistant, who, while licensed to practice law in California, was not licensed in South Carolina. Respondent had left his Client files with his assistant.

Respondent also failed to move before the United States District Court for leave to withdraw, or take any other action to protect Client's interests before leaving South Carolina.

After receiving Client's complaint, the Commission on Lawyer Conduct wrote respondent on September 20, 2000, requesting a reply within 15 days. On October 12, 2000, respondent replied that he wanted to file an amended reply after reviewing Client's file. On December 14, 2000, a Commission staff attorney wrote respondent requesting additional information; however, respondent did not submit the amended reply nor did he respond to the staff attorney's letter.

III. Matter C

Client and her husband retained respondent to file a bankruptcy action in the United States Bankruptcy Court for the District of South

Carolina. On April 21, 2000, respondent filed a Chapter 7 action and a trustee was appointed. Respondent abandoned his law practice in South Carolina and moved out of state without notifying Client and without taking steps to protect Client's interests in the bankruptcy proceeding. Respondent also failed to take the necessary steps to protect Client's furniture. Respondent failed to reply to Client's inquiries about the case and did not return Client's file. On August 23, 2000, the Bankruptcy Court issued an order discharging the debtors and the trustee and closing the case. Respondent also left Client's file with his associate who was not licensed to practice law in South Carolina.

After receiving Client's complaint, the Commission wrote to respondent on November 27, 2000, seeking a reply. Respondent did not respond. The Commission sent respondent a second letter on January 9, 2001, again asking for a reply to the complaint and reminding respondent that failure to cooperate with an investigation could constitute a violation of the Rules of Professional Conduct. Respondent did not reply. On February 5, 2001, the Commission sent respondent a Notice of Full Investigation. Respondent still did not reply.

IV. Matter D

In May 2000, Client, a resident of North Carolina, hired respondent to bring a quiet title action involving property she jointly owned in Myrtle Beach. Client paid respondent a fee of $1,750, by personal check, and signed the fee agreement respondent mailed to her. Respondent assured Client that the fee would be held in his trust account until earned and that any unearned portion of the fee would be returned to her.

Respondent failed to communicate with Client after receiving his fee and failed to reply to her telephone calls regarding the matter. Respondent did not file the quiet title action nor take any other action on Client's behalf. Respondent abandoned his law practice in South Carolina and moved out of state without notifying Client. Respondent failed to return Client's file to her or take appropriate steps to protect her interests when he left South Carolina.

Client eventually located respondent in October 2000 and respondent assured her that he would refund a portion of her money. In November 2000, respondent mailed Client a check, drawn on his wife's account, in the amount of $1,000. However, respondent stopped payment on the check without notice or explanation to Client.

Respondent failed to respond to letters sent by the Commission on December 15, 2000 and January 9, 2001. Respondent also failed to respond to the Notice of Full Investigation sent by the Commission on February 5, 2001. Respondent also left Client's file with his associate who is not licensed to practice law in South Carolina.

V. Matter E

In May 1999, Client retained respondent to represent him in a bankruptcy matter and paid him a fee. At the time, Client was at least two payments behind on his mortgage and expressed to respondent that he did not want lose his home because it had belonged to his grandfather. However, respondent failed to advise Client that he should keep his mortgage payments current. Further, respondent failed to promptly file for relief from the remaining debts. During the delay, a foreclosure action was started against Client. Respondent received a settlement offer from the mortgage holder which incorporated payment terms that Client could not make. Respondent then filed a Chapter 7 bankruptcy action.

Respondent failed to communicate and respond to all the inquires of Client during the representation. As a result, Client retained the services of attorney Lucy McDow, who converted the case to Chapter 13. Had this not been done, Client would have lost his home. Respondent also failed to answer a motion filed by the mortgage holder and did not move for an extension of time to file the answer.

When Client terminated respondent's services, respondent failed to provide a full refund of the attorney's fees and did not provide any accounting as to how the fee had been earned. Respondent did tender a check

for $125, which included the following notation, "Termination of representation full refund." Attorney McDow returned the check to respondent with a request that it be re-issued without the "full refund" language; however, respondent refused. McDow then filed a motion to refund excessive legal fee and respondent filed a response in opposition to the motion. The Bankruptcy Court issued a consent order requiring respondent to refund $1,250 in attorney's fees by paying $75 per week to the Chapter 13 trustee. Lawyer failed to make any payments, and on August 30, 2000, the Bankruptcy Court issued an order finding respondent in willful contempt of the court's previous order, and required respondent to purge himself of civil contempt by paying the entire $1,250 to the trustee within seven days. The order also required respondent to pay Client's attorney's fees and costs of $470.70.

After receiving Client's complaint, the Commission wrote respondent on January 20, 2000, and respondent replied on March 2, 2000. Thereafter, the Commission appointed attorney Robert S. Hudspeth, Esquire, to conduct a preliminary investigation. Mr. Hudspeth requested that respondent provide him bank records relating to Client's case, but respondent failed to do so. A notice of full investigation was authorized by the Commission and mailed to respondent's Rock Hill address on September 13, 2000; however, it was returned as undeliverable. The notice was re-mailed on October 2, 2000, to respondent's California address. Respondent did not reply.

