The Supreme Court of South Carolina

In the Matter of Larry D. McDonald, Respondent.

ORDER

Respondent has filed a petition requesting to be placed on incapacity inactive status and requesting the appointment of an attorney to protect the interests of his clients.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of the Court.

IT IS FURTHER ORDERED that Eugene C. Covington, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Covington shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Covington may make disbursements from respondent's trust account(s), escrow account(s), operating account(s),

and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

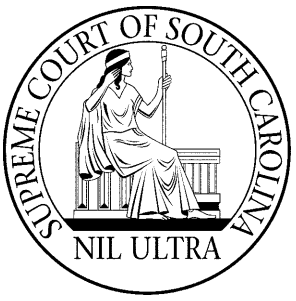
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution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

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

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

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina
February 24, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 3, 2003

ADVANCE SHEET NO. 8

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Beaufort County, South Carolina, Appellant,

v.

State of South Carolina and Richard W. Holtcamp, Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 25601
Heard January 8, 2003 – Filed March 3, 2002

AFFIRMED

James S. Gibson, Jr., Stephen P. Hughes, and Mary Bass Lohr, all of Howell, Gibson & Hughes, P.A., of Beaufort, for Appellant;

Wendy Bergfeldt Cartledge, of Columbia, for Respondent State of South Carolina;

Robert L. Widener and Erik P. Doerring, both of McNair Law Firm, of Columbia, for Respondent Richard W. Holtcamp.

JUSTICE BURNETT: Beaufort County appeals the circuit court's order granting summary judgment in favor of the State, finding S.C. Code Ann. § 27-32-240 (Supp. 2000) does not violate S.C. Const. art. X. We affirm.

FACTS

Beaufort County asserts S.C. Code Ann. § 27-32-240 violates S.C. Const. art. X. The State contends the statute is constitutional. The Circuit Court granted Richard Holtcamp ("Holtcamp") intervenor status and granted the State's motion for summary judgment.[1]

As no facts are in dispute, no party argues summary judgment was improper as a matter of law. The sole issue is whether § 27-32-240 violates S.C. Const. art. X.

DISCUSSION

Beaufort County argues Article X prohibits the legislature from using different methods to determine fair market value in two sub-classes of a particular class of property. We disagree.

Because this Court is reluctant to find a statute unconstitutional, every presumption is made in favor of its constitutionality. Knotts v. South Carolina Dep't of Natural Resour., 348 S.C. 1, 558 S.E.2d 511 (2002). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999), cert. denied 529 U.S. 1087, 120 S.Ct. 1719, 146 L.Ed.2d 641 (2000).

[1] Both Beaufort County and the State moved for summary judgment. Holtcamp filed a motion supporting the State's motion and opposing Beaufort County's motion. The circuit court granted the motion of State and Holtcamp. Beaufort County's motion for reconsideration was denied.

Beaufort County bears the burden of proving the statute unconstitutional. See Knotts, supra.

Beaufort County attempts to carry its burden by arguing the Legislature enacted § 27-32-240 in contravention of its limited powers under S.C. Const. art X, § 1 and S.C. Const. art. X, § 2(a). South Carolina's Constitution provides, in pertinent part:

> The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. **The assessment of all property shall be equal and uniform in the following classifications**:
> . . .
>
> (5) All other real property not herein provided for shall be taxed on an assessment equal to six percent of the fair market value of such property.

S.C. Const. art. X, § 1 (emphasis added).

It further provides:

> The General Assembly may define the classes of property and values for property tax purposes of the classes of property set forth in Section 1 of this article and establish administrative procedures for property owners to qualify for a particular classification.

S.C. Const. art. X, § 2 (a).

The statute at issue states:

> For purposes of property taxation, each time share unit, operating under a "vacation time sharing ownership plan" as defined in item (8) of § 27-32-10, must be valued in the same manner as if the unit were owned by a single owner. The total cumulative

> purchase price paid by the time-share owners for a unit may not be utilized by the tax assessor's offices as a factor in determining the assessed value of the unit. A unit operating under a "vacation time sharing lease plan" as defined in item (9) of § 27-32-10, may, however, be assessed the same as other income producing and investment property.

S.C. Code Ann. § 27-32-240 (1).

Beaufort County construes the sentence "[t]he assessment of all property shall be equal and uniform in the following classifications" in § 1 as mandating the Legislature value property in each subset of the section uniformly. Beaufort County relies upon this Court's previous decisions which provide: "The word 'assessment' used in the Constitution and the statutes means 'the value placed upon property for the purposes of taxation by officials appointed for that purpose.'" Meredith v. Elliot, 247 S.C. 335, 342, 147 S.E.2d 244, 247 (1966) (citing Owings Mills, Inc. v. Brady, 246 S.C. 361, 143 S.E.2d 717 (1965)); see also Simkins v. City of Spartanburg, 269 S.C. 243, 237 S.E.2d 69 (1977).

Beaufort County avers this definition clarifies the Constitution as requiring "[t]he [value placed upon property for the purposes of taxation] shall be equal and uniform in the following classifications. . ." As such Beaufort County believes the Legislature cannot require a local assessor to value similar property differently as is mandated by § 27-32-240.

The *ad valorem* tax is a product of three separate sets of numbers: the assessment ratio, the millage rate, and the fair market value of the property. *Ad valorem* taxes are calculated by multiplying the fair market value of a property by its assessment ratio to obtain the assessed value. The assessed value is then multiplied by the millage rate to determine the property tax owed. Homeowner's Guide to Property Taxes in South Carolina, South Carolina Dep't of Revenue 3; see also Newberry Mills Inc. v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972) (discussing assessment ratio, millage rate, values and calculation of property tax).

Three separate entities establish the three values. The millage rate is determined by local government. The South Carolina Constitution prescribes the assessment ratio. S.C. Const. art. X, § 1. The Legislature is empowered to prescribe the method of valuation to determine the fair market value of properties enumerated in § 1. See S.C. Const. art. X, § 2(a); South Carolina Tax Comm'n v. South Carolina Tax Bd. Of Rev., 305 S.C. 183, 407 S.E.2d 627 (1991) (Legislature is empowered to define value); South Carolina Tax Comm'n v. South Carolina Tax Bd. Of Rev., 278 S.C. 556, 299 S.E.2d 489 (1983).

Section 2 of Article X further confers upon the Legislature the power to "define the classes of property and values for property tax purposes of the classes of property set forth in Section 1." The section is logical only if read to allow the Legislature to define sub-classes of property for those classes enumerated in § 1 and to determine how each sub-class is valued for tax purposes. Section 2's grant of legislative power to "define the classes of property" would be meaningless were the intent of § 1 to treat all types of real property the same for tax purposes. Cf. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996) ("A statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object.").

Section 1 does not prohibit the Legislature from requiring different types of real property be valued the same. Instead, it requires each category of property enumerated retain the same assessment ratio as other property within its class. In other words, the South Carolina Constitution requires that an assessment ratio be applied to eight distinct classes of property, and that this assessment ratio must be uniform and equal to property within each class. The methodology to determine the **value** of the property remains a matter for the General Assembly.

Beaufort County's reliance on Meredith, Owings Mills, and Simkins, is misplaced. This Court in each case interpreted a version of Article X since amended. Under the previous Article X, the Legislature classified property, set the valuation method and set assessment rates. See S.C. Const. art. X (1976) ("The General Assembly shall provide by law for a

uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory. . . .”). The amended Article X removed the Legislature’s ability to set assessment rates in § 1 while maintaining its power to classify property for valuation purposes and to establish valuation methods under § 2.

Meredith, Owings Mill, and Simkins must be viewed in light of the former Article X. A closer reading of each opinion reveals this Court did not use the term “assessment” to refer to the valuation of property as Beaufort County insists. Instead, the term was used generically to refer to the three-step process to determine the taxable value of the property. Further, to read “assessment” to equal “value” is to ignore the explicit grant of power to the Legislature in § 2 to “define the classes of property and **values** for property tax purposes of the classes of property set forth in Section 1.” S.C. Const. art. X, § 1 (emphasis added).

Section § 27-32-240 does not violate S.C. Const. art. X. The Legislature is empowered to determine that a “vacation time sharing ownership plan” is valued differently from a “vacation time sharing lease plan” under the power granted by § 2.[2]

CONCLUSION

Accordingly, we **AFFIRM** the circuit court’s order.

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

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[2] Additionally, Judge Thomas Kemmerlin’s order correctly notes the intent of the Legislature in enacting § 27-32-240 was to statutorily prohibit the tax assessor from stacking the purchase price paid for each week of time for each time-share unit. Instead, the Legislature required an assessor to value only the underlying land and building itself. In doing so, the Legislature mandated that “time-share units are to be valued for tax purposes at what a single owner would pay for the unit, not the aggregate price paid by all owners.”

STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Raquib Abdul Al-Amin,

Appellant.

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

Opinion No. 3602
Heard January 14, 2003 – Filed March 3, 2003

AFFIRMED

Chief Attorney Daniel T. Stacey, of the SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka; and Solicitor Warren B. Giese, all of Columbia, for Respondent.

ANDERSON, J.: Raquib Al-Amin was convicted of murder. Al-Amin appeals alleging the Circuit Court erred in denying his motion for a directed verdict. Additionally, Al-Amin asserts he is entitled to a new trial because the Circuit Court allowed admission of his prior armed robbery conviction and excluded Al-Amin's testimony implicating third party guilt. We affirm.

FACTS/PROCEDURAL BACKGROUND

Around 3:30 p.m. on August 25, 1997, Michael Watkins, the manager of Churchill Place Apartments, was returning to the apartment complex and pulled into the parking lot. When Watkins looked out of his windshield, he noticed Al-Amin dragging something out of his apartment that was "consistent with being a [human] body" wrapped in a pink blanket. When Al-Amin became aware of Watkins watching him, he dragged the blanket back into his apartment. Watkins became suspicious. After he parked, Watkins decided to wait in his vehicle for several more minutes. About five minutes later, Al-Amin walked out of the apartment and noticed Watkins was still sitting in his vehicle. Al-Amin smiled at Watkins, waved his hand at him, and went upstairs as if nothing was going on. Within minutes, Al-Amin returned to his apartment.

After this incident, Watkins went to his office. At approximately 4:00 p.m., while in his office, Watkins observed Al-Amin walking across the catwalk from apartment 220, which was the victim's apartment. At 5:30 p.m., Watkins, still suspicious, checked the dumpster closest to Al-Amin's apartment. Watkins found the pink blanket which he had earlier seen Al-Amin dragging from his apartment. Watkins pulled aside part of the blanket and saw a human arm. He then called 911.

Officer Michael Mahon, with the City of Columbia Police Department, responded to the 911 call. Watkins advised Officer Mahon that he had seen Al-Amin dragging a body wrapped in a blanket from apartment four to the dumpster. Officer Mahon walked over to the dumpster and confirmed there was a body in the dumpster. Officer Mahon stated he could "see what looked like a patch of brown skin, maybe part of an arm or a leg." After verifying

there was a body in the dumpster, Officer Mahon called for an ambulance crew. Several officers arrived to help secure the scene and provide back-up.

Officer Dee Ann Johnson was present when the body was removed from the dumpster. According to Officer Johnson, "there was bleeding from the nose and there was a gash over [the victim's] left eye and also some marks on her neck." The coroner discovered a crack pipe in the crotch area of the victim's shorts.

Watkins related his story to the police. Thereafter, a warrant was obtained to search Al-Amin's apartment. While searching the apartment, the police found: a large construction bolt which had black electrical tape wrapped around the threaded end with the victim's blood on it; a shower curtain with human blood on it; carpet with human blood on it; a savings account bank book with Al-Amin's name on it; a box of checks with Al-Amin's name on them; and Al-Amin's bills with his name and the apartment's address on them.

At the autopsy, Investigator Walter E. Bales "noticed there was blunt trauma or striking injuries on the victim . . . [that] looked like they were caused by the head of [the] bolt" found in Al-Amin's apartment. The pathologist who performed the victim's autopsy testified there were four deep, full-thickness lacerations, which were all slightly curved, on the victim's face and head. When asked "[w]hat type of blow would cause injury all the way to someone's bone in their head," the pathologist opined: "That's an injury with significant force that is generally caused by a heavy object being swung with force." The pathologist further declared the victim had injuries to her neck that were "associated with someone who has been manually strangled" and that she most likely died of the strangulation, although the blows to the head were sufficient to have caused death.

Al-Amin was charged with murder. He was convicted and sentenced to life without parole.

LAW/ANALYSIS

I. Directed Verdict Motion

Al-Amin argues the Circuit Court erred when it denied his motion for directed verdict because the State failed to present sufficient evidence to convict him on the murder charge. We disagree.

In reviewing the denial of a motion for a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Morgan, ___S.C.___, 574 S.E.2d 203 (Ct. App. 2002). The trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Dudley, Op. No. 3579 (S.C. Ct. App. filed Dec. 9, 2002) (Shearouse Adv. Sh. No. 41 at 57). When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. 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 any direct or substantial circumstantial evidence of the offense charged. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

In this case, the State presented substantial circumstantial evidence pointing to Al-Amin's guilt. Watkins observed Al-Amin dragging something out of his apartment that was "consistent with being a [human] body" wrapped in a pink blanket. Watkins found this same pink blanket containing the victim's body in the dumpster closest to Al-Amin's apartment later that day.

Our courts have held that concealment of the body of a murdered person is a circumstance which tends to show guilt and should go to the jury to weigh the evidence. See State v. Ridgely, 251 S.C. 556, 164 S.E.2d 439 (1968); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946). In State v. Ridgely, the Supreme Court, quoting State v. Epes, discussed this principle:

> The facts in this case are similar in many respects to the facts in the case of State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946). In that case the accused reported to the police the disappearance of his wife and pretended to aid in search of her. Later he admitted that he had concealed her body and led the police to an improvised grave. It was his contention that his wife took an overdose of medicine and died as a result of it. In that case, as here, the law of circumstantial evidence was largely relied upon by the State. Referring to concealment of the body of a murdered person, this court said:
>
> > The general rule is that the concealment or the attempted destruction of a body of a person murdered is regarded as an incriminating circumstance and will be given probative force in connection with other facts. See Annotation, 2 A.L.R. 1227, and the numerous cases there cited to sustain this proposition; and also, Wigmore on Evidence, 2d Ed., Secs. 32, 172, 267, 272 and 276.
> >
> > The action of the appellant in concealing the body of his wife so as to divert suspicion from himself was a relevant circumstance tending to show guilt, and it was for the jury to estimate its weight, and it was for the jury to determine whether his explanation and the motive he assigned were truthful or otherwise. 39 S.E.2d at 777.

Id. at 565, 164 S.E.2d at 443 (internal quotation marks omitted); see also 40A Am. Jur. 2d Homicide § 462 (1999) (concealment or attempted destruction of body of murder victim is regarded as incriminating circumstance and will be given probative force in connection with other facts; an inference of guilt may be drawn therefrom). Cf. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (attempted destruction of evidence is regarded as a relevant incriminating circumstance).

The police discovered a construction bolt with the victim's blood on it in the closet in Al-Amin's apartment. Investigator Bales testified that "the gouge marks into the victim's head looked like they were the same size as the head of that bolt." Dr. Sally A. Harding, the pathologist who performed the autopsy on the victim, described four deep injuries to the victim's face and head. Harding stated a heavy object being swung with force generally causes the types of injuries sustained by the victim. Harding declared three of the four injuries were 2.8 centimeters long, which is the same size as the bolt found in Al-Amin's apartment. When asked whether the bolt was consistent with the length of the injuries to the victim's head, Dr. Harding responded: "Yes, that would be consistent with the length of the injury and the type of implement that could have inflicted this type of full-thickness laceration." Harding observed marks on the victim's neck which were consistent with manual strangulation. At the time Al-Amin reported to the police station, he had scratches on the left side of his face, on his cheek and lips, which were indicative of a struggle.

Upon searching Al-Amin's apartment, the police noticed the apartment had been cleaned and there was a smell of mothballs about the apartment. Further, the police detected human blood on the shower curtain and carpet inside the apartment. Al-Amin's bed had no blanket or bedspread on it. Darryl Cunningham professed he saw Al-Amin with the victim in Al-Amin's apartment around 2:30 p.m. that day and that Al-Amin and the victim were alone when Cunningham left. At the scene, police observed that the victim's body was fairly limp and the blood was still wet and appeared to be fresh.

In addition, Al-Amin fled the scene. Flight from prosecution is admissible as evidence of guilt. See State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). "[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent." State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) (internal quotation marks omitted) (clarifying that while a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning it are allowed). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (evidence of flight has been held to constitute evidence of guilty knowledge and intent); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854

(1996) ("flight . . . is at least some evidence of guilt"); Thompson, 278 S.C. at 10-11, 292 S.E.2d at 587 (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

These facts, especially Al-Amin's apparent attempt to conceal the body and his flight from the scene, constitute substantial circumstantial evidence presented by the State to warrant submission of the case to the jury. The motion for directed verdict was properly denied.

II. Prior Armed Robbery Conviction

Al-Amin claims he is entitled to a new trial because the Circuit Court erred when it allowed the State to introduce evidence of Al-Amin's prior armed robbery conviction without making a probative value/prejudicial effect analysis. Al-Amin was convicted of armed robbery in 1988 and was released from confinement in 1991. He remained on parole until 1994. Al-Amin's trial and conviction occurred in 2000. Clearly, Al-Amin's release from confinement in 1991 falls within the ten-year time limit provided by Rule 609(b), SCRE.

