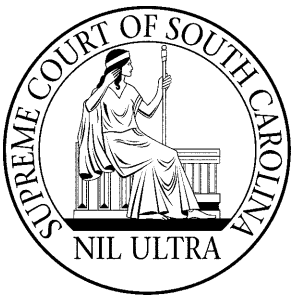

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 11, 2004

ADVANCE SHEET NO. 19

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Wesley Max Myers, Appellant.

Appeal From Charleston County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25818
Heard April 6, 2004 - Filed May 11, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE PLEICONES: Wesley Myers (Appellant) was convicted of murder and arson in the third degree. Appellant was sentenced to thirty years imprisonment for murder and ten years imprisonment for

arson. Appellant appealed his convictions on multiple grounds. This appeal was certified from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTS

On Thursday, March 13, 1997, at 3:15 am the fire department responded to an emergency call and found the Mill Inn Tavern on fire. A body was discovered in the bar after the fire was extinguished. The body was that of Teresa Haught (Teresa), Appellant's girlfriend and manager of the bar. Teresa had been hit in the head, and then the bar had been set on fire. During the investigation of the scene, some hairs were found in Teresa's hand.

The police interviewed Appellant three different times: at the scene of the fire (early Thursday morning), and twice at the police station (Friday and Saturday). On Thursday and Friday, Appellant was cooperative and consistently offered to help the police find the killer. During a skillfully conducted interrogation on Friday, the police sought, and obtained, Appellant's agreement that the hair found in Teresa's hand must have come from the head of the person who killed her.

At the meeting on Saturday with Appellant, the police told Appellant that South Carolina Law Enforcement Division (SLED) had matched the hair found in Teresa's hand to the hair that Appellant had given the police for testing.[1] At that point, Appellant confessed to killing Teresa. Appellant's confession stated:

> On March 13th, 1997 at about 2:00am or so I drove to the Mill Inn to check on my girlfriend, Theresa (sic) Haught. I parked my truck beside her Mercury parked in front of the Mill Inn. I went to the front door and knocked. Teresa came to the door about 5-10 minutes later. It is not uncommon for me to go by and check on her at closing time. There was no one in there or I don't think there was anyone in there. While I was in the bar, I found a pink note on the bar. It was a note signed by

[1] The police actually received the call from SLED on Friday, before the interview with Appellant began.

> Allen White. I think it said that "I'll see you later" and it was signed by him. I thought that they might have had something going. I had seen Allen pinch her and kiss her on the lips. I asked her about the note and she said that it was none of my business. Teresa pushed me by the chin and the chest hard. I told her "don't push me Teresa." She hit me in my chest with her fist. Then, she pushed me up against the bar. I told her not to hit on me. Teresa grabbed the glass wine craft (sic) and she told me to get away. I grabbed the wine craft (sic) from her. Then, she pushed me in the face. I struck her in the center of the head with the wine craft (sic). Both of us went down to the floor. Like a blur, I lost control. I went around the counter behind the bar. I believe I held her for a while on the floor before I went around the counter. I think I struck her twice. I was raged upset, real mad. I couldn't believe what she was saying. She called me a fool. I grabbed "closed on Sunday sign" and some papers. At that state I grabbed anything around. I piled some papers up behind the bar and lit it with a lighter. I remember I wanted to die. I wanted to burn up in there with her. I sat there and closed my eyes and the fire was getting really big. I went out the back door and went to the right. I went around front and got into my truck. I put a purse behind the seat of my truck. I don't remember what I did with the purse. I drove home. I forgot to mention that I opened the cabinet behind the bar looking for something to burn.

The hair that was found in Teresa's hand was lost when SLED sent the hair to the FBI for DNA analysis, so there is no physical evidence linking Appellant to the crime.

ISSUES

1. Did the trial court err in admitting Appellant's confession?
2. Did the trial court err in admitting into evidence an anger management questionnaire completed by Appellant, in which he acknowledged problems with controlling his emotions?
3. Did the trial judge err in sealing letters from the solicitor to the police department because the letters contained impeachment or exculpatory evidence?

4. Did the trial court err in ruling Dr. Saul Kassin, an expert in social psychology, could not use examples or facts from other states to illustrate his opinion about false confessions?

ANALYSIS

1. Confession

Appellant argues that the confession should have been suppressed because it was the product of police trickery and coercion. The totality of the circumstances does not demonstrate that Appellant's will was overborne by the police. As there is no evidence that the confession was not voluntary we therefore hold that the trial court did not err in admitting Appellant's confession.

Initially, Appellant gave a statement to a police officer on Thursday, at the scene of the fire. Before giving the statement, Appellant was advised of his rights. Appellant did not say anything incriminating in this statement.

On Friday, Appellant met with Officer McHale at the police station. When Appellant arrived at the station, the officers were leaving for lunch and invited Appellant to join them. Appellant declined. After the officers returned, McHale read Appellant his Miranda rights, and Appellant waived his rights. During Friday's interview, McHale used the "Reid Technique" of interrogation.[2] The Reid technique involves nine steps. The first part of the process involves "breaking the suspect down" by asserting the suspect's guilt and not allowing the suspect to deny his or her guilt. The second part of the process involves "development of alternative questions" in which the

[2] During the Friday interview, McHale told Appellant, among other things, that McHale sometimes thought about killing his own wife, and that he had once pushed his wife when she was pregnant. McHale testified that the purpose behind these statements was for Appellant to relate to McHale and also for McHale to gauge the reaction of Appellant. Also, McHale suggested to Appellant that the police had evidence that Appellant was in the bar the night of Teresa's murder, even though the police did not have any such evidence.

interrogator gives the suspect a "face-saving or moral-justifying alternative." For example, the interrogator would say "maybe you were provoked" or "maybe it was an accident" or "I know this isn't something that you wanted to do or planned."

Initially, Appellant agreed to take a polygraph examination, but during the interview with McHale, Appellant told McHale that Appellant had been up all night, had 24 beers to drink the night before, and had taken caffeine pills. McHale decided to send Appellant home, and asked Appellant to get a good night's rest before meeting with the police on Saturday. McHale testified that he stopped the interrogation because he wanted to make sure that if the police elicited a confession, it would be admissible in court. Appellant did not make any incriminating statements on Friday.

On Saturday, Officer Clayton took Appellant to breakfast, then Clayton took Appellant to the station for the interrogation. Appellant was again advised of his rights. During this interrogation, the officers spoke with Appellant for about an hour and a half before Lt. Cumbee arrived and asked Appellant to come into his office. Appellant agreed with the police that "the hair that was found in [Teresa's] hand belonged to the person who [murdered her]." After Appellant said this, Lt. Cumbee left the office and when he came back he "told the [Appellant] that [Lt. Cumbee] just received a phone call from SLED and that SLED said the hair that was found in [Teresa's] hand is from, came from [Appellant]…that it matched." In reality, the police had received the phone call on Friday from SLED stating that the hair matched.[3] When Appellant was confronted with this information, he said "I must have did it then." Lt. Cumbee said "Well, don't you think you need to say you're sorry?" Appellant said "I'm sorry, Teresa. I didn't mean to do it. It was an accident." Then, Lt. Cumbee pulled out a photograph of Teresa, and Appellant started rubbing the photograph and saying that he was sorry. Appellant told the police the details of the murder. At this point, the police

[3] SLED had not conducted a DNA analysis on the hair, but had inspected the hair through a microscope. There was a microscopic match, meaning that the hair was consistent with Appellant's hair. However, this analysis does not yield a positive identification, like DNA.

took Appellant to the park where he said he hid Teresa's purse, however, they were unable to locate the purse. They returned to the police station and Appellant signed the written statement. Appellant was placed under arrest.