VI. Failure to Cooperate with Investigation

After residing in California, respondent relocated to New Jersey and wrote to the Office of Disciplinary Counsel, requesting that all future correspondence to him be forwarded to an address in Hackensack, New Jersey. On March 12, 2001, the Office of Disciplinary Counsel procured from the Commission on Lawyer Conduct, a subpoena ducus tecum for five Client files and bank records. The subpoena was mailed to respondent's New Jersey address; however, respondent failed to respond to the subpoena, and did not provide the documents that were requested.

On March 26, 2001, respondent wrote the Office of Disciplinary Counsel, expressing a desire to discuss pending cases and to submit written replies. Thereafter, the Attorney General's Office sent copies of the notices of full investigation and letters of complaint regarding pending cases to respondent's New Jersey address. Respondent did not respond.

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 1.2 (failing to abide by the client's decisions concerning the objectives of 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 1.7 (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests); Rule 1.9 (a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation); Rule 1.15 (failing to keep clients' funds in a separate account and failing to keep records of such funds); Rule 1.16 (failing to withdraw from representation when continued representation would violate the Rules of Professional Conduct); Rule 2.1 (failing to exercise independent professional judgment and render candid advice); Rule 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.1 (knowingly making false statements of material fact in connection with a disciplinary investigation and failing to respond to a lawful demand for information from a disciplinary authority); Rule 8.4, subsections (a) (violating the Rules of Professional Conduct); (c) (engaging in conduct involving moral turpitude); and (e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent also admits that he violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a), subsections (1) (violating the Rules of Professional Conduct); (3) (willfully violating a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules, willfully failing to appear personally as directed, willfully failing to comply with a subpoena issued under these rules, and knowingly failing to respond to a lawful demand from a disciplinary authority); (5) (engaging in conduct prejudicial to the administration of justice and bringing the courts and the legal profession into disrepute); (6) (violating the oath of office taken to practice law in this State); and (7) (willfully violating a court order issued by a court of this state).

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 twenty-four months. 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

The State, Respondent,

v.

Larry Dean Dawkins, Appellant.

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

Opinion No. 25558
Heard June 12, 2002 - Filed November 18, 2002

REVERSED

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

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for respondent.

CHIEF JUSTICE TOAL: Appellant, Larry Dean Dawkins ("Dawkins"), appeals the circuit court's ruling that his probationary period does not begin to run until after he successfully completes his community supervision program.

FACTUAL/PROCEDURAL BACKGROUND

Dawkins pled guilty to assault and battery with intent to kill ("ABIK") on February 24, 1999. He was sentenced to five years, suspended to five years probation upon service of two years. His sentence began when he was arrested on November 16, 1998. As a condition of his sentence, Dawkins was prohibited from having any contact with the victim or her family. Further, Dawkins was required to pay restitution to the victim and to spend six months in a Restitution Center ("RC") after his release.

In May 2000, the RC refused to accept Dawkins because his ABIK conviction constituted a violent offense. As a result, the requirement that Dawkins spend six months at a RC was deleted. On July 28, 2000, Dawkins was released from prison, after serving 620 days (85%) of his two year sentence, to a community supervision program ("CSP") pursuant to section 24-21-560 of the South Carolina Code.[1] According to the terms of the CSP Certificate issued by

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[1] S.C. Code Ann. § 24-21-560(A) (Supp. 1998). This section provides, in part:

> [A]ny sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a [CSP] operated by the Department . . . . No prisoner who is serving a sentence for a "no parole offense" is eligible to participate in a [CSP] until he has served the minimum period of incarceration as set forth in Section 24-13-150.

ABIK is a no parole offense for which a prisoner must serve at least 85% of his sentence under South Carolina Code Ann. § 24-13-150 before participating in a

the South Carolina Department of Probation, Parole, and Pardon Services ("Department"), Dawkins was required to participate in the CSP for 2 years, until July 27, 2002.[2]

Within the first month of his participation in the CSP, Dawkins violated the terms of the program. Dawkins concedes he violated the terms of the CSP by failing to abide by the electronic monitoring rules, failing to report to his agent as instructed, and failing to follow the advice and instruction of his agent. Specifically, Dawkins moved from his approved residence without telling his CSP agent, left his approved residence while on home detention, and, finally, cut his electronic monitoring bracelet off of his ankle and threw it away.

An administrative hearing was held by the Department on September 8, 2000 to address Dawkins' violations. Based on the testimony of the CSP agent and Dawkins' own admissions mentioned above, the hearing officer concluded that Dawkins' placement in the CSP should be revoked.

On October 30, 2000, the circuit court held a hearing to address the hearing officer's recommendation for revocation. Again, Dawkins conceded he had committed the violations, but argued that successful completion of the CSP would satisfy his original five year probation sentence. The State contended, instead, that Dawkins' five year probation sentence was distinct from the time he was required to spend in the CSP, and that his probation would begin when he successfully completed the CSP. Ultimately, the judge agreed with the State. The judge sentenced Dawkins to 1 year in prison for his wilful violation of the terms of the CSP pursuant to section 24-21-560(C) of the South Carolina Code, and

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CSP.

[2] Section 24-21-560(B) gives the Department discretion to set the period of time and the terms and conditions of a prisoner's CSP based on guidelines developed by the Director of the Department, but limits the amount of time a prisoner can spend in a CSP to two continuous years. "A [CSP] . . .must last no more than two continuous years." S.C. Code Ann. § 24-21-560(B) (Supp. 1998).

found that his probation period would be tolled until his release from the CSP.[3]

Dawkins raised the following issue on appeal:[4]

> Did the circuit judge err in ruling that Dawkins' five-year probation sentence is tolled until he successfully completes the CSP?