The State argues that, since Al-Amin's prior armed robbery conviction fell within the time limits for admission, the Circuit Court could admit evidence regarding the armed robbery conviction without weighing the probative value against the prejudicial effect because armed robbery is considered a crime of dishonesty under Rule 609(a)(2), SCRE.

Rule 609, SCRE, which governs the admissibility of prior crimes to attack the credibility of a witness, provides:

> (a) **General rule**. For the purpose of attacking the credibility of a witness,
>
> > (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was

> convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> . . . .
>
> (b) **Time limit**. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

The question as to whether armed robbery is a crime of dishonesty in this state is novel. For guidance and edification, we look to the federal authorities and other state jurisdictions.

A. Rule 609(a)(2) in the Federal Jurisdictions

There is disagreement among federal circuit courts and state courts construing Rule 609(a)(2) as to which crimes are included. The disagreement revolves around whether convictions for theft crimes, such as larceny, robbery, and shoplifting, should be admitted under the rule as involving dishonesty or false statement.

A majority of the federal circuits and the Conference Committee for the federal rules limit crimes of dishonesty to those involving crimen falsi. See, e.g., United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978); United States

v. Ashley, 569 F.2d 975 (5th Cir. 1978); United States v. Carroll, 663 F. Supp. 210 (D. Md. 1986). "The original House-Senate Conference Committee Report explained that crimes involving dishonesty and false statement 'means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.'" 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 609.04[3][a] (Joseph M. McLaughlin, ed., 2d ed. 2002).

Crimen falsi means "the crime of falsifying." Black's Law Dictionary 379 (7th ed. 1999). Crimen falsi has been defined as "[a] crime in the nature of perjury"; "[a]ny other offense that involves some element of dishonesty or false statement." Id. Crimes involving crimen falsi include perjury, false statement, false pretense, criminal fraud, or embezzlement. See E. Warren Moise, Impeachment Evidence: Attacking and Supporting the Credibility of Witnesses in South Carolina 109 (1996). Convictions solely involving the use of force, such as assault and battery, or crimes such as public drunkenness or prostitution, generally are not admissible under Federal Rule 609(a)(2). Id.

Because the federal courts have adopted a narrow interpretation of the words "dishonesty or false statement" in Rule 609(a)(2), most have decided robbery is not a crime of dishonesty. See, e.g., United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (robbery per se is not a crime of dishonesty under the federal rule); United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995) (prior robbery convictions are not admissible for impeachment purposes under Rule 609(a)(2)); United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992) (bank robbery is not per se crime of dishonesty for purposes of rule allowing impeachment of witness by evidence that he has been convicted of crime involving dishonesty); United States v. Dunson, 142 F.3d 1213 (10th Cir. 1998) (prior conviction for robbery is not automatically admissible under Rule 609(a)(2)); United States v. Sellers, 906 F.2d 597, 603 (11th Cir. 1990) ("It is established in this Circuit . . . that crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statement' within the meaning of Rule 609(a)(2)."); see also Weinstein's Federal Evidence, §

609.04[3][c] ("robbery is generally held not to constitute a crime of dishonesty" under Rule 609 of the Federal Rules of Evidence); 1 Kenneth S. Broun et al., McCormick on Evidence § 42, at 161 (John W. Strong ed., 5th ed. 1999) ("[F]ederal courts and most state courts are unwilling to classify offenses such as petty larceny, shoplifting, [and] robbery . . . as per se crimes of 'dishonesty or false statement.'").

The precedent set by the federal circuit courts is not binding on this Court. See Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 569 S.E.2d 349 (2002), cert. granted, 123 S.Ct. 817 (Jan. 10, 2003). We decline to follow the federal courts' restrictive interpretation of the phrase "dishonesty or false statement" in Rule 609(a)(2).

B. Construction of Rule 609(a)(2) by Other State Courts

The majority of other state courts which have considered the question of whether robbery is a crime of dishonesty for purposes of Rule 609(a)(2) have answered in the affirmative. See Jane Massey Draper, Annotation, What Constitutes Crime Involving "Dishonesty or False Statement" Under Rule 609(a)(2) of Uniform Rules of Evidence or Similar State Rule – Crimes Involving Violence or Potential for Violence, 83 A.L.R. 5th 277 (2000) (listing in section 11 that Alaska, Illinois, Kansas, New Mexico, Pennsylvania, Tennessee, and Washington have found robbery to be a crime of dishonesty while Minnesota, North Dakota, and Utah have not).

Prior convictions, depending on the nature of the offense, may have different types of probative value relative to a witness's credibility. Crimes of dishonesty and those involving false statement have an obvious bearing on a defendant's credibility.

The Supreme Court of Alaska, in Alexander v. State, 611 P.2d 469 (Alaska 1980), concluded robbery was a crime of dishonesty under that state's very similar rule of evidence. The court stated: "Although robbery involves the additional element of force or putting in fear, it, like larceny, concerns the unlawful taking of something of value." Id. at 476 (footnotes omitted). In a footnote, the court further added: "It is the larceny element of

robbery which makes such a conviction admissible as impeachment of a witness." Id. at 476 n.18.

Although Connecticut has a test which is different from our Rule 609(a)(2), case law from that state is enlightening. In State v. Dawkins, 681 A.2d 989 (Conn. App. Ct. 1996), the Appellate Court of Connecticut elucidated:

> Two general categories of prior convictions are admissible for impeachment. "First are those crimes that by their very nature indicate dishonesty or tendency to make false statement. . . . The second category involves convictions for crimes that do not reflect directly on the credibility of one who has been convicted of them." It is recognized in Connecticut courts "that crimes involving larcenous intent imply a general disposition toward dishonesty such that they also fall within this [first] category. . . . Convictions of this sort obviously bear heavily on the credibility of one who has been convicted of them. The probative value of such convictions, therefore, may often outweigh any prejudice engendered by their admission." The prior convictions at issue here fall within the first category. Each involved a prior conviction for larceny.

Id. at 994 (citations omitted). Thereafter, in State v. Banks, 755 A.2d 279 (Conn. App. Ct. 2000), the Connecticut court reiterated:

> [Our Supreme Court] has recognized that **crimes involving larcenous intent imply a general disposition toward dishonesty** or a tendency to make false statements. . . . [Furthermore] **larceny, which is the underlying crime in any robbery, bears directly on the credibility of the witness-defendant.** Thus, in the present case, the defendant's prior convictions of larceny and robbery were highly probative of his truthfulness and veracity.

Id. at 289 (citation omitted) (internal quotation marks omitted) (emphasis added).

The Supreme Court of Delaware has "construed the phrase 'dishonesty or false statement' in D.R.E. 609 to mean that crimes involving dishonest conduct as well as crimes involving false statements are admissible for impeachment purposes." Gregory v. State, 616 A.2d 1198, 1204 (Del. 1992). See also Morris v. State, 795 A.2d 653, 665 (Del. 2002) (noting "'prior conviction[] for robbery . . . clearly ha[s] been determined by this Court to be [a] crime[] involving dishonest conduct'" under Rule 609(a)(2)).

The District of Columbia Court of Appeals, in Bates v. United States, 403 A.2d 1159 (D.C. 1979), noted that Congress, in legislating for the District of Columbia, had an expansive view of "dishonesty or false statement." The Bates court emphasized: "'The offenses which involve dishonesty or false statement and which may be used in the discretion of the cross-examining party include, but are not limited to, any offense involving fraud, or intent to defraud, larceny, robbery . . . .'" Id. at 1161.

In finding the trial court properly denied the defendant's motion to prohibit the introduction of his prior convictions for armed robbery, the Appellate Court of Illinois, in People v. Dee, 325 N.E.2d 336 (Ill. App. Ct. 1975), explained:

> While the crime of robbery involves an element of violence, this does not remove it from the category of crimes which involve dishonesty. Robbery is a form of stealing [and is a crime] which reflect[s] on the honesty and integrity of the perpetrator. Robbery is not a crime of passion or violence done in response to some form of provocation. It is generally a preplanned crime designed to steal property from a person in rightful possession. We are of the opinion that a prior conviction for the crime of robbery, whether armed or otherwise, is probative of the perpetrator's honesty and veracity as a witness.

Id. at 341-42; see also People v. Paul, 710 N.E.2d 499 (Ill. App. Ct. 1999) (armed robbery has been treated as a crime of dishonesty); People v. Thomas, 580 N.E.2d 1353 (Ill. App. Ct. 1991) (robbery is a crime of dishonesty for Rule 609 impeachment purposes; stating that robbery is a veracity-related

crime and a conviction thereof is probative of defendant's credibility); People v. Harris, 580 N.E.2d 1342 (Ill. App. Ct. 1991) (theft-related offenses, such as armed robbery, obviously involve dishonesty and arguably reflect on a person's likelihood of telling the truth when testifying as a witness).