After Appellant signed the written statement, Lt. Cumbee asked Appellant if he wanted to speak to Teresa's mother. He said yes, and Teresa's mother was brought into a conference room. There, Appellant told her he was sorry and that he lost control and that he had killed Teresa.

After the arrest, Lt. Cumbee called the media and informed them he had made an arrest, and that the police would be escorting Appellant to the county jail later in the afternoon. When Appellant was escorted out of the station, he told the reporters that he wanted to make a statement. Both Lt. Cumbee and Officer Tetanich testified that they advised Appellant not to talk to the media, but that Appellant told them that "I want to tell the world how sorry I am." Appellant told the reporters that he killed Teresa and that he was sorry for what he had done.

Appellant argues the initial confession was coerced, and therefore the statement to Teresa's mother and the statement to the media were inadmissible as fruit of the poisonous tree. We disagree. A confession is not admissible unless it was voluntarily made. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (quoting State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)). A determination whether a confession was "given voluntarily requires an examination of the totality of the circumstances." Von Dohlen, 471 S.E.2d at 694-95. On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion. Id. "Both this Court and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible…The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" Id.

The trial judge did not abuse his discretion in allowing the confession into evidence. Appellant was advised of his rights three different times. Not one of the interrogations lasted more than a few hours. Appellant was offered

food by the police and told he was free to leave the station at any time on Friday. Also, the police made sure that Appellant was well rested and fresh before they interrogated him on Saturday. In addition, when the police told Appellant that the hair found in Teresa's hand matched Appellant's hair, they were communicating the information that they received from SLED. Even if the information were untrue, it is not, alone, enough to render the confession involuntary. See Von Dohlen, 471 S.E.2d at 695; State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)("A misrepresentation, while relevant, may be insufficient to render inadmissible an otherwise valid confession"); State v. Register, 323 S.C. 471, 476 S.E.2d 153 (1996)(holding defendant's confession was voluntary and admissible when police misrepresented to defendant that he had been seen with the victim the night she was murdered, that his tires and shoe matched impressions found at the murder scene, and that the police had DNA evidence establishing defendant's guilt). Since the initial confession was voluntary, the subsequent statements were properly admitted.

While we find no fruit of the poisonous tree here, we cannot let pass without comment the police conduct in arranging media coverage of Appellant's "perp walk." Such actions were improper and reflect poorly on the professionalism of the department.

2. Anger Management Questionnaire

Appellant argues that the trial judge should have excluded an anger management questionnaire taken by Appellant because any probative value was substantially outweighed by its prejudicial effect under Rule 403, SCRE. We agree that the questionnaire should have been excluded, but affirm the trial court because its erroneous admission was harmless error.

The police found the questionnaire during a search of Appellant's house. The questionnaire was from an adult outpatient treatment program that Appellant attended for alcoholism. It is titled "Anger Questionnaire Worksheet." Appellant answered yes to both "I've gotten so angry at times, that I've become physically violent, hitting other people or breaking things" and "At times, I've felt angry enough to kill," among other questions. The

State's theory of the case was that Appellant killed Teresa in a fit of rage. Appellant argued that it was unclear when Appellant filled out the questionnaire, and that it was too prejudicial to be admitted into evidence.

This Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). We agree with Appellant that the prejudicial value of the questionnaire substantially outweighed the probative value and should have been excluded from evidence. It is unclear when, or under what circumstances, the questionnaire was filled out. However, this error was harmless in light of Appellant's confession. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990).

3. Sealed letters

Appellant argues the trial court erred in sealing two letters as the letters contained impeachment or exculpatory evidence related to police misconduct. Judge Cottingham ruled in a pre-trial hearing that these letters were work product, and ordered the letters sealed. We have reviewed the letters and determined that the trial court did not err in sealing the letters, as one of the letters is work product and the other is not relevant.

There are two letters at issue in this case. First is a copy of a letter to Chief Caldwell of the North Charleston Police Department from David Schwacke, Solicitor, Ninth Judicial Circuit, written on January 29, 1998 (hereinafter "January letter"). The second letter is from Amie Clifford, Assistant Solicitor, Ninth Judicial Circuit, to Chief Caldwell, sent on July 15, 1999 (hereinafter "July letter"). The July letter is specifically about the case at hand, and is written to Chief Caldwell regarding numerous issues with the case.

Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or "internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case…." In essence, Rule 5 SCRCrimP exempts "internal prosecution documents made in connection with an investigation." State v. Hughes, 336

S.C. 585, 521 S.E.2d 500 (1999). The July letter clearly falls into the exemption under Rule 5. The letter was written to the North Charleston Chief of Police regarding the prosecution of the case. Thus, the July letter was an internal prosecution document and not subject to discovery. See State v. Gill, 319 S.C. 283, 460 S.E.2d 412 (1995)(holding that a summary report prepared by police officers for the solicitor's use in prosecuting the case was not subject to discovery), vacated on other grounds, State v. Gill, 327 S.C. 253, 489 S.E.2d 478 (1997). In addition, the July letter does not contain any impeachment or exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

The January letter, on the other hand, was not prepared for the prosecution of the case and thus does not fall under Rule 5, SCRCrimP. However, the January letter is not relevant to the case at hand. The only paragraph regarding Appellant was about the "perp walk." The jury heard evidence that the officers called the media to let them know about the "perp walk," so although the letter might have bolstered the testimony that the police called the media, it had no independent evidentiary value. Finally, the letter does not contain any impeachment or exculpatory evidence. We affirm the trial court's ruling.

4. Dr. Kassin's testimony

Dr. Kassin is a psychology professor at Williams College and was qualified in this case as an expert in social psychology. Dr. Kassin testified about the psychology of confessions and false or coerced confessions. Appellant alleges that the trial court erred in preventing Dr. Kassin from testifying about specific case studies, in contravention of Rule 702, SCRE, because the testimony would have been helpful to the jury. We have determined there was no error, and affirm the trial court's ruling.

In the Jackson v. Denno hearing, Dr. Kassin testified about the facts of particular cases in Connecticut[4] and Indiana[5] in which people confessed to

[4] The Connecticut case involved a man whose mother was killed. The police told the man he failed a polygraph examination, and that the test was

crimes, but later were exonerated. Before Dr. Kassin testified before the jury, the solicitor objected to Dr. Kassin testifying about "cases that don't involve this particular case" because they were irrelevant. The trial judge stated "Just object to the things you want…let's try to keep it as much as you can to something that fits the facts of this case generally."

Dr. Kassin testified that he reviewed the videotape of the interview that Officer McHale conducted of Appellant on Friday, and that he was concerned that the techniques used by McHale could lead to a coerced confession. Dr. Kassin testified in great detail about coerced confessions. However, on redirect when he was asked to give "anecdotal examples of false confession" the judge stated "I'm not going to allow it unless you got a case exactly like this." Dr. Kassin went on to say "there's a case in Indiana that's very similar. There's a case in Connecticut…" The solicitor objected again.

Despite these objections, the record reflects that in fact Dr. Kassin was allowed to testify about specific cases of false confession. For example, Dr. Kassin testified that there were incidences of people confessing to a "shaken baby" case when the child died of other causes. He testified that sometimes someone confesses to a murder and some time later the victim turns up alive, so no crime was ever committed. Dr. Kassin testified about the "Innocence Project" in which DNA testing has exonerated people convicted of crimes and that 22% of the people had given false confessions. Finally, Dr. Kassin testified that people can give very detailed false confessions. For example, a man accused of killing his mother gave a reason for killing her as well as the

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infallible. The man told the police that he could not have killed his mother. But the interrogator told him that "people black out these sort of things." The man then said "Well, then I guess I must have done it."