LAW/ANALYSIS

Dawkins argues his five-year probation sentence is discharged upon successful completion of the CSP under section 24-21-560(E).

South Carolina Code section 24-21-560(E) provides, "[a] prisoner who successfully completes a [CSP] pursuant to this section has satisfied his sentence and must be discharged from his sentence." Dawkins argues his five years of probation are part of his "sentence" and, therefore, are discharged by successful completion of the CSP.[5] Dawkins bases his appeal on this section 24-21-560(E)

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[3]Section 24-21-560(C) provides:

> If the court determines that a prisoner has wilfully violated a term or condition of the [CSP], the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the [CSP].

S.C. Code Ann. § 24-21-560(C) (Supp. 1998).

[4]This case was set to be argued before the Court of Appeals, but after the parties filed their briefs, it was transferred to this Court.

[5]The record does not indicate that Dawkins has completed his CSP successfully. As discussed, Dawkins' CSP was revoked and he was sentenced to one year of imprisonment in August of 2000 because he violated the terms of

argument, and on the well-settled principle that penal statutes are to be strictly construed against the state and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). Dawkins' contends the most reasonable interpretation of the statute is that probation and community supervision run concurrently, and that probation is discharged by completion of the CSP.

In response, the State submits that the section 24-21-560(E) argument is not ripe for review as Dawkins has not completed the CSP.[6] Additionally, the State argues that section 24-21-560(E) must be read in conjunction with section 24-21-560(A), applying its definition of "sentence." Section A provides that "any sentence for a 'no-parole offense' . . . must include any term of incarceration and completion of a [CSP]. . . ." Because the legislature did not mention probation in this definition, the State argues that probation is not part of the sentence that is discharged upon successful completion of the CSP.

As Dawkins points out, section 24-21-560 is penal, and should be construed strictly against the State. *Blackmon*. However, "even though penal statutes are to be strictly construed, 'the canons of construction certainly allow the court to consider the statute as a whole and to interpret its words in light of the context.'" *Rorrer v. P. J. Club, Inc.,* 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Ct. App. 2001) (citing *State v. Standard Oil Co. of N.J.,* 195 S.C. 267, 288, 10 S.E.2d 778, 788 (1940)). The Court "does not look merely at a particular clause in which a word may be used, but rather [should look] at the word and its meaning in conjunction with the purpose of the whole statute, and in light of the object and policy of the law." *S.C. Coastal Council v. S.C. State Ethics*

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his CSP. The record provides no further information regarding Dawkins' current status.

[6]The State argues that Dawkins' argument is not ripe because he has not completed the CSP yet, which is a condition to discharge under section 24-21-560(E). Although it is a condition of discharge, we believe the question is ripe now because Dawkins will eventually complete the CSP, and the judge who revoked his CSP in August 2000 included an order that his probation be tolled during his participation in the CSP.

Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). Further, the interpretation of a term within a statute "should support the statute and should not lead to an absurd result." *Id.* (citing *Hamm v. S.C. P.S.C.,* 287 S.C. 180, 336 S.E.2d 470 (1985)).

In this case, all parties agree the statutory scheme is convoluted. Construing the statute against the State as we must, however, we believe Part E mandates that the prisoner's entire sentence be discharged, including any residual probation, after he completes the mandatory CSP. The CSP is a more stringent, closely monitored form of supervision than normal probation. Even considering Part E in the context of the statute as a whole, we believe the legislature intended mandatory participation in the CSP to serve as a more rigorous term of probation for those convicted of no-parole offenses, in lieu of normal probation. Accordingly, Dawkins' sentence, including probation, is discharged upon successful completion of the CSP.

CONCLUSION

For the foregoing reasons, we **REVERSE** the circuit court's ruling to the extent that it held Dawkins' probation is tolled during his participation in the CSP.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Rodney Maurice Smith,

Appellant.

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

Opinion No. 3567
Heard January 8, 2002 - Filed November 12, 2002

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

SHULER, J.: Rodney Maurice Smith appeals his conviction for second degree lynching, arguing the trial court erred in failing to direct a verdict. We agree and reverse.

FACTS/PROCEDURAL HISTORY

On September 2, 1998, Carlos Parson and his friend Ebay Moore were on their way to a nearby store in York to buy beer.[1] As they approached California Street, where "a lot of young men" were hanging out, Parson noticed a black truck pull up and stop. Moore, recognizing Rodney Smith, approached the vehicle. When Parson also approached, Moore introduced Smith, whom Parson did not know, as "Tee Top."

Parson then told Moore he was ready to go on to the store. At that, Smith got out of the truck and said to Parson: "You don't know me like that to be talking to me like that." Although Parson denied having said anything to Smith, Smith "raised his hand" and said "Man, I'm tired of these fake-ass niggers trying to handle me any kind of way." The next thing Parson knew, Smith stepped up and hit him.