The Supreme Court of Kansas examined the issue in State v. Thomas, 551 P.2d 873 (Kan. 1976):

> [R]obbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness had no compunctions against stealing another's property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony. Furthermore, such criminal acts, although evidenced by a single conviction, may represent such a marked breach from sanctioned conduct that it affords a reasonable basis of future prediction upon credibility.

Id. at 876 (internal quotations omitted); see also State v. Davis, 874 P.2d 1156 (Kan. 1994) (noting that cross-examination of defense witness concerning prior robbery conviction was proper impeachment because robbery is a crime of dishonesty under the applicable Kansas Rule of Evidence).

In State v. Johnson, 460 N.E.2d 625 (Ohio Ct. App. 1983), the Court of Appeals of Ohio discussed the dishonesty prong of that state's Rule 609:

> [D]efendant contends that "dishonesty," as used in the rule, is limited to *crimen falsi*, namely, fraud, perjury and similar offenses.
>
> While there is some support for defendant's position in some federal cases, courts of some states have defined "dishonesty" in a much broader sense so as to include theft

> offenses. Although there is some suggestion of limitation in the Staff Notes to the rule, it is inconceivable that the drafters of the rule would not have been more precise and used more limiting language, such as *crimen falsi* or fraud, had such a limitation been intended, rather than using the much broader term "dishonesty." Clearly and undisputedly, a theft is inherently dishonest. Common sense dictates that stealing is a dishonest act. While dishonesty also includes deceit, it is not limited thereto. . . . Since a theft offense could be used to impeach under the common law, and in common parlance theft involves dishonesty, we are constrained to the common-sense conclusion that dishonest acts such as receiving stolen property and stealing are included within the meaning of the word "dishonesty," as used in Evid. R. 609(A)(2).

Id. at 629 (citations omitted). See also State v. Rogers, No. 77723, 2000 WL 1714912, at *3 (Ohio Ct. App. Nov. 16, 2000) ("Ohio courts have consistently held that theft, robbery and aggravated robbery are crimes of dishonesty and, therefore, a conviction for theft can be used for impeachment."); State v. Tolliver, 514 N.E.2d 922 (Ohio Ct. App. 1986) (theft offenses are crimes of dishonesty within meaning of Rule 609 and may be used to impeach credibility of witness).

State v. Goad, 692 S.W.2d 32 (Tenn. Crim. App. 1985), a case decided by the Court of Criminal Appeals of Tennessee, is particularly instructive:

> The defendant's contention that a previous armed robbery conviction cannot be used for the purposes of impeachment because it is not a crime involving dishonesty is without merit or support in the law of this state.
>
> In State v. Fluellen, 626 S.W.2d 299 (Tenn. Crim. App. 1981), this Court held that armed robbery could be used to test the credibility of a testifying defendant because it was a form of larceny, a crime which involves dishonesty. The Supreme Court of this State held in State v. Martin, 642 S.W.2d 720 (Tenn.

1982), that a conviction for an attempt to commit armed robbery fell within the dishonesty classification.

. . . .

To convince us that armed robbery is not a crime of dishonesty, the defendant cites us to United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), which held that armed robbery is not admissible for impeachment purposes because it does not involve dishonesty. We think that Court failed to recognize an essential element of armed robbery or an attempt to commit the offense. An essential element of robbery is that the perpetrator of the offense steals the goods and chattels of another or, in the case of an attempt to commit robbery, intends to steal the goods or chattels of the person assaulted. If this element is not present, the crime is not robbery or an attempted robbery. Stealing is defined in law as larceny. Larceny involves dishonesty. The fact that the perpetrator of the crime manifests or declares his dishonesty by brazenly committing the crime does not make him an honest person. We hold, as has been previously held, that convictions for these offenses are admissible in this state for impeachment purposes.

Id. at 37; see also State v. Galmore, 994 S.W.2d 120, 122 (Tenn. 1999) ("Robbery is a crime involving dishonesty and may be used for impeachment purposes."); State v. Caruthers, 676 S.W.2d 935 (Tenn. 1984) (armed robbery involves dishonesty).

Appellate entities in Washington have likewise recognized that robbery is a crime involving dishonesty. The Court of Appeals of Washington illuminated:

Although robbery involves assaultive behavior, it also involves theft. We see no merit to the argument that a person's propensity to give false testimony may be shown only by instances of past lying; for it is a fact of life that in many situations, actions speak more loudly than words. Robbery is not

> considered an "honest" endeavor by society and is not so viewed by this court. . . . [W]e hold that robbery is a crime involving dishonesty. As such, the defendant's conviction was admissible for impeachment purposes under the plain language of ER 609(a)(2) and the trial court did not err in so ruling in response to the defendant's motion in limine at the outset of the trial.

State v. Turner, 665 P.2d 923, 925 (Wash. Ct. App. 1983). In a later case holding that robbery was a crime involving dishonesty and, thus, admissible under Rule 609(a)(2), the Court of Appeals of Washington declared "[t]he taking of the property of another whether by stealth, subterfuge, fraud or by threat or force is dishonest and bears on the credibility of an accused." State v. Saldano, 675 P.2d 1231, 1235 (Wash. Ct. App. 1984). See also State v. Rivers, 921 P.2d 495, 498 (Wash. 1996) ("Two of Defendant Rivers' prior crimes, robbery and attempted robbery, involved dishonesty and therefore were per se admissible for impeachment purposes under [Rule] 609(a)(2)."); State v. Brown, 782 P.2d 1013, 1031 (Wash. 1989), opinion corrected on other grounds, 787 P.2d 906 (Wash. 1990) ("[W]e include robbery as per se admissible under [Rule] 609(a)(2) because it is not purely an assaultive crime, but also involves the larcenous taking of property.").

Courts in Florida, Mississippi, New Mexico, Oregon, and Pennsylvania have held that robbery is a crime of dishonesty within the meaning of Rule 609(a)(2). See, e.g., State v. Page, 449 So. 2d 813 (Fla. 1984) (finding that any offense falling within the scope of Chapter 812, which deals with "Theft, Robbery, and Related Crimes," of the Florida Statutes, necessarily involves "dishonesty" so as to bring any conviction for such crime within the scope of Florida's version of Rule 609(a)(2)); Ruttley v. State, 746 So. 2d 872 (Miss. Ct. App. 1998) (pointing out that robbery conviction may be introduced pursuant to M.R.E. 609(a)(2) as crime of "dishonesty" for purpose of impeaching defendant's credibility as witness in his own behalf); State v. Day, 617 P.2d 142 (N.M. 1980) (noting cross-examination of defendant concerning prior robbery conviction was permissible under Rule 609 in light of fact that robbery involves dishonesty); State v. Sims, 692 P.2d 575, 576 (Or. 1984) (stating "[a]rmed robbery is a crime involving dishonesty and is relatively high on the credibility scale"; rule is similar to South Carolina rule); Commonwealth v. Strong, 563 A.2d 479 (Pa. 1989) (holding

Commonwealth may use robbery conviction to impeach defendant's credibility because robbery involves element of dishonesty); Commonwealth v. Jackson, 561 A.2d 335 (Pa. Super. Ct. 1989), aff'd, 585 A.2d 1001 (1991) (finding trial court properly allowed defendant to be impeached with his prior conviction for robbery because robbery is deemed to be a crime that involves dishonesty).

On the other hand, appellate courts in Minnesota, North Dakota, Utah, and West Virginia have determined that a prior conviction for robbery is not automatically admissible under Rule 609(a)(2). See, e.g., State v. Sims, 526 N.W.2d 201 (Minn. 1994) (stating that prior convictions for robbery and aggravated robbery did not directly involve dishonesty and false statement, so as to make evidence of such prior offenses automatically admissible for impeachment purposes under Rule 609(a)(2); rather, offenses were admissible in trial court's discretion under Rule 609(a)(1)); State v. Bohe, 447 N.W.2d 277 (N.D. 1989) (making clear that conviction for armed robbery does not necessarily indicate a propensity toward testimonial dishonesty and is not automatically admissible under Rule 609(a)(2)); State v. Lanier, 778 P.2d 9 (Utah 1989) (finding defendant's prior conviction for robbery was not crime of "dishonesty or false statement" within meaning of Rule 609(a)(2), unless it was committed by fraudulent or deceitful means bearing directly on the defendant's likelihood to testify truthfully); State v. Morrell, 803 P.2d 292 (Utah Ct. App. 1990) (declaring that crime of robbery does not automatically qualify for admission under Rule 609(a)(2)); State v. Rahman, 483 S.E.2d 273 (W. Va. 1996) (noting that robbery is not a per se crime of dishonesty; evidence that a witness has been convicted of a crime is admissible for purpose of impeachment under Rule 609 when underlying facts show crime involved dishonesty or false statement).