[5] The Indiana case involved a man who was accused of killing his daughter and throwing her into a lake. The man confessed to the police that he clubbed the girl to death, which was consistent with what was known about the crime at the time. However, when the body was analyzed, it turns out she was stabbed to death, not clubbed to death. So, the actual confession did not match the facts of the case.

thoughts that were going through his head as he killed her. His confession was a documented false confession.

A trial court's ruling "to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002). Dr. Kassin did testify about specific cases, he just did not use names or say in which state the crime happened. In addition, the Indiana case was so dissimilar that there was no evidentiary value. See footnote 5 supra. Although the Connecticut case was similar, the trial court did not abuse its discretion in excluding the information. Dr. Kassin was able to testify at length about false and coerced confessions, and he was able to touch briefly on the Connecticut case. However, assuming error in limiting testimony about the Connecticut case, Appellant cannot show prejudice in light of Dr. Kassin's other testimony. See State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)(exclusion of evidence is harmless where cumulative).

CONCLUSION

We **AFFIRM** the trial court's rulings.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice John W. Kittredge., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Hastings Arthur Wise, Appellant.

Appeal From Aiken County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25819
Heard February 3, 2004 – Filed May 11, 2004

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor Barbara R. Morgan of Aiken, for Respondent.

JUSTICE BURNETT: Hastings Arthur Wise (Appellant) was convicted of four counts of murder, three counts of assault and battery with intent to kill, one count of second-degree burglary, and four counts of possession of a weapon during the commission of a

violent crime. The jury found two aggravating circumstances: a murder was committed during the commission of a burglary; and two or more persons were murdered by one act or pursuant to one scheme or course of conduct. See S.C. Code Ann. § 16-3-20(C) (2003 and Supp. 2003).

Appellant was sentenced to death on the jury's recommendation for each count of murder, twenty years consecutive on each count of assault and battery with intent to kill, fifteen years concurrent for burglary, and five years concurrent on each weapon possession conviction. This appeal follows.

FACTS

Appellant drove into the employees' parking lot at the R.E. Phelon manufacturing plant in Aiken County at about 3 p.m. on September 15, 1997, as the work shifts were changing. He had been fired from his job as a machine operator at the plant several weeks earlier. [1]

Stanley Vance, the security officer on duty, testified he believed Appellant had come to pick up his personal belongings which were stored in the guard station. Appellant exited his vehicle, walked to the guard station, and shot Vance once in the upper abdomen with a semi-automatic pistol.

During the guilt phase of the trial, in addition to two security officers, the State presented fifteen employees as witnesses to the shootings at the plant. All identified Appellant as the perpetrator. Their testimony, along with the testimony of law enforcement

[1] Appellant did not present a defense. His lawyers' examination of some plant employees during the trial indicated Appellant may have been upset because he had not received a promotion from machine operator to the tool and dye division.

investigators and the medical examiner, established the following events:

After tearing out telephone lines in the guard station, Appellant entered the plant's human resources office. He shot personnel manager Charles Griffeth, age 56, twice in the back, killing him as he sat at his desk. Appellant held his pistol to the head of a secretary as he exited Griffeth's office, tore out the secretary's telephone line, and continued into the plant.

Appellant walked to the tool and dye area where several employees were working. He fired his pistol repeatedly at the employees, killing David W. Moore, age 30, and Earnest L. Filyaw, age 31. Lucius Corley and John Mitchell were wounded. Mitchell was shot in the chest, and suffered extensive and severe internal injuries which required multiple surgical procedures.

Appellant walked toward another area of the plant as employees, who gradually had become aware of the shootings in the plant, fled the building. He shot Cheryl Wood, age 27, in the back and leg as she stood near a doorway. She was fatally shot after she fell to the floor, described by the prosecutor as an execution-style slaying.

Appellant continued firing his pistol at other employees in other areas of the plant. Witnesses observed Appellant reload his pistol several times as he progressed through the plant. Investigators recovered four empty, eight-round magazines at the scene, plus four full magazines and 123 additional rounds in Appellant's possession. Some witnesses related Appellant was "screaming something" unintelligible during the shootings.

Appellant walked to an upstairs office, shooting through glass windows and doors. He entered an office, lay down on the floor, and swallowed or attempted to swallow an insecticide. Police found Appellant lying there semi-conscious, arrested him, and transported him to a hospital.

The trial judge ruled Appellant competent to stand trial. Appellant did not present witnesses or evidence during the guilt or sentencing phases of the trial. He refused before trial to identify for his attorneys family or friends as favorable witnesses. During the sentencing phase, Appellant refused to allow his attorneys to call thirteen mitigation witnesses to present evidence that life imprisonment without parole was the appropriate sentence.

Appellant's refusal prompted the trial judge to again have Appellant examined during the trial by a psychiatrist, who again testified Appellant was competent. Although his attorneys had evidence of the presence of the hallucinogenic drug LSD in his body when the shootings occurred, Appellant told the judge "I was in total control of my faculties at the time."

ISSUES

I. Did the trial judge err in excusing a potential juror for cause during individual voir dire without allowing defense counsel to examine her about personal religious beliefs that would preclude her from finding Appellant guilty of the crimes charged?

II. Did the trial judge err in refusing to allow a surviving victim, called by the State to provide victim-impact evidence, to testify on cross-examination that he previously had stated Appellant should not receive the death penalty?

STANDARD OF REVIEW

In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973); State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997). The appellate court is bound by the trial court's factual findings made in response to preliminary motions when

there is conflicting testimony, or when the findings are supported by any evidence and not clearly erroneous or controlled by an error of law. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000); State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997).

DISCUSSION

I. Individual voir dire issue

Appellant argues the trial judge erred in excusing a potential juror (Juror) for cause during individual voir dire without first permitting his lawyers to personally examine her. Appellant contends the judge did not have the discretion to excuse Juror. We disagree.

Juror was the fourth venireman examined during individual voir dire. Responding to questions from the trial judge, Juror testified she would accept and apply the law as instructed by the court. She testified she could find a defendant not guilty in a criminal case; however, she could not find a defendant guilty. Juror testified she was a member of the "Holiness" religion, did not believe in judging anyone, and would be unable under any circumstances to find a defendant guilty. Juror testified, "I mean, they could be guilty but I'm not going to sit on the jury stand and say that they're guilty because it's not right to say whether they're guilty or not."

The judge and attorneys discussed Juror's responses outside her presence. The judge requested Appellant's attorneys suggest questions he might ask Juror. No questions were suggested,

but Appellant's attorneys requested an opportunity to examine and possibly rehabilitate Juror by clarifying her responses. The judge denied the request, but examined her further about the source of her beliefs. Juror testified her beliefs were personal, and she was unaware of any pastoral counseling or similar program she could undergo in order to sit in judgment of another person. Juror testified she could not find someone guilty in "so serious as this case is" and she did not "want to have [any] part in saying what, you know, where he's going to be at, you know."

The judge excused Juror for cause over defense counsel's objection, relying primarily on State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999).