Immediately thereafter, Tori Rawlinson, whom Parson did know, also struck him. Parson fell to the ground. Although he tried to get up, Smith and Rawlinson continued to beat him. At that point, Lavonne Hanna, Smith's girlfriend who was not known to Parson, got out of the truck and stabbed Parson several times, leaving a seventeen-inch laceration across Parson's stomach and a gash on his eyeball that nearly blinded him. Parson did not see the weapon, which was never identified or recovered. As the police arrived at the scene, they passed a black truck headed in the opposite direction with three occupants; both officers identified Hanna as the driver and one officer identified Rawlinson as one of the passengers.

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[1] Upon examination at the hospital, Parson registered a blood alcohol content of .23 percent. A trial expert testified that level of intoxication would render someone of Parson's size significantly impaired.

On November 12, 1998, a York County grand jury indicted Rawlinson, Hanna, and Smith on charges of assault and battery with intent to kill (ABIK) and lynching, second degree; Hanna was also indicted for possession of a weapon during the commission of a violent crime. In a joint trial, held February 8, 1999, a jury convicted all three defendants of second degree lynching and assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of ABIK. The jury also convicted Hanna on the weapon possession charge. Thereafter, the trial court sentenced Smith to twelve years imprisonment for lynching and ten years concurrent for ABHAN; both were consecutive to a sentence Smith already was serving for a parole violation. The court also imposed joint restitution totaling $31,000 on all three defendants.

Pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), Smith's appellate counsel filed a brief along with a petition to be relieved, stating her examination of the record indicated the appeal was without merit. Following our Anders review, this Court ordered the parties to brief the following issue:

> Whether the trial court erred in refusing to grant Appellant's motion for directed verdict as to Second Degree Lynching, where the State failed to prove the defendants acted for the premeditated purpose and with the premeditated intent to commit an act of violence upon the person of another, an essential element of the crime.

Thus, the sole issue in this appeal is whether the trial court erred in failing to direct a verdict on the charge of second degree lynching.

LAW/ANALYSIS

Standard of Review

In considering a motion for directed verdict in a criminal case, all evidence is viewed in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). The trial court is "concerned with the existence or non-existence of evidence, not its weight." State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). Thus, if the State presents direct or substantial circumstantial evidence reasonably tending to prove guilt, or from which guilt can be logically deduced, the directed verdict motion is properly denied. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001); McHoney, 344 S.C. at 97, 544 S.E.2d at 36.

Discussion

Smith argues the trial court should have granted his motion for directed verdict because the State failed to present evidence that he and his co-defendants assembled with the common purpose and intent of committing an act of violence against Parson. We agree.

Second degree lynching, a felony, is defined as "[a]ny act of violence inflicted by a mob upon the body of another person and from which death does not result . . . ." S.C. Code Ann. § 16-3-220 (1985); see Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000). "Mob" is further defined as "the assemblage of two or more persons, without color or authority of law, for *the premeditated purpose and with the premeditated intent* of committing an act of violence upon the person of another." S.C. Code Ann. § 16-3-230 (1985) (emphasis added); Knox, 340 S.C. at 84, 530 S.E.2d at 888. Although "[t]he common intent to do violence" may be formed before or during the assemblage, State v. Barksdale, 311 S.C. 210, 214, 428 S.E.2d 498, 500 (Ct. App. 1993), to sustain a conviction for lynching the State must produce at least some evidence of premeditation. See § 16-3-230; Barksdale, 311 S.C. at 214, 428 S.E.2d at 501 ("The State is required to prove every element of the crime for which an accused is charged.").

Premeditation connotes "willful deliberation and planning" or "conscious consideration" preceding a particular act. Black's Law Dictionary 1199 (7th ed. 1999); see also Webster's New World College Dictionary 1134 (4th ed. 1999) (defining legal definition of premeditation as "a degree of planning and forethought sufficient to show intent to commit an act"). By definition then, the premeditated purpose and intent underlying a charge of lynching cannot be spontaneous.

At trial, the State called three witnesses who testified to the assault on Parson: Parson himself; Tina Hughes, an eyewitness; and Lavonne Hanna, Smith's girlfriend and co-defendant. Parson's testimony revealed he was talking to Moore when Smith inexplicably said "You don't know me like that . . . " and began hitting him. According to Parson, after Smith struck him he saw "Tori Rawlinson come across and hit me" and he fell to the ground. When Parson attempted to get up, Hanna, who had exited the truck, raised her hand and cut him.

Hughes essentially confirmed Parson's account, testifying that after Parson "mumbled something," Smith made the "you don't know me" remark, got out of the truck, and hit Parson in the mouth. Hughes further testified Rawlinson then "came in and hit [Parson] in the back of the head. And when [Parson] had fell, that's when [Hanna] came with the blade and started cutting him." Although Hanna testified she and Smith struck Parson in self-defense, she also stated Parson initially approached Smith and asked if he was interested in buying some crack or "weed." In Hanna's account, that was when Smith replied: "Man, you don't even know me like that to ask me something like that."

Thus, all of the testimonial evidence presented by the State indicated Smith became upset at something Parson said, jumped out of the truck, and hit him. Moreover, it was undisputed Rawlinson came over *from across the street* and hit Parson in the back of the head; he neither arrived with Smith and Hanna nor was with them when the incident began. Finally, the evidence showed that as Smith and Rawlinson independently attacked Parson, Hanna exited the truck and cut Parson with an unknown weapon. In other words, the combined testimony

evinced an impulsive attack on Parson by Smith that Rawlinson and Hanna later joined.