C. Is Armed Robbery a Crime of Dishonesty Under Rule 609(a)(2), SCRE?

The Court of Appeals, in State v. Shaw, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997), previously determined shoplifting was a crime of dishonesty for purposes of Rule 609(a)(2), SCRE. The Court concluded:

> Although we are aware that some federal courts have held a defendant may not be impeached on a prior shoplifting conviction, we prefer to align ourselves with those state courts that hold shoplifting to be a crime that involves dishonesty *per se*. Common sense tells us that anyone who, in violation of the shoplifting statute, takes and carries away a storekeeper's merchandise with intent to deprive the owner of its possession without paying for it, or alters or removes a label or price tag in an attempt to buy a product at less than its value, or transfers merchandise from its proper container for the purpose of depriving a storekeeper of its value acts dishonestly. We, therefore, hold a prior conviction for shoplifting can be used to impeach a witness under Rule 609(a)(2), SCRE. See Webster's New Universal Unabridged Dictionary 525 (Deluxe 2d ed. 1983) (defining the word "dishonesty" to mean "deceiving, stealing, etc.").

Id. at 456-57, 492 S.E.2d at 403-04 (footnotes omitted).

Armed robbery occurs when a person commits robbery either while armed with a deadly weapon or while the person was alleging he was armed and was using a representation of a deadly weapon. S.C. Code Ann. § 16-11-330 (Supp. 2001). Our statutory scheme provides that the crime of robbery is defined by the common law. See S.C. Code Ann. § 16-11-325 (Supp. 2001). Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002); Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002). "The common-law offense of robbery is essentially the commission of larceny with force." State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent. See Broom v. State, 351 S.C. 219, 569 S.E.2d 336 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). To convict of larceny, the State must show the defendant took the property and carried it away with intent to steal it. State v. Posey, 88 S.C. 313, 70 S.E. 612 (1911). "In common parlance[,] larceny is just plain stealing." State v. Roof, 196 S.C. 204, 209,

12 S.E.2d 705, 707 (1941); see also Gill v. Ruggles, 95 S.C. 90, 78 S.E. 536 (1913) (noting that "stealing" is the popular word for the technical word "larceny").

We find the same logic by which we recognized shoplifting to be a crime of dishonesty applies to armed robbery. It is the larcenous element of taking property of another which makes the action dishonest. Larceny is a lesser-included offense of armed robbery. See State v. Parker, 351 S.C. at 570-71, 571 S.E.2d at 290; State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989). Larceny is also implicit within the crime of shoplifting.

To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a "'disposition to lie, cheat, or **steal**.'" United States v. Papia, 560 F.2d 827, 845 (7th Cir. 1977) (citing Random House College Dictionary 380 (abr. ed. 1973)) (emphasis added); see also Webster's New Twentieth Century Dictionary 525 (2d ed. 1983) (defining "dishonesty" as "deceiving, **stealing**, etc.") (emphasis added). "To be dishonest means to deceive, defraud or **steal**." State v. Saldano, 675 P.2d 1231, 1236 (Wash. Ct. App. 1984) (citing Oxford English Dictionary (1969)) (emphasis added). See also Gregory v. State, 616 A.2d 1198, 1204 (Del. 1992) (defining the term "dishonesty" as "the act or practice of lying, deceiving, cheating, **stealing** or defrauding.") (emphasis added). "'In common human experience[,] acts of deceit, fraud, cheating, or **stealing** . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity.'" Bogard v. State, 624 So. 2d 1313, 1317 (Miss. 1993).

We hold that armed robbery is a crime of dishonesty under Rule 609(a)(2). In concluding armed robbery is a crime of dishonesty under Rule 609(a)(2), we are in agreement with the majority of other state courts which have considered the question of whether robbery is a crime of dishonesty for purposes of Rule 609(a)(2).

D. No Requirement of Probative Value/Prejudicial Impact Analysis under Rule 609(a)(2)

Having concluded that armed robbery is a crime of dishonesty under Rule 609(a)(2), SCRE, we consider whether there is any requirement for the court to engage in a probative value/prejudicial impact analysis. Rule 609(a)(1) mandates for non-"dishonesty crimes" that, prior to admission, the court must determine the probative value outweighs prejudicial effect to the accused.

Rule 609(a)(2), by contrast, clearly limits the discretion of the court by mandating the admission of crimes involving dishonesty without any determination as to a balancing test. See United States v. Morrow, 977 F.2d 222 (6th Cir. 1992).

Commentators have stated that "[t]he court must admit evidence that a witness has been convicted of a crime that involved dishonesty." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 609.04[1] (Joseph M. McLaughlin, ed., 2d ed. 2002) (emphasis added). "[M]ost courts held that the trial court lacks discretion under Rule 403 to exclude crimes of dishonesty. Thus, an opponent has the absolute right to impeach a witness by introducing a prior conviction involving dishonesty." Id.; See, e.g., United States v. Kuecker, 740 F.2d 496 (7th Cir. 1984) (under Federal Rule of Evidence 609(a)(2), any prior conviction involving dishonesty is admissible to impeach witness's credibility without recourse to Rule 403 balancing); see also 1 Kenneth S. Broun et al., McCormick on Evidence § 42, at 159-60 (John W. Strong ed., 5th ed. 1999) ("Crimes involving 'dishonesty or false statement,' . . . do not require balancing of probative value against prejudice; under 609(a)(2), they are automatically admissible."). "A conviction that does not involve dishonesty . . . may be admitted only after the court has performed the appropriate balancing test." Weinstein's Federal Evidence, § 609.04[1] (emphasis added).

We hold Rule 609(a)(2) provides for automatic admission of evidence of a prior crime of dishonesty without the balancing of probative value against prejudicial effect. This conclusion is supported by the juxtaposition of Rule 609(a)(1) and Rule 609(a)(2). There is absolutely no language in

Rule 609(a)(2) compelling a balancing test for admission in regard to a crime of dishonesty.

While crimes punishable by death or imprisonment in excess of one year require the court to determine whether the probative value of such evidence outweighs the prejudicial effect, no such balancing need occur when the crime is one involving dishonesty or false statement. These crimes are automatically admissible for impeachment purposes because they have the greatest probative value on the issue of truth and veracity.

In the instant case, the trial court did not err in admitting Al-Amin's prior armed robbery conviction without making a determination that the probative value outweighed the prejudicial effect. This balancing test was not required because armed robbery is a crime of dishonesty within the meaning of Rule 609(a)(2).

III. Third Party Guilt

Al-Amin contends he is entitled to a new trial because the Circuit Court erred when it excluded evidence that (1) James Conyers, who lived in the apartment with the victim, had been evicted; and (2) DNA testing had excluded Al-Amin as a source of DNA obtained from a sperm fraction that had been taken from the victim. Al-Amin maintains the Circuit Court's exclusion of this evidence deprived him of his right to present a defense. We disagree.

In the instant case, Al-Amin sought to admit the proffered testimony of Officer Joe Philip Smith. Al-Amin wished to establish that Conyers had been evicted. During the proffer, in addition to testifying regarding the living situation of Conyers and the victim, Officer Smith stated that the first place the police look for a suspect, once a murder victim has been identified, is "in her immediate family or immediate surroundings." The judge excluded this testimony.

Thereafter, Al-Amin sought to present evidence that DNA testing demonstrated Al-Amin was excluded as the source of DNA obtained from a

sperm fraction on a vaginal slide taken from the victim. The court allowed a proffer, but excluded the evidence.

This Court addressed the issue of third party guilt in State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). Mansfield was charged with attempted first degree burglary and sought to introduce evidence that another man who lived in the apartment complex where the defendant was found and was home that day also matched the victim's description of the person who committed the crime. In upholding the Circuit Court's decision to exclude the evidence, the Court of Appeals held:

> Our Supreme Court has imposed strict limitations on the admissibility of third-party guilt. Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt. The evidence must raise a reasonable inference as to the accused's innocence.

Id. at 81, 538 S.E.2d at 265 (citations omitted). The Court concluded:

> [The proffered] evidence casts a mere "bare suspicion" on [the other man]. The fact that [the other man] generally fit the description of the perpetrator and lived in the apartment complex does not show his guilt, nor is it inconsistent with [the defendant's] guilt. Because the evidence was not inconsistent with [the defendant's] own guilt, the trial court exercised sound discretion in excluding it.

Id. at 85-86, 538 S.E.2d at 267.

The Mansfield Court discussed State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), which articulated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence;

> evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id. at 104-05, 16 S.E.2d at 534-35 (internal quotations and citations omitted).