"The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law." S.C. Code Ann. § 14-7-1010 (Supp. 2003). The authority and responsibility of the trial court is to focus the scope of the voir dire examination as set forth in S.C. Code Ann. § 14-7-1020 (Supp. 2003). State v. Hill, 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998) (citing State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)). A capital defendant has the right to examine jurors through counsel pursuant to S.C. Code Ann. § 16-3-20(D) (Supp. 2003), but that statute does not enlarge the scope of voir dire permitted under Section 14-7-1020.[2] Id. The scope of voir dire and the manner

[2] Section 14-7-1020 provides:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must

continued . . .

in which it is conducted generally are left to the sound discretion of the trial judge. Id. (citing State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

"Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 500 U.S. 415, 431, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493, 509 (1991). A capital defendant's right to voir dire, while grounded in statutory law, also is rooted in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. See id.; Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492, 503 (1992). To be constitutionally compelled, it is not enough that a question may be helpful. Rather, the trial court's failure to ask or allow a question must render the defendant's trial fundamentally unfair. Mu'Min, 500 U.S. at 425, 111 S.Ct. at 1905, 114 L.Ed.2d at 506; State v. Tucker, 334 S.C. 1, 10, 512 S.E.2d 99, 103 (1999).

An appellate court will not disturb the trial court's disqualification of a prospective juror when there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. Tucker, 334 S.C. at 11, 512 S.E.2d at 104 (citing State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990)).

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be placed aside as to the trial of that cause and another must be called.

Section 16-3-20(D) provides:

> Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

We conclude the trial judge properly excused Juror for cause. Section 14-7-1010 requires the judge determine whether a juror is disqualified or exempted by law, a determination that may be made before parties are given an opportunity to examine the juror in a death penalty case. A juror who testifies she would not be able to find a criminal defendant guilty under any circumstances is disqualified by law. Such a person may not be seated because she would be unable to fulfill her duties as a juror or apply the law as it is given to her by the court. See also State v. Plath, 281 S.C. 1, 5, 313 S.E.2d 619, 621 (1984) (court repeatedly has said test of juror's qualification under Section 16-3-20 is ability to both reach a verdict of either guilt or innocence and, if necessary, to vote for death sentence).

In addition, the trial judge's excusal of Juror is supported by Tucker, supra. In that case, the trial court excused for cause a juror, a Jehovah's Witness, because the juror stated he could not sit in judgment without undergoing religious counseling that might take four days. The juror was excused during the general qualifying of the jury pool. We rejected the argument that the excusal improperly prevented defense counsel from rehabilitating the juror during individual voir dire as to his views on the death penalty and the special circumstances which might allow him to sit as a juror. We found the trial court properly excluded the juror because his religious beliefs which prohibit judging another person would prevent or substantially impair the performance of juror's duties; therefore, a reasonable basis existed in support of the trial court's excusal of the juror for cause. Tucker, 334 S.C. at 10-11, 512 S.E.2d at 103-104.

In the present case, the trial judge's lengthy colloquy with Juror revealed she would be unable to return a verdict of guilty under any circumstances. Her belief she should not sit in judgment of another rendered her incapable of fulfilling her basic responsibilities as a juror, and would have prevented or substantially impaired the performance of her duties as a juror. Consequently, a reasonable basis existed for the trial judge's excusal for cause of Juror. See Sections 14-7-1010 and -1020; Tucker, supra; Plath, supra. Furthermore, we conclude her

excusal for cause did not render Appellant's trial fundamentally unfair. See Mu'Min, supra; Tucker, supra.

Appellant argues we should find State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987), overruled on other grounds by Torrence, supra, to be controlling, not Tucker. In Atkins, the trial court excused four potential jurors for cause, without allowing counsel for either side to examine them, after concluding they were opposed to the death penalty.

We emphasized in Atkins that case law and the mandatory language of Section 16-3-20(D) "make it clear that the trial court's discretion does not extend so far as to authorize it to refuse counsel the right to conduct any examination at all in a capital case. When our legislature has seen fit to enact special statutory requirements to be followed in death penalty cases, the courts should endeavor to see that these are strictly followed." Atkins, 293 S.C. at 297, 360 S.E.2d at 304.

We explained in Atkins that further examination by counsel might reveal the juror would be able to subordinate his personal views and apply the law of the state. The error could not be deemed harmless as the defendant was sentenced to death; therefore, we reversed and remanded for a new penalty phase proceeding. Id; see also State v. Owens, 277 S.C. 189, 192, 284 S.E.2d 584, 586 (1981) (finding error in trial court's dismissal of two potential jurors for cause, without allowing defense counsel to examine them, when jurors indicated opposition to death penalty, although issue was moot because defendant was given a life sentence).

Atkins is distinguishable on two grounds. First, the juror qualification issue in Atkins was the ability of jurors to consider both the death penalty and life imprisonment. In the present case, the qualification issue was whether Juror believed she could sit on a jury in judgment of another person at all. Her comments and belief she could never find someone guilty in such a serious case disqualified her, at a

more fundamental level than the jurors in Atkins, to serve. See Plath, supra.

Second, it is clear from this record that further examination of Juror would have been unlikely to reveal she could subordinate her views and apply the law of the state. Juror unequivocally and repeatedly stated during thorough examination by the trial judge she would be unable to find the defendant guilty. In fact, Appellant's attorneys were given an opportunity to suggest additional questions to the trial judge, but suggested none. Nevertheless, the trial judge after conferring with counsel examined Juror further to ascertain the basis of her beliefs.

Appellant also contends Tucker is distinguishable because Juror was excused during individual voir dire, while the juror in Tucker was excused during the general juror qualification process. This distinction is unpersuasive because the basic requirement of ensuring a juror is qualified and able to render a fair and just verdict to either party based on the facts and the law applies throughout the jury selection process.

We do not intend, by this decision or the decision in Tucker, to dilute the mandate of Section 16-3-20(D) as expressed in Atkins, supra. When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel. Accordingly, the trial judge did not err and properly exercised his discretion in excusing Juror for cause.

II. Cross-examination of victim impact witness

Appellant contends the trial judge erred by refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally believe appellant should receive the death penalty. We disagree.

Security officer Vance testified during both the guilt and sentencing phases of the trial. Vance was shot once in the upper abdomen by Appellant, resulting in temporary paralysis in his legs, rendering him totally disabled, unable to work. Vance testified he suffers constant, intense pain requiring daily medications. He has weekly psychiatric appointments and has been diagnosed with depression and post-traumatic stress disorder. Vance testified he knew Appellant only by sight and had little or no interaction with him on the job.

During cross-examination in the sentencing phase, Appellant's attorney attempted to question Vance about a statement he made to a newspaper reporter shortly after the shootings, in which Vance reportedly said Appellant should not receive the death penalty. The trial judge sustained the State's objection and did not allow the testimony.[3]

A capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty. Such questions go to the ultimate issue to be decided by the jury – life in prison versus the death penalty – and are properly reserved for determination by the jury. State v. Matthews, 296 S.C. 379, 393, 373 S.E.2d 587, 595 (1988) (affirming exclusion of family members' opinion about appropriate penalty and what effect the death penalty would have on them, although defendant could show no prejudice because his mother expressed her opinion to jury despite judge's ruling); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (whether death penalty should be imposed is an ultimate issue reserved for jury's determination), overruled on other grounds by Torrence, supra.

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[3] The judge earlier had refused to allow Appellant to question Vance about the same alleged statement to the media during the guilt phase, as it was irrelevant. This ruling obviously was proper. Appellant now challenges only the ruling during the penalty phase.

Similarly, a capital defendant may not present a penalty-phase witness to testify explicitly what verdict the jury "ought" to reach. Torrence, 305 S.C. at 51, 406 S.E.2d at 319. A capital defendant may not present witnesses merely to testify of their religious or philosophical attitudes about the death penalty. Id.