These facts distinguish this case from Barksdale, supra, in which this Court upheld several convictions for first degree lynching following an altercation outside a nightclub. In Barksdale, the defendants were involved in a verbal confrontation in which the victim intervened. Afterward, "[a]lthough the [defendants] started to leave, *they decided to return and fight* with [the victim]." Barksdale, 311 S.C. at 212, 428 S.E.2d at 499 (emphasis added). The defendants then took turns assaulting the victim, and the victim later died from his injuries. On appeal, the State successfully argued that the defendants' intent in assembling was transformed from a lawful purpose to an unlawful one as "evidenced by the fact [they] *returned to the club* with the *expressed purpose and intent* to commit an act of violence upon the victim." Id. at 215, 428 S.E.2d at 501 (emphasis added).

While we agree the State may demonstrate the intent element in a lynching case through "positive" testimonial evidence or circumstantial inferences, id. at 214, 428 S.E.2d at 500, the record before us is devoid of any evidence, direct or circumstantial, tending to prove Smith, Hanna, and Rawlinson acted with the premeditated purpose and intent required to sustain a conviction. Accordingly, as Smith and his co-defendants did not constitute a "mob" within the meaning of the lynching statute, Smith's conviction for second degree lynching is

REVERSED.

CURETON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fred T. Hopkins,	Appellant,
v.	
Robert F. Harrell, Jr. and Miles Heating and Air-Conditioning, Inc.,	Defendants,
of whom Robert F. Harrell, Jr., is the	Respondent.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3568
Heard October 9, 2002 – Filed November 18, 2002

AFFIRMED

Fred T. Hopkins, of Florence, pro se.

Reginald C. Brown, Jr., and Robert D. McKissick, of Florence, for Respondent.

GOOLSBY, J.: Fred T. Hopkins appeals a circuit court order dismissing this action based on his alleged failure to mediate the matter as required by a prior court order. Hopkins asserts the circuit court's dismissal was error because (1) this action was filed prior to the effective date of the rules for mediation and arbitration established by the South Carolina Supreme Court, and (2) he was not given proper notice of the motion to dismiss. We affirm.

FACTS

This action arises out of Hopkins's purchase of a home in the Vintage Place Development (Phase II) in Florence County. The home was constructed by Robert F. Harrell, Jr., the general contractor, and a subcontractor, Miles Heating and Air Conditioning. In March 1996, Hopkins brought this action against both Harrell and Miles alleging the home was improperly constructed.

By letter dated May 18, 1998, Harrell's counsel notified Hopkins that this action was included on a list of cases to be tried that week and that "[w]e appeared Monday morning before Judge Breeden and he has ordered this matter to mediation." Counsel noted, "Apparently what happened is that the mediator was appointed on the declaratory judgment case but never was appointed on this matter." Counsel asked Hopkins to sign an enclosed stipulation of mediator selection form naming Karl Folkens as the mediator or to submit the names of two or three other potential mediators.

Upon receiving no response, Harrell's counsel sent a second letter to Hopkins on July 8, 1998 reminding him of Judge Breeden's order requiring mediation and advising him that he had not received the stipulation form selecting a mediator. Harrell's counsel thereafter sent Hopkins similar letters on July 30, 1998 and again on August 25, 1998 reminding him of the mediation order and requesting a response.

On September 18, 1998, Harrell filed a motion to dismiss the action based on Hopkins's failure to comply with the order requiring mediation. On October 6, 1998, Judge James Brogdon held a hearing on Harrell's motion to

dismiss that was attended by both Hopkins and Harrell.[1] Judge Brogdon issued an order on November 9, 1998, stating: "After hearing from all parties and [reviewing] the clerk's file, it appears to this court that the mediation previously ordered by [Judge Breeden] has not been carried out by the parties." Judge Brogdon noted that Hopkins had failed to respond to requests for discovery and that discovery should be completed before meaningful mediation could occur. Judge Brogdon ordered the matter to be scheduled for mediation before Karl Folkens within thirty days of completing discovery, and provided if Hopkins failed to abide by the terms of this order, the matter would be dismissed.

On December 3, 1998, Harrell's counsel discovered the designated mediator, Karl Folkens, might have a conflict of interest because he had represented Hopkins in a real estate transaction, and he informed Hopkins, Folkens, and Judge Brogdon of the conflict. On March 9, 1999, Harrell's counsel wrote to Hopkins to inform him that he had appeared at a roster meeting before Judge Floyd and had advised the court that the matter had not been mediated because of the conflict. Judge Floyd directed the clerk of court to assign a mediator.

Eventually another mediator was assigned, and the case was scheduled for mediation on June 25, 1999. This date was rescheduled to July 15, 1999 and notice was sent to all parties on June 10th. Hopkins failed to appear at the mediation meeting on July 15th and did not provide notice to either the mediator or Harrell that he would not be in attendance. On July 20, 1999, Harrell filed another motion to dismiss based on Hopkins's failure to comply with Judge Brodgon's order of November 9, 1998 regarding discovery and mediation. The same day, Harrell's counsel filed a certificate of mailing with the circuit court verifying the motion had been mailed to Hopkins on that date.