Here, the trial judge did not err in excluding this testimony. There is no evidence tying Conyers to the murder other than the fact that he and the victim were roommates. Testimony regarding whether Conyers had been evicted was not relevant. Furthermore, information as to where the police generally begin looking for perpetrators in a homicide investigation is irrelevant to Al-Amin's guilt and, at most, would merely cast a "bare suspicion" upon Conyers. The evidence Al-Amin sought to admit does not show Conyers's guilt nor is it inconsistent with Al-Amin's culpability and presents an even weaker case for admissibility than the evidence in Mansfield. Moreover, by Al-Amin's own admission, he was in the victim's immediate surroundings on the date of her death.

Additionally, the refusal by the court to admit negative DNA evidence concerning sperm in the victim and the fact that the sperm did not belong to Al-Amin was proper. There was no assertion that the victim was sexually assaulted by the perpetrator. In his brief, Al-Amin alleges the fact that a crack pipe was recovered from the victim's crotch area "made it reasonable to infer that there was a sexual component to the crime" and that evidence excluding Al-Amin as the sperm donor was relevant and reasonably indicated his innocence. This assertion is implausible and conjectural.

The evidence offered by Al-Amin was not inconsistent with his own guilt, nor did it raise a reasonable inference or presumption as to Al-Amin's innocence. The trial judge exercised sound discretion in excluding it.

CONCLUSION

Accordingly, based on the foregoing reasons, Al-Amin's conviction is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of John Foley Kennedy, Appellant.

Appeal From Laurens County
John W. Kittredge, Circuit Court Judge

Opinion No. 3603
Heard January 15, 2003 - Filed March 3, 2003

AFFIRMED

Elizabeth Fielding Pringle, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Deputy Attorney General Treva Ashworth, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Steven G. Heckler, all of Columbia; for Respondent.

HEARN, C.J.: The State petitioned to have John Foley Kennedy committed to the Department of Mental Health (DMH) as a sexually violent predator under S.C. Code Ann. § 44-48-100 (Supp. 2001). After a bench

trial, the court found beyond a reasonable doubt that Kennedy was a sexually violent predator and committed him to the DMH. We affirm.

FACTS

In March 1991, Kennedy pleaded guilty to committing a lewd act on a child and received a suspended sentence. The sentence was later revoked. In 1996, he entered two Alford pleas to committing a lewd act on a child under the age of fourteen. The first victim was a young girl, approximately two years of age. The second victim was a boy about one year old. He was sentenced to six years incarceration suspended upon service of five years probation.

On January 5, 1999, the State petitioned for a finding of probable cause that Kennedy was a sexually violent predator. On July 26, 1999, the judge entered an order finding probable cause existed and ordered that Kennedy be taken into custody. After a probable cause hearing, Kennedy was ordered to undergo a psychiatric evaluation. Kennedy was evaluated by the State's expert witness, Dr. Donna Schwartz-Watts, in August 1999, and by his own expert witness, Dr. Harold Morgan, in November 1999. A non-jury trial was held on May 23, 2000, at which Kennedy was found to be a sexually violent predator. He was committed to the DMH for his long-term control, care, and treatment.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Thus, this court must affirm if there is any evidence to support the trial court's findings.

DISCUSSION

Kennedy contends the trial court erred in committing him to the DMH because the State failed to prove beyond a reasonable doubt he was a sexually violent predator and could not control his behavior.[1] We disagree.

I. State's Proof That Kennedy Was a Sexually Violent Predator

Kennedy argues there was ample evidence to support a finding that he was not a sexually violent predator. S.C Code Ann. § 44-48-30(1) (Supp. 2000) provides that a sexually violent predator is a person who:

> (a) has been convicted of a sexually violent offense; and
> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Addressing the first prong of the statute, it is clear that Kennedy's convictions for committing a lewd act on a child under the age of fourteen is a sexually violent offense as enumerated in S.C. Code Ann. § 44-48-30(2)(k) (Supp. 2002). Therefore, we must look at the second prong to determine if Kennedy suffers from a mental abnormality[2] that would make him likely to engage in acts of sexual violence.

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[1] We note that the State conceded at oral argument that Kennedy's issues were preserved for review by this court pursuant to Norell Forest Products v. H & S Lumber Co., 308 S.C. 95, 99, 426 S.E.2d 96, 99 (Ct. App. 1992), rev'd in part on other grounds, 310 S.C. 368, 426 S.E.2d 800 (1993).

[2] Under the Act, "mental abnormality" is defined as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(4) (Supp. 2002).

In support of his argument, Kennedy asserts that because he passed the Penal Plethysmography (PPG) test, which is used to test sexual arousal to children, this was the best evidence that he would not re-offend. He also contends that he sought treatment while in prison and voluntarily inquired of his probation officer about possible treatment programs. He further notes that he was released for a period of approximately seven months without incident before he was arrested pursuant to the Act, and that he had consistently and successfully abided by the terms of his probation.

However, there is evidence to support the trial judge's finding beyond a reasonable doubt that Kennedy was a sexually violent predator. During trial, the State offered the testimony of Dr. Donna Schwartz-Watts regarding Kennedy's psychiatric illness and possible treatments. She found that Kennedy suffered from pedophilia, frotteurism[3], and anxiety disorder. She testified that pedophilia is a lifelong illness, and most significant to our analysis, she stated that Kennedy had the propensity to commit future acts on children because of the illness.

Dr. Schwartz-Watts also testified that due to Kennedy's continuing denial of the events, he is less likely to pursue outpatient treatment and therefore needs the supervision of inpatient treatment. She further testified that the only comprehensive program in the state is the inpatient program through the DMH. Dr. Harold Morgan, Kennedy's court-appointed psychiatrist, also opined that Kennedy would benefit from some type of treatment. Dr. Morgan stated that he knew of outpatient treatment in Greenville, but did not know of specific programs anywhere else. He also agreed that there would be no guarantee that Kennedy would not reoffend while in an outpatient program.

While there may be some evidence supporting Kennedy's claim that he is not a sexually violent predator, including a normal PPG test result, there is more than enough evidence to support the decision reached by the trial court. Moreover, our supreme court has previously noted that such arguments concerning evidence that an individual was not a sexually violent

[3] Frotteurism is the non-consenting touching of another person's buttocks.

predator go to the weight of the evidence and not its sufficiency. In re Matthews, 345 S.C. 638, 647, 550 S.E.2d 311, 315 (2001), cert. denied by Matthews v. South Carolina, ___ U.S. ___, 122 S. Ct. 1928 (May 13, 2002). Therefore, in light of our limited scope of review, we find the trial court did not err in concluding Kennedy was a sexually violent predator and in committing him to the DMH for treatment.

II. Proof That Kennedy Could Not Control His Behavior

Kennedy next argues the trial court erred in finding he was a sexually violent predator because the State failed to prove beyond a reasonable doubt that he could not control his behavior. We disagree.

South Carolina's Sexually Violent Predator Act is modeled on the Kansas Act. Matthews, 345 S.C. at 649, 550 S.E.2d at 316. Kennedy cites a Kansas case, In the Matter of the Treatment and Care of Michael T. Crane, 7 P.3d 285 (2000), in support of his argument that it was incumbent upon the State to prove that he could not control his behavior. This case, however, has been vacated by the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). In Crane, the Supreme Court found that the Kansas statute "set forth no requirement of total or complete lack of control." 534 U.S. at 411. It further noted that "the most severely ill people--even those commonly termed 'psychopaths'--retain some ability to control their behavior." Id. at 412. However, the Court further found that the federal constitution does not allow civil commitment under the Act without any lack of control determination. Id., at 414.

Our supreme court has previously addressed the holding in Crane in In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). It recognized that "[t]he Crane Court failed to provide an exact threshold between where control ends and where a lack of control begins. . . . '[I]t is enough to say that there must be proof of serious difficulty in controlling behavior.'" Id., 351 S.C. at 142, 568 S.E.2d at 348 (citations omitted). It further found that:

> Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e. the

> individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act.

Id., 351 S.C. at 144, 568 S.E.2d at 349. Thus, Crane does not mandate a separate and specific lack of control determination, "only that a court must determine the individual lacks control while looking at the totality of the evidence." Id., 351 S.C. at 143, 568 S.E.2d at 348 (citing Crane, 534 U.S. at 413). Therefore, because Kennedy suffered from pedophilia, "a mental abnormality that critically involves what a lay person might describe as a lack of control," we find this is inherent evidence that Kennedy suffered from an inability to control his own behavior. Crane, 534 U.S. at 414 (citing DSM-IV 571-572 (listing as a diagnostic criterion for pedophilia that an individual have acted on, or been affected by, "sexual urges" toward children)). Accordingly, we find no error in the trial court's order mandating Kennedy's civil commitment.

CONCLUSION

We find there was sufficient evidence to support the trial court's finding that Kennedy was a sexually violent predator and could not control his behavior because he suffered from pedophilia. Accordingly, the judgment of the trial court is

AFFIRMED.