On the other hand, a capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf. Thus, a close relative of a defendant, such as his mother, may make a general plea for mercy for the life of her son. Torrence, 305 S.C. at 51, 406 S.E.2d at 319. A close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach. State v. Johnson, 338 S.C. 114, 125-127, 525 S.E.2d 519, 524-525 (2000) (while trial court erred in limiting sister's testimony, defendant was not prejudiced because sister was able to make a general plea for mercy on his behalf and clearly expressed her love and affection for him).

We are unpersuaded by Appellant's argument he should have been allowed to cross-examine Vance pursuant to Torrence and Johnson. We accept as true the proffer by Appellant's attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would constitute Vance's opinion of what verdict – life in prison versus the death penalty – the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness. See Matthews, 296 S.C. at 393, 373 S.E.2d at 595.

PROPORTIONALITY REVIEW

As required, we conduct a proportionality review of Appellant's death sentence. S.C. Code Ann. § 16-3-25(C) (2003). The

United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. State v. Copeland, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, we search for similar cases in which the death sentence has been upheld. Id.; S.C. Code Ann. § 16-3-25(E) (2003).

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of statutory aggravating circumstances for each of the four murders is supported by the evidence. Furthermore, a review of prior cases shows the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003) (death penalty warranted for defendant convicted of murders of former live-in lover, lover's thirteen year-old daughter, and lover's mother; aggravating circumstances included two or more persons were murdered pursuant to one scheme or course of conduct, and murder was committed during commission of burglary); State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992) (death penalty warranted where defendant was convicted of two counts of murdering two schoolchildren, eight counts of assault and battery with intent to kill, one count of assault and battery of a high and aggravated nature, and one count of illegally carrying a firearm in shootings at an elementary school); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (death penalty warranted where defendant shot and killed former girlfriend and another woman in a home); State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999) (death penalty warranted where defendant shot and killed former girlfriend and her young daughter in their home); State v. Reed, 332 S.C. 35, 503 S.E.2d 347 (1998) (death penalty warranted where defendant shot and killed both parents of his former girlfriend).

AFFIRMED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice Alexander S. Macaulay, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Electric
& Gas Co. and SCANA Corp., Respondents,

v.

Town of Awendaw and Berkeley
Electric Cooperative, Inc., Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Roger M. Young, Master-In-Equity

Opinion No. 25820
Heard February 5, 2004 – Filed May 11, 2004

REVERSED

William B. Regan and Frances I. Cantwell, of Regan and Cantwell, LLC, of Charleston; and Dwayne M. Green of Hampton Green, LLC, of Charleston, for Petitioner Town of Awendaw; and Michael A. Molony, Stephen L. Brown and Lea B. Kerrison of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston, for Petitioner Berkeley Electric Cooperative, Inc.

James B. Richardson, Jr., of Richardson & Birdsong; Catherine D. Taylor of South Carolina Electric & Gas Co.'s Legal Department; and Patricia T. Smith, all of Columbia, for Respondents.

Danny C. Crowe, of the Municipal Association of South Carolina, Columbia; and James M. Brailsford, III, of Edisto Island, for Amicus Curiae

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JUSTICE BURNETT: We granted the petitions of Town of Awendaw (Town) and Berkeley Electric Cooperative, Inc. (BEC) for a writ of certiorari to review the Court of Appeals' decision in South Carolina Elec. & Gas Co. v. Town of Awendaw, 351 S.C. 491, 570 S.E.2d 542 (Ct. App. 2002). We reverse.

FACTS

Rural electrical cooperative BEC provided service to all of Town's residents when Town was incorporated in 1992. About 1,033 residents live in Town, located in northern Charleston County. Town enacted an ordinance and adopted a franchise agreement in 1993 which designated BEC as the primary supplier of electricity to Town and granted BEC the right to use public streets to construct and maintain its facilities. In exchange, BEC agreed to pay Town an annual franchise fee equaling three percent of its gross revenues from the sale of electricity within Town's limits.

Town subsequently annexed the property of residents who are served by South Carolina Electric & Gas Co., a wholly owned subsidiary of SCANA Corp. (collectively, SCE&G). Some twenty-six residential customers inside Town's limits are now served by SCE&G, which has about 770 feet of line on four poles located along public streets in Town's limits. SCE&G served those customers prior to annexation because they were located within unincorporated areas previously assigned to the company by the S.C. Public Service Commission pursuant to S.C. Code Ann. § 58-27-640 (1976).

Town requested SCE&G enter into a franchise agreement. Town and SCE&G unsuccessfully attempted to negotiate the terms of

such an agreement from 1995 to 1999. In late 1998, Town enacted a business license ordinance. That ordinance imposed franchise fees of three percent of gross revenues collected on sales within Town's limits on various utility providers, including electrical utilities. SCE&G paid franchise fees to Town under protest, paying $941 in 1999 and $760 in 2000.

In 1999, SCE&G initiated a lawsuit challenging Town's authority to impose a franchise fee on SCE&G's operations in Town's limits in the absence of a franchise agreement.[1] BEC intervened in support of Town. SCE&G subsequently moved for summary judgment, arguing because it had no franchise agreement with Town, Town had no authority to unilaterally impose a franchise fee on SCE&G. SCE&G asserted, inter alia, the resolution of the issue is controlled by City of Abbeville v. Aiken Elec. Co-op, Inc., 287 S.C. 361, 338 S.E.2d 831 (1985). Town also moved for summary judgment, contending the franchise fee was proper under state law and relying primarily on BellSouth v. City of Orangeburg, 337 S.C. 35, 522 S.E.2d 804 (1999).

The master-in-equity granted Town's motion for summary judgment, concluding the franchise fee is proper under state law and BellSouth, supra. The Court of Appeals reversed, interpreting City of Abbeville, supra, to prohibit the municipality's unilateral imposition of

[1] The parties' initial efforts to resolve the dispute before the Charleston County Business License/Users Fee Appeals Board and their original court pleadings focused on the legitimacy of Town's imposition of a business license tax. Town amended its Answer to clarify it was imposing a franchise fee – not a business license tax – following the deposition of expert Roy D. Bates and the publication of BellSouth v. City of Orangeburg, 337 S.C. 35, 522 S.E.2d 804 (1999). The parties, as well as the trial court and Court of Appeals, all have addressed the legitimacy of the fee as a franchise fee, not a business license tax.

a franchise fee because an existing utility provider is allowed to continue serving its existing customers after annexation. The Court of Appeals' majority distinguished BellSouth, reasoning that case did not apply because Town and SCE&G never had entered into a franchise agreement, unlike the utility and municipality in BellSouth. The dissenting judge would have relied on BellSouth to conclude the imposition of the franchise fee was proper, provided it was not so unreasonable that it amounted to ouster of an existing utility provider following annexation pursuant to City of Abbeville.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Id. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

ISSUE

Did the Court of Appeals err in holding Town lacked the authority to impose a franchise fee on an electrical utility provider in the absence of a franchise agreement?

DISCUSSION

Town asserts the Court of Appeals misinterpreted state law and this Court's precedent to err in holding Town lacked the authority to impose a franchise fee on SCE&G in the absence of a franchise agreement. We agree.

Governmental franchises typically are obtained by service-type, monopolistic businesses such as electricity, water, telephone, and cable television providers. A franchise constitutes a special privilege granted by the government to particular individuals or companies to be exploited for private profits. Such franchisees seek permission to use public streets or rights of way in order to do business with a municipality's residents, and are willing to pay a fee for this privilege. Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 165, 547 S.E.2d 862, 867 (2001); City of Cayce v. AT&T Communications, 326 S.C. 237, 486 S.E.2d 92 (1997); State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537, 548 (1929). While a franchise is a privilege, it also is viewed as a function delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control. 12 McQuillin Mun. Corp. § 34.01 (3d ed. 1995).