A hearing on Harrell's motion to dismiss was held by Judge Brogdon. Hopkins appeared at the hearing and argued the motion should not be heard because he allegedly did not receive notice of the motion. Hopkins further

[1] Miles eventually settled with Hopkins and is not a party to this appeal.

argued the action should not be dismissed because he did not intentionally fail to attend the mediation on July 15, 1999. Hopkins informed the court that he had been on vacation and the envelope containing the notice had been mistakenly placed inside a magazine. Hopkins maintained he did not find the notice of the mediation meeting until some three hours after the mediation was scheduled.

On September 9, 1999, Judge Brogdon filed an order dismissing the case with prejudice. The court concluded Hopkins had failed to comply with the November 9, 1998 order directing the parties to complete discovery and schedule mediation. The court noted the case had been pending since 1996 and Hopkins had made no effort to arrange mediation, nor had he responded to any attempts by Harrell to schedule the mediation. Hopkins appeals from the dismissal order.

LAW/ANALYSIS

I.

Hopkins first asserts the circuit court erred in dismissing this action because it did not have the authority to order the parties to engage in mediation. He contends the action was filed on March 8, 1996 and therefore was not subject to the mandatory Circuit Court Alternative Dispute Resolution Rules established by the South Carolina Supreme Court because the rules are applicable only to cases filed on or after March 15, 1996.

We conclude this argument is not properly before us for consideration on appeal. There is no indication in the record that Hopkins ever appealed the ruling requiring mediation or that he ever raised this issue to the circuit court during the three years the case was pending until after the action was dismissed. Hopkins never made this argument at the hearing held on Harrell's motion to dismiss and only belatedly raised the issue in his Rule 59(e), SCRCP motion to alter or amend the judgment.[2]

[2] See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on

Additionally, we reject Hopkins's contention that the argument is nevertheless appropriate for review because it involves a question of subject matter jurisdiction, which can be raised at any time. "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'"[3] It is clear the circuit court had subject matter jurisdiction to hear and determine this type of action, which sought damages for the defective construction of a home.[4] Accordingly, we find no reversible error in this regard.

II.

Hopkins next argues the circuit court erred in hearing Harrell's motion to dismiss because he did not receive proper notice of the motion.

Rule 5(a) of the South Carolina Rules of Civil Procedure requires every written motion to be served upon all of the parties.[5] The rule further provides

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appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) (noting an alleged error must be raised to and ruled upon by the trial court to be preserved); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

[3] Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (citation omitted).

[4] Cf. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 184, 561 S.E.2d 659, 662 (Ct. App. 2002) ("There is a difference between a want of jurisdiction, in which case the court has no power to adjudicate, and a mistake in the exercise of undoubted jurisdiction, in which case the court's action is not void, but is subject to direct attack on appeal.").

[5] Rule 5(a), SCRCP.

service may be accomplished by mailing the motion to the last known address of the party.[6]

Harrell's motion to dismiss is accompanied by a certificate of mailing filed with the circuit court which indicates the motion was mailed to Hopkins on July 20, 1999. The circuit court noted the certificate of service by mail was proper and that Hopkins had admittedly received a similar motion to dismiss from the co-defendant, Miles, raising the same grounds. We find no reversible error in the circuit court's determination that service was properly made in this case.[7]

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.

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[6] Id. Rule 5(b)(1).

[7] See id. ("Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint."); Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (Ct. App. 1998) (citing Rule 5(b)(1) and holding service of a hearing notice was complete when deposited in the United States mail with a proper address and sufficient postage); see also State v. Langston, 275 S.C. 439, 272 S.E.2d 436 (1980) (noting there is a rebuttable presumption of delivery which arises from evidence that a notice was properly mailed).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Landrum, Appellant,

v.

Michael James Sarratt, Respondent.

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

Opinion No. 3569
Heard September 18, 2002 – Filed November 18, 2002

REVERSED

Harold Lloyd Howard, of Landrum; for Appellant

Ricky Keith Harris, of Spartanburg; for Respondent.

CURETON, J.: Michael J. Sarratt was charged with public disorderly conduct. Sarratt waived his right to a jury trial and requested a bench trial. The municipal judge convicted Sarratt and ordered him to pay a fine of $112

or serve 20 days imprisonment. Sarratt appealed to the circuit court. The circuit court reversed the conviction. The City of Landrum appeals. We reverse.

FACTS

Sarratt was arrested for yelling profanities at Franklin Keith Hembree and his mother, June Hembree, as they left the Landrum Municipal Court and walked across the municipal parking lot. Franklin testified Sarratt called him a crack head, loudly yelled profanities, and called his mother a "bitch." June testified Sarratt called her names and used the "f" word.

ISSUE

Whether the circuit court erred in reversing Sarratt's conviction, finding that although Sarratt used profanity in a public place, profane language alone is insufficient to constitute a violation of the public disorderly conduct statute.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, this court may review errors of law only." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (internal citations omitted), cert. denied, Mar. 22, 2002 .

LAW/ANALYSIS

S.C. Code Ann. § 16-17-530 provides:

> Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use

> obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

S.C. Code Ann. § 16-17-530 (1985). The circuit court found that "profane language alone cannot constitute a violation of the public disorderly conduct statute in light of the First Amendment to the Constitution of the United States." Rather, the circuit court found that profane language must be accompanied by fighting words or other behavior such as gross intoxication.