CURETON and ANDERSON, JJ., concurring.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nickie White, Appellant.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3604
Heard January 14, 2003 – Filed March 3, 2003

AFFIRMED IN PART, REVERSED IN PART, & REMANDED

Assistant Appellate Defender Katherine Carruth Link, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; Warren Blair Giese, of Columbia; for Respondent.

HEARN, C.J.: Following a jury trial, Nickie White was convicted of criminal sexual conduct in the first degree and kidnapping. He was sentenced to consecutive prison terms of thirty years for criminal sexual conduct and ten years for kidnapping. White appeals, arguing the circuit court erred (1) in refusing to charge assault and battery of a high and aggravated nature (ABHAN) and simple assault and battery as lesser-included offenses of criminal sexual conduct, and (2) in admitting the testimony of the State's expert on post-traumatic stress disorder and sexual abuse. We affirm in part and reverse in part.

FACTS

The victim was employed as a bartender at Club Palace in Columbia. During the course of her employment, White was a customer of the club. The victim often engaged in conversation with White while she was working. On July 31, 1998, White went to Club Palace. When White arrived, the victim hugged him and later danced with him during the evening. At some point during her shift they left together to get change. The victim and White went to a nearby Wal-Mart for change; while there they entered a photo booth and took several instant photographs together. Afterwards, the victim agreed to go to breakfast with White when she got off work. According to the victim, however, she changed her mind about breakfast because she had not made much money that night and was tired. Nevertheless, she agreed to drive White home to his grandmother's house. Upon arriving at the home, White went inside to check on his grandmother and then returned to the car where the victim was waiting.

At this point, both the victim and White testified to a different version of the events that occurred afterwards. According to the victim, White asked her to drive him to a nearby store for a soda. She testified that when they returned to the house, White pulled a knife on her and demanded that she drive to Earlewood Park. She testified that White sexually assaulted and raped her there, but that she was eventually able to seize the knife and

stab him forcing him to flee. The victim stated that she followed him out of the park "to make sure that he stayed, he didn't try and come back to get me."

According to White, the victim suggested they go to the park to watch the sun rise. He stated he took a knife for protection because of the park's location. He testified that the victim made sexual advances towards him at the park and they engaged in consensual intercourse. He added that she became angry when he wanted to stop, cursed at him, grabbed the knife, and then stabbed him. He further stated that she followed him out of the woods when he turned to leave, and "came behind [him], charging." One of the witnesses who transported the victim to the hospital after the incident testified that when he saw them, the victim was following after White as he walked past him.

White was indicted for kidnapping and first degree criminal sexual conduct in connection with the incident.[1] He was found guilty of both charges and was sentenced to consecutive sentences of thirty years imprisonment for criminal sexual conduct and ten years for kidnapping. White appeals, arguing the circuit court erred in failing to charge ABHAN and simple assault and battery as lesser included offenses of first degree CSC, and in admitting the testimony of the State's expert witness on post-traumatic stress disorder and sexual abuse.

DISCUSSION

I. Jury Charge on ABHAN

At the close of the case, White requested a jury charge on assault and battery of a high and aggravated nature (ABHAN) as a lesser-included offense of criminal sexual conduct in the first degree.[2] The circuit court

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[1] White was also indicted for armed robbery and possession of marijuana; however, the jury found him not guilty of these charges.

[2] Pursuant to S.C. Code Ann. § 16-3-652 (Supp. 2001):

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

denied the requested charge. White argues this was error because the requested charge was supported by the evidence. We agree.

ABHAN "is an unlawful act of violent injury accompanied by circumstances of aggravation." State v. Primus, 349 S.C. 576, 580, 564 S.E.2d 103, 105 (2002) (citation omitted). "'Circumstances of aggravation' is an element of ABHAN." Id. (citation omitted). "Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority." Id. at 105-106, 564 S.E.2d at 580-581.

Our supreme court has recently held that ABHAN is a lesser-included offense of first degree criminal sexual conduct. Primus, 349 S.C. at 581, 564 S.E.2d at 106. A "trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the defendant committed the lesser included of the crime charged." State v. Heyward, 350

> and if any one or more of the following circumstances are proven:
> (a) The actor uses aggravated force to accomplish sexual battery.
> (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.
> (c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

S.C. 153, 157, 564 S.E.2d 379, 381 (Ct. App. 2002), cert. denied Nov. 6, 2002, (citing State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986)). "To warrant eliminating a lesser included offense charge, it must 'very clearly appear that there is no evidence whatsoever' tending to reduce the crime from the greater offense to the lesser." Heyward, 350 S.C. at 158, 564 S.E.2d at 382 (citation omitted) (emphasis added in the original).

In both Heyward and Drafts, the issue was whether the trial judge erred in failing to issue an ABHAN charge where the defendant was on trial for assault with intent to commit criminal sexual conduct in the first degree. Id. at 157, 564 S.E.2d at 381. In both cases, there was evidence from which a jury could find the defendant was guilty of ABHAN, and thus the trial judge erred in not charging ABHAN. Heyward, 350 S.C. at 158, 564 S.E.2d at 382; Drafts, 288 S.C. at 34, 340 S.E.2d at 786. In Drafts, the defendant allegedly held the victim at knifepoint and asked her to "give him a little bit" and perform oral sex. The defendant, however, claimed that "he did not want to do anything" with the victim, but admitted taking indecent liberties with her. Our supreme court found that if the jury had believed the defendant "did not want to do anything with the victim, they could have concluded there was no sexual battery and found him guilty of ABHAN." Drafts, 288 S.C. at 34, 340 S.E.2d at 786. Similarly, in Heyward, after beating the victim about the head and choking her, the defendant allegedly forced the victim into her car and told her he was taking her for a ride "to get some of [her] good stuff." Heyward, 350 S.C. at 156, 340 S.E.2d at 381. This court found it could not "isolate Heyward's single statement concerning Victim's 'good stuff' to the exclusion of the evidence that Heyward was guilty only of ABHAN." Id. at 158, 340 S.E.2d at 382.

In the present case, the victim testified that prior to the commission of the alleged CSC, White dragged her into the woods by her arms while holding the knife and then punched her in her eye. She further stated that during the alleged CSC, White "got mad and slapped [her]." Thus, under the victim's version of events, a charge for ABHAN would have been proper because it was contemporaneous with the alleged CSC.

White testified that he and the victim had consensual sexual intercourse. Under his version of events, because the sex was consensual, no battery could have occurred until after he and the victim had sex. White admitted that he struck the victim in self-defense when she became angry with him for withdrawing from sex. Thus, because there was evidence from which the jury could have believed that the sex was consensual, and that no battery occurred until after the parties engaged in intercourse, we find White was entitled to an ABHAN charge. Accordingly, we reverse White's first degree CSC conviction and remand this issue to the circuit court for a new trial.

II. Jury Charge on Simple Assault

White also asserts the trial court erred in refusing to charge simple assault and battery as a lesser included offense of CSC. We disagree.

"[S]imple assault and battery is an unlawful act of violent injury to another, unaccompanied by any circumstances of aggravation." State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) (quoting State v. Sprouse, 325 S.C. 275, 285-86, 478 S.E.2d 871, 877 (Ct. App. 1996)). Among other things, an example of a circumstance of aggravation includes a difference in the sexes. Id. In this case, we find no error in the trial judge's refusal to charge simple assault and battery. Here, the evidence shows that the parties were of opposite sexes, an aggravating circumstance of ABHAN. Therefore, a circumstance of aggravation existed in this factual scenario to take this case outside of the realm of simple assault and battery.

III. Testimony of State's Expert Witness

White next argues the circuit court erred in admitting the testimony of the State's expert witness, Coles Badger, on post-traumatic stress disorder and sexual abuse because it was more prejudicial than probative. We disagree.

As an initial matter, we address the preservation of this issue for our review. During a motion in limine, White's attorney objected to

Badger's testimony, arguing its prejudicial effect would greatly outweigh its probative value. After arguments on this issue, the circuit court stated it would "take a look at the cases [on the issue] and then [make] a determination before [court] started back." However, before there was a ruling on the admissibility of Badger's testimony, another witness testified. Badger then testified in camera, and White's attorney again objected to her testimony, this time based on the ground that she was not qualified. After hearing arguments from both sides, the circuit court ruled Badger could be admitted as an expert in the fields of post-traumatic stress disorder and sexual abuse. The circuit court also noted for the record that it "made an analysis under Rule 403 and . . . deemed that the testimony would be appropriate." Thus, we find the circuit court made a final ruling on White's in limine Rule 403 objection. Therefore, this issue is properly preserved for our review. See State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling is procured, the issue is not preserved for review.") (citation omitted).

At trial, Badger testified that in her opinion, the victim's symptoms were consistent with someone who had suffered trauma and had been raped. Badger explained that the victim "described symptoms of being unable to sleep and of having nightmares, having difficulty concentrating, being very fearful, unable to trust others." She further testified about the victim's "jumpiness," "anger," "shame," "crying," and "anxiety."