A municipality in South Carolina may enact ordinances and regulations which "grant franchises for the use of public streets and make charges for them," provided the ordinances and regulations are consistent with the Constitution and general law of the state. S.C. Code Ann. § 5-7-30 (Supp. 2003). The state Constitution vests the authority to make such decisions in a municipality's governing body. See S.C. Const. art. VIII, § 15 (prohibiting Legislature from enacting any law which grants the right to a utility provider to construct, operate, or use the public streets or public property without first obtaining the consent of the municipality).

When an area is incorporated into a new municipality or annexed into an existing one, the municipality may not oust or evict a utility provider which previously has lawfully served the area, in the absence of statutorily delegated powers of eminent domain authorizing such an ouster. City of Abbeville, 287 S.C. at 370-371, 338 S.E.2d at 836 (construing S.C. Const. art. VIII, § 15 and S.C. Code Ann. § 58-27-670, and rejecting challenges to legitimacy and constitutionality of amended statute which restricts municipality's right to oust existing utility providers by exercising eminent domain).

Under City of Abbeville, a franchisee possessing a valid territorial assignment to serve an area subsequently annexed or newly incorporated is permitted to continue serving premises in that area which were being served as of the date of the annexation or incorporation. However, the franchisee is prohibited, without prior consent of the municipality, from extending or expanding service in that area by the use of any streets, alley, public property, or public ways after the date of the annexation or incorporation. Id.

In BellSouth, we concluded a municipality may exercise its authority under § 5-7-30 to unilaterally impose a franchise fee on a utility provider even though no such fee had ever been imposed during the existence of a long-term franchise agreement. BellSouth, 337 S.C. 35, 522 S.E.2d 804. In that case, BellSouth operated under an 1894 franchise ordinance that allowed it to use the public streets of the city of Orangeburg to erect poles and wires and exempted BellSouth from "all municipal taxation, licenses, or rentals" for a term of five years. The original franchise agreement was expanded in 1914 to include underground use of public streets, but again no fee was required. BellSouth never had been obligated to pay a franchise fee until the city of Orangeburg enacted one by ordinance in 1993, ninety-nine years after the original agreement. BellSouth, 337 S.C. at 38-39, 522 S.E.2d at 806.

We upheld the unilaterally imposed franchise fee, rejecting BellSouth's arguments the fee actually is an impermissible tax, it conflicted with federal telecommunications law, the ordinance exceeded the municipality's power to manage public rights of way, the fee was not fair and reasonable, and it violated a state statute which granted telephone companies the right to construct and maintain its lines along public highways. We concluded the franchise fee was consistent with the state Constitution and state and federal law. Id. at 39-46, 522 S.E.2d at 806-809.

Neither BellSouth nor City of Abbeville directly answers the question presented in this case, i.e., whether Town may impose a

franchise fee on SCE&G in the absence of a franchise agreement. BellSouth is not directly on point because, as recognized in the Court of Appeals' majority and dissenting opinions, the franchise fee was unilaterally imposed by a municipality with an existing franchise agreement with the utility provider. City of Abbeville stands for the proposition that a utility provider's right to serve its present customers continues upon annexation or incorporation, but does not address the fee issue.

We conclude that in areas which are subsequently annexed or newly incorporated, a new relationship is created by operation of law between the municipality and the existing utility provider. The new relationship is municipality as franchisor and utility provider as franchisee, although the relationship obviously is more limited in scope and nature than the typical franchisor-franchisee relationship due to the lack of a franchise agreement.

We base our decision primarily on § 5-7-30, which authorizes a municipality to "make charges" for the use of public streets, and on City of Abbeville, supra. The existing utility provider has the right to continue serving its existing customers in subsequently annexed or newly incorporated areas, and the municipality is prohibited from ousting the utility provider, as we decided in City of Abbeville. The utility provider does not, however, have the right to continue using public streets which have come under the purview and control of the municipality in pursuit of the utility's for-profit business interests without payment of a reasonable fee to the municipality.

Accordingly, a municipality may, consistent with § 5-7-30 and S.C. Const. article VIII, § 15, impose by ordinance a reasonable franchise fee on an existing utility provider in subsequently annexed or newly incorporated areas. The amount of such a fee must be reasonable, as an inordinate fee would be unreasonable and could constitute ouster pursuant to City of Abbeville, supra. See also BellSouth, 337 S.C. at 44, 522 S.E.2d at 808 (finding no evidence imposition of annual franchise fee of five percent of gross revenue and

one-time administrative fee would actually effect an ouster of BellSouth from its service of city residents).

This result is consistent with BellSouth, supra. While a franchise agreement existed in that case, the municipality's imposition of a franchise fee without the utility provider's consent admittedly was an important and substantive change in the agreement. We consistently have taken the view a utility provider generally should not be allowed free use of a municipality's streets in light of the constitutional and statutory authority reserving or granting power to municipalities to impose charges for such use. See City of Cayce, 326 S.C. 237, 486 S.E.2d 92 (holding the municipal consent power provided by Article VIII, § 15 of the constitution allows a municipality, before facilities are constructed, to require payment of a fee as a condition of permitting a telephone utility to construct and operate a fiber optic cable system using public streets, even though fee could not be imposed as a franchise fee because service relationship between municipality and utility was too attenuated to be characterized as a franchise); see also Athens-Clarke County v. Walton Elec. Membership Corp., 454 S.E.2d 510, 512-513 (Ga. 1995) (payment of a franchise fee is a plausible prerequisite to the grant of a franchise; therefore, municipality may impose a franchise fee in the absence of a franchise agreement when the municipality enacts a franchise ordinance conditioning the future grant of a franchise on the payment of a reasonable franchise fee).

We do not conclude a municipality may unilaterally impose a franchise agreement on a utility provider. Various terms and conditions of an agreement generally are set forth in a written, enforceable contract between the municipality and the franchisee. See 12 McQuillin §§ 34.06, 34.45 and 34.45.10; 2 Antieau on Local Government Law § 28.01 (2d ed. 2003). A municipality does not have the authority to force a utility provider to accept a franchise agreement. See 12 McQuillin § 34.74 (municipality may not, under pretense of regulation as exercise of police power, force a franchise agreement on a utility provider); 2 Antieau § 28.01 and 28.05 (general rule is that franchise agreement must be accepted by franchisee in order to be valid).

Therefore, a municipality may impose a reasonable franchise fee, contained in a duly enacted ordinance, on an existing utility provider in subsequently annexed or newly incorporated areas. The municipality and utility provider remain free to negotiate terms and enter into a traditional franchise agreement to be adopted in the usual fashion by a franchise ordinance. See Quality Towing, 345 S.C. at 165-167, 547 S.E.2d at 867 (franchise contract between city and single company, which granted single company the exclusive right to charge the public for a vendor's services, was a classic example of a franchise; however, the contract was invalid because the city had not granted the franchise by enacting an ordinance as required by statute).

In the present case, a limited relationship of franchisor and franchisee was created by law when Town annexed areas served by SCE&G. Town has imposed a franchise fee on SCE&G of three percent of gross revenue the company earns from the sale of electricity within Town's limits. The fee imposed on SCE&G is the same Town collects from BEC under a franchise agreement, and the record reveals it is comparable to franchise fees imposed by other municipalities across South Carolina. Town imposed the fee in a duly enacted business license ordinance. Accordingly, the franchise fee is a lawful obligation of SCE&G.