The First Amendment prohibits laws that abridge the freedom of speech. U.S. Const. amend. I; S.C. Const. art. I, § 2. There are, however, certain classes of speech that are not afforded the protection of the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

One such class of speech, fighting words, is defined as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572. Fighting words must be inherently likely to induce the ordinary person to react violently. Cohen v. California, 403 U.S. 15, 20 (1971). The fact that words are vulgar or offensive is not alone sufficient to classify them as fighting words, thereby removing them from the protection provided by the First Amendment. See Gooding v. Wilson, 405 U.S. 518, 527 (1972) (striking Georgia statute that, as construed, prohibited the use of words that disgraced or insulted the listener, but did not constitute fighting words); In re Louise C., 3 P.3d 1004, 1005-07 (Ariz. Ct. App. 1999) (holding juvenile's use of "f" word in argument with principal and another student over whether student had cheated her out of money, although offensive and unacceptable, did not constitute fighting words); Ware v. City & County of Denver, 511 P.2d 475, 475-76 (Colo. 1973) (stating "one man's vulgarity is another's lyric" and holding defendant's statement "f--- you" during political speech at university not fighting words); Downs v. State, 366 A.2d 41, 42-46 (Md. 1976) (stating the defendant's use of profanity and racial epithets in crowded, noisy restaurant in loud voice to fellow diners not fighting words as

not directed to anyone in particular; finding the use of the "f" word not punishable absent compelling reasons); City of Bismarck v. Schoppert, 469 N.W.2d 808, 811 (N.D. 1991) (in finding "f--- you" not fighting words the court stated: "It is . . . not a crime in this country to be a boor, absent resort to fighting words.").

However, the determination of whether profane words constitute fighting words depends upon the circumstances surrounding their utterance. Lewis v. City of New Orleans, 415 U.S 130, 135 (1974) (Powell, J., concurring). Some of the factors to consider in determining if profanity constitutes fighting words are the presence of bystanders, the accompaniment of other aggressive behavior, and whether the words are repeatedly uttered. See State v. Szymkiewicz, 678 A.2d 473, 475-79 (Conn. 1996) (finding fighting words where defendant repeatedly cursed police officer and store detective and threatened store detective, and uproar occurred in front of other customers who congregated to watch); State v. Hammersly, 10 P.3d 1285, 1287-89 (Idaho 2000) (finding adult in vehicle who yelled "shut your f---ing mouth, you b---- . . ." to 13 year old friend of adult's daughter and two other preteens on street used fighting words); State v. James M., 806 P.2d 1063, 1065-66 (N.M. Ct. App. 1990) (holding minor's repeated yelling of "f--- you" while flailing arms and pointing at another individual on a public sidewalk as a small crowd congregated constituted fighting words); In re S.J.N-K., 647 N.W.2d 707, 709-12 (S.D. 2002) (stating the context in which the language is used must be considered; finding minor's repeated use of "f--- you" and middle finger gesture toward a school principal and his family in a store parking lot, continuing while minor tailgated principal as principal drove away, constituted fighting words).

Whether a communication constitutes fighting words also "depends in large part on the addressee of the communications." Aviva O. Wertheimer, The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence, 63 Fordham L. Rev. 793, 813 (1994). In Cohen, the defendant's display of the words "F--- the Draft" on the back of his jacket were determined not fighting words. 403 U.S. at 20-22. The court determined "[n]o individual actually or likely to be present could reasonably have regarded the words on [Cohen's]

jacket as a direct personal insult." Id. at 20. The court explained that fighting words must be directed at someone in particular. Id.

In State v. Perkins, our supreme court concluded a conviction under section 16-17-530 required more than raised voices. 306 S.C. 353, 355, 412 S.E.2d 385, 386 (1991). Without fighting words, the defendants in Perkins could not be convicted. Id. Likewise, in State v. Pittman, this court stated if a defendant's "only disorderly behavior had been to use profanity, . . . he could not be arrested for public disorderly conduct." 342 S.C. 545, 548, 537 S.E.2d 563, 565 (Ct. App. 2000). Both of these cases, however, involved law enforcement personnel on the receiving end of the verbal abuse. See Perkins, 306 S.C. at 354, 412 S.E.2d at 386 (sheriff's department employee); Pittman, 342 S.C. at 546, 537 S.E.2d at 564 (sheriff's department officer). The Perkins court, relying on City of Houston v. Hill, noted the narrow application of the fighting words exception in cases involving words addressed to a police officer. Perkins, 306 S.C. at 354-55, 412 S.E.2d at 386. See City of Houston v. Hill, 482 U.S. 451, 462 (1987) (limiting the fighting words doctrine when the addressee, as a properly trained police officer, is reasonably expected to exercise a higher degree of restraint than the average citizen).

More recently, this court affirmed the trial court's denial of a defendant's motion for a directed verdict on his charge of disorderly conduct in violation of section 16-17-530. State v. LaCoste, 347 S.C. 153, 163-64, 553 S.E.2d 464, 470 (Ct. App. 2001), cert. granted, Feb. 25, 2002. LaCoste threw up his arms in a hostile manner and yelled obscenities at a police officer, insisting he would not comply with the officer's demands. After his arrest, LaCoste repeatedly shouted obscenities, challenging the officer, and taunting the officer and another officer regarding their lack of success in bringing him under control. This court found there was sufficient evidence to enable the trial court to deny LaCoste's motion for directed verdict. Id.