White argues Badger's testimony was more prejudicial than probative because it was outside the scope of the exception for rape trauma evidence as carved out by State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), and its progeny. White contends this case is distinguishable from those cases which allow expert rape trauma testimony because the victim in this case was an adult. White argues the victim was neither a person whose ability to discuss the facts and circumstances of the case would prevent her from coming forward for fear of reprisal nor someone whose age, inexperience, and impressionability might make it difficult to accurately remember the events because of an immaturity or lack of understanding with

the judicial process. More succinctly stated, White claims the reasons for the exception in Schumpert simply do not exist in this case.

We could discern no case in this state which has held that the Schumpert exception applies only to child victims. Neither Schumpert nor any of its progeny limits the use of rape trauma evidence to cases involving child sexual assault victims. Accordingly, we decline to limit the use of this testimony to cases where the sexual conduct involves a minor.

Moreover, we find this testimony was cumulative to the unchallenged testimony of Dr. Alfred Jenkins, Nurse Bridgette Deguzman, and Officer Bob Benson. Dr. Jenkins, who observed the victim in the emergency room after the incident, testified that at that time she was "quite tearful," "agitated," and "withdrawn." He stated in his opinion, she had suffered trauma. Nurse Deguzman, who also saw the victim in the emergency room after the incident, stated that when she first saw her, the victim "was upset and she appeared frightened, disheveled; she was crying, visibly shaken." Officer Benson testified that when the victim wrote her statement approximately two days after the incident, she would write a few pages and then get upset.

Given the testimony of these witnesses, any error in admitting Badger's testimony was harmless. See Schumpert, 312 S.C. at 507, 435 S.E.2d at 862 (stating that any error in the admission of cumulative evidence is harmless); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

Finally, White argues that the prejudicial effect of Badger's testimony, that she believed the victim's account of events, far outweighed its probative value and improperly bolstered the victim's testimony. Essentially, White argues that this testimony "tipped the scales" in the victim's favor, and therefore White should be entitled to a new trial on the kidnapping charge as well. Although this testimony may have exceeded the proper boundaries of expert testimony regarding post-traumatic stress and sexual abuse under State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) and its progeny, we find

this issue is not preserved for our review as White's attorney failed to object to this testimony when it was elicited during trial. See State v. Peay, 321 S.C. 405, 413, 468 S.E.2d 669, 674 (Ct. App. 1996) (finding a contemporaneous objection and ruling at trial is required to properly preserve an error for appellate review). Thus, we decline to address this issue on appeal and necessarily hold that White's kidnapping conviction is affirmed.

CONCLUSION

Based on the foregoing reasons, we find White was entitled to an ABHAN charge and accordingly, we reverse White's CSC conviction and remand that issue to the circuit court for a new trial consistent with this opinion. We further find the circuit court did not err in failing to charge simple assault and battery and in admitting the testimony of the State's expert witness; therefore, we affirm White's kidnapping conviction.[3]

AFFIRMED in part, REVERSED in part, and REMANDED for a new trial.

CURETON and ANDERSON, JJ., concur.

[3] We note that in Drafts, our supreme court let a conviction for kidnapping stand where a conviction for CSC was reversed and remanded for a new trial for failure to charge ABHAN. Drafts, 288 S.C. at 34, 340 S.E.2d at 786.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry K. Purdy, III, Appellant,

v.

Catherine A. Purdy, Respondent.

Appeal From Beaufort County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 3605
Submitted January 13, 2003 - Filed March 3, 2003

AFFIRMED

H. Fred Kuhn, of Beaufort; for Appellant.

Edwin W. Rowland, of Hilton Head Island; for Respondent.

HUFF, J.: Henry K. Purdy, III (the father) appeals from an order of the family court refusing to terminate his child support obligation to

Catherine A. Purdy (the mother) before the parties' child reached the age of majority. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The parties were formerly married. Their youngest child, Ryan, who was born March 15, 1984, is the subject of this action. The mother and father were divorced by order of the family court dated October 30, 1995. Pursuant to the order, the parties were awarded joint custody of Ryan, with the mother designated the primary custodial parent. The family court set the father's monthly child support at $1,500 for Ryan and her older sister. At the time of the instant action, the father's child support obligation was $750 per month, inasmuch as Ryan's sister had already reached majority.

The father instituted this action against the mother on February 28, 2001 seeking an order declaring Ryan emancipated and terminating his child support obligation. The mother answered, denying that Ryan was emancipated.

The family court held the final hearing on the matter on May 14, 2001, at which time Ryan was still a minor. Ryan testified she quit school in late 2000 when she was in the eleventh grade. Shortly thereafter, on February 28, 2001, she moved out of the mother's home. At the time of trial, Ryan was living with her boyfriend and a roommate, and was pregnant with her boyfriend's child. Both she and her boyfriend were employed. Ryan had been employed for approximately two months by a hotel-resort baby-sitting service on a part-time basis, working three or four days per week. Ryan testified she and her boyfriend paid their own rent, food and utility expenses without assistance from the mother, and she intended to remain with her boyfriend after the birth of their child.

The mother testified she wanted what was best for her daughter. While agreeing her daughter was "out on her own" at that time, she noted Ryan's future was uncertain inasmuch as she was still a minor and unmarried. She noted she was concerned the boyfriend could leave her daughter and she

would then be responsible for both her daughter and her grandchild. She stated she did not want the child support money for herself, and would turn any further child support payments over to Ryan.

By order dated May 25, 2001, the family court declined to declare Ryan emancipated and ordered the father to continue paying child support until Ryan became emancipated by reaching the age of eighteen or getting married.[1] In reaching this determination, the trial court reasoned that there was no credible evidence establishing Ryan was able to sustain herself.

STANDARD OF REVIEW

On appeal from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). We are not, however, required to disregard the findings of the trial judge, who saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony. Haselden v. Haselden, 347 S.C. 48, 58, 552 S.E.2d 329, 334 (Ct. App. 2001); Wilson v. Walker, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (Ct. App. 2000).

LAW/ANALYSIS

Generally, under South Carolina law, a parent's obligation to pay child support extends until the child reaches majority, becomes self-supporting, or marries, then ends by operation of law. See S.C. Code Ann. § 20-7-420(17) (Supp. 2002) (granting family court jurisdiction "[t]o make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first . . . ."). "Emancipation of a minor child is effected primarily by agreement of the parent, although acts of the child are to be considered."

[1]The court further ordered that the support "shall be paid to the mother who in turn will write a check to the child, Ryan Purdy."

Timmerman v. Brown, 268 S.C. 303, 305, 233 S.E.2d 106, 107 (1977). "Whether a child has been emancipated depends on the facts and circumstances of each case." Id.

At first glance, the acts of Ryan strongly suggest emancipation, but when considered in light of other facts and circumstances, we agree with the findings of the trial judge and defer to his wisdom and judgment as to the lack of evidence establishing Ryan's full emancipation at the time this action was commenced. Although Ryan had moved out of the mother's home and was residing with her boyfriend, it is clear from the record that the mother, who is the primary custodial parent, objected to the move and clearly did not agree that her daughter should be emancipated. The mother testified the father gave Ryan "money behind [the mother's] back" in order to allow Ryan to move out of her home. The father himself testified he gave Ryan $700 for the "down payment" on her apartment, and took Ryan and her boyfriend to a store, spending over $500 for them to "get whatever they needed for their apartment."[2] Further, Ryan and her boyfriend were not married and, therefore, the boyfriend was not legally obligated to contribute to Ryan's support. While Ryan was employed on a part-time basis, there was no evidence that she could have supported herself in the event her relationship with her boyfriend deteriorated. Additionally, the mother testified she had continued to financially support her daughter, giving her cash, taking her out for meals, paying for repairs to Ryan's car, and paying $100 toward Ryan's medical bill until she could obtain reimbursement for the bill from Ryan's father. Thus, it appears Ryan, even with the help of her boyfriend, was not truly self-supporting.

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[2]It should be noted the father filed this action on the same day the daughter moved out of the mother's home. It appears the father is, in effect, attempting to eliminate his monthly support obligation by financially enabling his daughter to move out of the home of her mother against the mother's wishes. While we agree with the father's assertion that the provision of money to the child under these circumstances tends to reward the minor for "quitting school, moving in with her boyfriend, [and] getting pregnant," the father is, in part, the author of this problem.

CONCLUSION

Under the particular facts and circumstances of this case, especially the fact that the primary custodial parent did not acquiesce in the minor's move from the home but the supporting parent both consented and encouraged the move with financial aide, we discern no error in the family court's ruling.

For the foregoing reasons, the decision of the family court is

AFFIRMED.

GOOLSBY and SHULER, JJ., concur.