CONCLUSION

We reverse, concluding a municipality may, consistent with § 5-7-30 and S.C. Const. article VIII, § 15, impose by ordinance a reasonable franchise fee on an existing utility provider in subsequently annexed or newly incorporated areas. We remand this matter to the circuit court for entry of summary judgment in favor of Town.

REVERSED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice Alexander S. Macaulay, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Willie Earl Reese, Jr., **Appellant.**

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3790
Heard April 7, 2004 – Filed May 3, 2004

REVERSED AND REMANDED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

ANDERSON, J.: Appellant Willie Earl Reese, Jr. was indicted and charged with the murder of his wife Teresa. Following a jury trial, he was found guilty and sentenced to thirty-five years in prison. He now appeals, asserting the trial court erred in the admission of hearsay testimony, the admission of photographs of the victim's body and autopsy, denying

certain requested jury charges, and failing to grant a mistrial based on the Solicitor's closing arguments. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Following her marriage to Reese in January 1999, Teresa Joyner moved out of the marital house and returned to her parents' home on two occasions, the first in January 2001 and again in April of the same year. Late in the evening during her second stay away from the marital home, as Teresa stood on the sidewalk in front of her parents' house, Reese shot Teresa in the head, killing her.

During the evening leading up to the fatal shooting, Teresa had been playing softball with her neighbor and cousin, Edith McKenzie. After the game, the two went to a club. Throughout the evening, while Teresa was with Edith, Teresa's mother received repeated telephone calls from Reese inquiring about Teresa's whereabouts and asking that she call him when she returned home. Each time he called, Teresa's mother assured Reese that she would tell her daughter he had called.

Edith testified that after leaving the club with Teresa around 1:30 a.m., she noticed Reese's car parked at a stop sign as she pulled into Sandstone Lane. Pulling alongside his car, Teresa spoke briefly with Reese, after which he turned his car around and followed Teresa to her parents' house. Standing in front of her parents' house, Teresa assured Edith that everything was okay, gave her a hug, and told her that she would see her tomorrow. Edith then departed, leaving Teresa and Reese standing on the sidewalk facing each other.

Edith drove to her own home two houses away, and once inside, called to check on Teresa. Teresa's mother answered the phone, and Edith asked if Teresa had come inside. According to Edith's testimony, when Teresa's mother went outside to check, she began screaming. Edith then drove back to where she had left Teresa and found her body on the sidewalk.

The following day, using his father as an intermediary, Reese contacted the police and informed them he wanted to turn himself in. Deputy Thomas Reese, the officer who took Reese into custody, testified that Reese was upset, at times crying, and cooperative throughout the process. At the sheriff's office, Reese gave the following voluntary written statement:

> I didn't go there to kill my wife. I went to talk to her. When she pulled up she said to follow her to the house, so I did. We were right there on the sidewalk talking. I said hello to [Edith] and she drove home. We talked for a few minutes. I was upset and crying. I pulled the gun out and told her that I was going to kill myself. She was trying to tell me not to kill myself. I kept asking, "Why does it got to be like this, baby?" I was moving the gun back and forth as a reaction. I don't know why the gun went off. I thought both safeties were on. I just wanted to see how she would react when I told her I was going to kill myself. I didn't mean to shoot her.
>
> When the gun went off I put my hands on my head. I panicked. I went to my car and put the gun to my head. I decided to call my dad. He talked me out of killing myself. I went to my aunt's house and parked the car. I walked to my dad's house. He told me to please put the gun down. I ended up putting the gun in the tire in the boat in the backyard where I told you all it was and it's the same one you recovered. My sister had called Tasha to bring the kids over because I was thinking about killing myself. My dad calmed me down and rode me around. Then I turned myself in over at Deputy Reese's house where you picked me up.

At trial, three witnesses testified that Teresa had moved out because of marital difficulties she was having with Reese. On each occasion, counsel for Reese objected that the portion of the testimony relating to why she moved out was hearsay because they "could only know that through hearsay." The objections were overruled. Over Reese's objection, four of the State's witnesses testified that during the week prior to her shooting, Teresa had told them that she was afraid for her life. Over objection, the

State admitted into evidence Exhibit 13, a photograph of Teresa's body at the scene, and Exhibit 19, an autopsy photo.

At the close of the State's evidence, counsel for Reese requested that the jury be instructed on the law of involuntary manslaughter and accident. The State objected, arguing that the felony of pointing and presenting a firearm was involved, thereby leaving Reese ineligible for jury instructions on involuntary manslaughter and accident. Whether or not the felony was implicated, counsel for Reese responded, the evidence did not necessarily establish the elements of the crime and "the jury could conclude that he was not pointing or presenting." The trial court sustained the State's objection, ruling that Reese was not entitled to involuntary manslaughter and accident charges.

At the beginning of his closing argument, the Solicitor noted the presence of counsel for Reese and explained his role as an advocate. He then asked the jury, "Who speaks for Teresa Reese? In this system of justice that we have in this type of case who speaks for Teresa Reese? That is the question that has been asked since April 29th, I submit to you, of this year, since the day she died." The Solicitor reiterated the question, "Madam Forelady and Gentlemen, the question is: Who speaks for Teresa Reese? And I submit to that that question can be answered and will be answered today." The Solicitor argued:

> After you have seen all of the evidence – you notice I didn't answer the question before I went over the evidence with you. I have now gone over all of the evidence with you. And this is argument. And you have seen all of the evidence of malice that the State submits to you we have proven. So now I ask you, now that all the evidence is in upon my argument, who speaks for Teresa Reese? You do, Madam Forelady and Ladies and Gentlemen of the jury.

The Solicitor then concluded, "You can speak for her with your verdict. Because the truth is that she was murdered. The facts are there and you're going to hear the law. And so you, the State submits, will speak for her with your verdict, with your verdict."

Counsel for Reese twice objected to the Solicitor's closing argument and moved for a mistrial. The trial judge denied Reese's motion, explaining, "All right, sir. It may be close, but I'll overrule your motion Mr. Swerling." When counsel for Reese requested a curative instruction, the trial judge responded, "I've already ruled. I overruled his objection. I can't very well give a curative instruction if I were to believe that your final argument was beyond the bounds of what is allowed by law."

LAW/ANALYSIS

I. SOLICITOR'S CLOSING ARGUMENT

The following colloquy occurred during the Solicitor's closing argument:

> MR. GASSER: Who speaks for Teresa Reese? In this system of justice that we have in this type of case, who speaks for Teresa Reese? That is the question that has been asked since April the 29th, I submit to you, of this year, since the day she died.
>
> From the time that Willie Earl Reese was arrested, the time that he initially appeared in court, through the Grand Jury proceedings, when he was placed on the trial docket, when his case was called on Monday, when you jurors with your fellow jurors assembled downstairs before Judge Manning, during the process of you being selected for this case, from opening statements of Ms. Campbell and Mr. Swerling through the presentation of the testimony and the submission of evidence, through the closing remarks of Ms. Campbell and Mr. Swerling and as I stand before you, Madam Forelady and Ladies and Gentlemen, the question is: Who speaks for Teresa Reese? And I submit to you that that question can be answered and will be answered today.
>
> . . . .

Ms. Campbell told you, the last line of her opening statement Ms. Campbell told you that this case is about holding Willie Reese, Jr. responsible for the choices he made on April the 29th. So I ask you again: Who speaks for Teresa Reese?

MR. SWERLING: Judge, I have to object. I don't like to do it, but I have to object to this line of argument. I don't think it's proper and I'd like to make a motion on it. I can either do it after Mr. Gasser is done.

THE COURT: Yes, sir.

MR. SWERLING: But it is closing argument. But I object to this line of argument.