Applying the fighting words doctrine to the facts of this case, we agree with the magistrate and conclude Sarratt's remarks, accompanied with the loud manner in which they were spoken, constituted fighting words. We find Sarratt's language, especially once he directed vulgarities at Franklin's

mother, would incite an ordinary person to violence. Accordingly, the circuit court's order reversing Sarratt's conviction is

REVERSED.

SHULER, J., concurs.

HEARN, C.J., dissents in separate opinion.

HEARN, C.J.: Because I disagree with the majority that the evidence supports the finding that the statements uttered by Sarratt constitute fighting words, I respectfully dissent.

The United States Supreme Court has recognized the power of states to punish fighting words under carefully drawn statutes which do not infringe upon protected forms of speech. Gooding v. Wilson, 405 U.S. 518, 523, 92 S.Ct. 1103, 1107 (1972). The Court defines fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769 (1942). The majority correctly recognizes that the vulgarity or offensiveness of words is not by itself sufficient to classify them as fighting words. Wilson, 405 U.S. at 527, 92 S.Ct. at 1108. However, the majority holds the language used by Sarratt constituted fighting words finding that an ordinary person would be incited to violence in light of the comments made by Sarratt, the tone in which they were spoken, and the fact that vulgarities were directed at Mrs. Hembree. I believe the majority incorrectly reaches this conclusion because there is no evidence in the record suggesting that Sarratt's comments had any effect on the Hembrees other than to offend them. Absent evidence that Sarratt's statements tended to cause the Hembrees to react violently, his words do not fall within the narrowly tailored exception to protected speech set forth in Chaplinsky.

Cases interpreting Chaplinsky have made it clear that states may only prohibit speech that has "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." Wilson, 405 U.S. at 524, 92 S.Ct. at 1107 (emphasis added). See also Diehl v. State, 294 Md. 466, 474-75, 451 A.2d 115, 120 (1982) (stating fighting words are those that "would

produce an uncontrollable impulse to violence . . ."). "In effect, 'fighting' words have been recognized as having some social value and are punishable now not on a 'per se' basis, but only when there is a likelihood of imminent disturbance." Downs v. State, 278 Md. 610, 615, 366 A.2d 41, 44 (1976) (citations omitted). The mere use of profane or unpopular language is not enough. "Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances." Eaton v. City of Tusla, 415 U.S. 697, 700, 94 S.Ct. 1228, 1231 (1974) (Powell, J., concurring). This is the very nature of free speech in our society. The Supreme Court of Minnesota recognized the inherent difficulty in determining the relative offensiveness of any particular expression. The court stated,

> To begin with, curses, oaths, expletives, . . . and the whole vocabulary of insults are not intended or susceptible of literal interpretation. They are expressions of annoyance and hostility – nothing more. To attach greater significance to them is stupid, ignorant, or naive. Their significance is emotional, and it is not merely immeasurable but variable.

City of Saint Paul v. Morris, 258 Minn. 467, 481, 104 N.W.2d 902, 910 (1960). The court further noted that the emotional quality of words varies from time to time, from region to region, and as between social and cultural groups. Id.

Before one may be punished for spoken words, there must be evidence that the abusive utterance itself tended to incite an immediate breach of the peace. See Downs, 278 Md. at 618, 366 A.2d at 46 ("And, even if someone were offended by [the abusive statement], there was no evidence that any person was so aroused as to respond in a violent manner."). The State may not assume that provocative expressions will incite such violence. Rather, the State must carefully consider the surrounding circumstances to determine "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Texas v. Johnson, 491 U.S. 397, 409, 109 S.Ct. 2533, 2542 (1989) (refusing to accept the State's argument that it need only demonstrate a potential for breach of the peace). Certainly, words may convey anger and frustration and yet not rise to a level such as to provoke a violent reaction from the listener. Lewis v. City of New Orleans, 415 U.S. 130,

135, 94 S.Ct. 970, 973 (1974) (Powell, J., concurring). It is not enough that the words merely arouse anger or resentment. See Skelton v. City of Birmingham, 342 So.2d 933, 937 (Ala. Crim. App. 1976).

Here, the record shows only that a verbal exchange occurred between the parties during which profanity was used. Upon finding Sarratt guilty, the magistrate stated, "On the charge of public disorderly conduct the way I understand the law . . . is that it was loud and boisterous, there was cursing and all this . . . ." The magistrate makes no finding that there was an imminent risk of violence resulting from Sarratt's statements nor does the record suggest that any party involved was incited to react violently. Moreover, the officer who arrested Sarratt did so based only on statements given to him by the Hembrees, and he did not personally observe the altercation. Accordingly, it is impossible for the officer to have assessed whether the comments made by Sarratt, and circumstances under which they were made, were so abusive towards the Hembrees that an immediate violent reaction was imminent. See State v. James, 111 N.M. 473, 475, 806 P.2d 1063, 1065 (N.M. Ct. App. 1990) (considering the fact that the arresting officer felt it necessary to step between the arguing parties as evidence that a fight was likely to ensue).

While this court may find it deplorable that Sarratt directed abusive language towards Mr. Hembree and his mother, we must not predicate a conviction for such conduct on our view of poor taste. Instead, the evidence must show that there was an imminent risk of violent reaction to Sarratt's language. In the absence of such evidence, Sarratt's expressions, although profane in nature, are entitled to the protection granted by the First Amendment to the Constitution. Accordingly, I would affirm the circuit court's order reversing Sarratt's conviction.