THE COURT: All right, sir.

MR. SWERLING: I have a motion.

THE COURT: Overruled. Go ahead.

MR. GASSER: Thank you, Your Honor. After you have seen all of the evidence—you notice I didn't answer that question before I went over the evidence with you. I have now gone over all of the evidence with you. And this is argument. And you have seen all of the evidence of malice that the State submits to you we have proven. So now I ask you, now that all the evidence is in upon my argument, who speaks for Teresa Reese? You do, Madam Forelady and Ladies and Gentlemen of the Jury.

MR. SWERLING: Again, Your Honor, for the same reasons.

MR. GASSER: You do. You speak for her.

MR. SWERLING: I'd like to be heard on that issue.

THE COURT: Yes, sir. I'll hear you.

MR. GASSER: You can speak for her with your verdict. Because the truth is that she was murdered. The facts are there, and you're going to hear the law. And so you, the State submits, will speak for her with your verdict, with your verdict.

She had the right to leave him and she had the right to not be afraid. She had the right to live. That was her choice. Willie Earl Reese's choice that morning, he chose death. Now, you can't do anything about that. But when your verdict speaks the truth when you convict him of murder, it will be justice. And justice, Madam Forelady, and Ladies and Gentlemen, justice is what each and every one of you represent here today.

After the Solicitor's closing argument, the judge charged the jury. Once the jury retired to the jury room, the judge heard Mr. Swerling's motion:

THE COURT: Mr. Swerling, I'll hear your motion first.

MR. SWERLING: Yes, sir. During the argument I objected twice to Mr. Gasser's statements to the jury reluctantly. But I think that those kind of remarks exceed the bounds of permissible argument. The jury's responsibility is to speak the truth, to render a verdict on the law and the evidence, not to speak for the victim in the case. They're not supposed to speak for anyone except to speak the truth.

Mr. Gasser personalized the issue to the jury by suggesting they were speaking for Ms. Joyner, made their responsibility personal rather than as a jury to decide the issue from the facts and evidence and injected I think into the trial and to the jury an inflammation and a passion to decide this case for some other reason other than the facts and the law. So, based on it, Judge, I object and I move for a mistrial.

THE COURT: Mr. Gasser.

MR. GASSER: Your Honor, I couched it. That's why I didn't answer that question. Mr. Swerling is the one who told the jury that we were advocates and we were arguing a position and that—I had specifically waited to the end of my argument after I'd gone over all of the evidence. And I was arguing them, which I am entitled to, that the evidence clearly shows that he's guilty and I'm asking them for a verdict of guilt, and I'm merely telling them when they—our position is when they—the evidence is that he is guilty and when they sign—they'll all vote guilty which we're asking them to do because we are advocates, Mr. Swerling is asking them to find him not guilty, that when they all agree that he is guilty that their agreement and then the forelady's signature speaks on behalf of Ms. Reese. But I waited to do that towards the end. It was an argument that I've seen made on numerous occasions and that I've made before.

THE COURT: All right, sir. It may be close, but I'll overrule your motion, Mr. Swerling.

MR. SWERLING: Yes, sir.

. . . .

MR. SWERLING: Would you issue at least a curative instruction to the jury they are to disregard those remarks by Mr. Gasser?

MR. GASSER: Your Honor, I don't understand why one side can passionately argue a position and why the other side can't. I don't know how many times he used the word Mr. Reese, Mr. Reese and Willie Reese, and developed the principles and foundations of the Constitution, which is permissible, just as what I have done.

THE COURT: I've already ruled. I overruled his objection. I can't very well give a curative instruction if I were to believe that

your final argument was beyond the bounds of what is allowed by the law.

. . . .

MR. SWERLING: Yes, sir.

A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). The appropriateness of a solicitor's closing argument is a matter left to the trial court's discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003); State v. King, 349 S.C. 142, 160, 561 S.E.2d 640, 649 (Ct. App. 2002); State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000). A trial judge is allowed broad discretion in dealing with the range and propriety of closing arguments to the jury. State v. Raffaldt, 318 S.C. 110, 114-15, 456 S.E.2d 390, 393 (1995); State v. Bell, 302 S.C. 18, 33, 393 S.E.2d 364, 372 (1990); State v. Woomer, 278 S.C. 468, 474, 299 S.E.2d 317, 320 (1982). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Jernigan, 156 S.C. 509, 524, 153 S.E. 480, 486 (1930). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (Ct. App. 2003); State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct. App. 2003). To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to

the personal biases of the jurors."); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to personal bias of juror nor calculated to arouse his passion or prejudice"); State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors.").

Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct. App. 1995). This is known as the Golden Rule Argument. The Golden Rule Argument "ask[s] the jurors to become advocates for the plaintiff or victim and to ignore their obligation to exercise calm and reasonable judgment." Black's Law Dictionary 700 (7th ed. 1999); see also John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69-JAN Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective."). Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has now been made applicable to criminal actions. 75A Am.Jur.2d Trial § 650 (1991); see Lucas v. State, 335 So.2d 566, 568 (Fla. Dist. Ct. App. 1976) (holding that "[t]he technique of asking jurors to place themselves in the position of the victim has been held to be improper in both criminal and civil cases").

"The 'Golden Rule' argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75A Am.Jur.2d Trial §650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's

shoes is disallowed Golden Rule Argument. Johnson v. State, 587 S.E.2d 775, 781 (Ga. Ct. App. 2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 78 P.3d 403, 410 (Kan. 2003); see also State v. Prevatte, 570 S.E.2d 440, 476 (N.C. 2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper."); Velocity Express Mid-Atlantic, Inc. v. Hugen, 585 S.E.2d 557, 565 (Va. 2003) (ruling "plaintiff's repeated requests to the jury that it apply the 'Golden Rule' were prejudicial and constitute[d] reversible error").

During the Solicitor's closing arguments, Mr. Swerling immediately objected once the Solicitor posed the question to the jury, "Who speaks for Teresa Reese?" The judge overruled the motion. After the Solicitor's closing remarks included "[w]ho speaks for Teresa Reese? You do, Madam Forelady and Ladies and Gentlemen of the Jury," Mr. Swerling again objected. The court heard Mr. Swerling's motion after the judge charged the jury and they were in the jury room. Mr. Swerling initially moved for a mistrial based upon the passion-invoked closing argument. The judge overruled his motion. Mr. Swerling then asked the judge for a curative instruction to the jury to disregard the remarks made by the Solicitor. The judge denied the motion by stating, "I've already ruled."

Although a judge is given wide discretion in regard to closing arguments, the judge irrefutably abused his discretion when he allowed the Solicitor to continue the argument in his closing statement that aroused the passions or prejudices of the jury. This was impermissible Golden Rule Argument that asked the jurors to become advocates for the victim by speaking for her instead of maintaining their neutral role as jurors. Because the judge did not give a curative instruction after Mr. Swerling requested it, the trial judge's abuse of discretion resulted in prejudice to Reese. We rule the improper jury argument was prejudicial requiring a reversal of the jury verdict.

II. INVOLUNTARY MANSLAUGHTER CHARGE

The Solicitor published the following **STATEMENT** that Reese gave to Sergeant Barnes:

> I didn't go there to kill my wife. I went there to talk to her. When she pulled up she said to follow her to the house, so I did. We were right there on the sidewalk talking. I said hello to Nel and she drove home. We talked for a few minutes. I was upset and crying. I pulled the gun out and told her I was going to kill myself. She was trying to tell me not to kill myself. I kept asking, "why does it got to be like this, baby?" **I WAS MOVING THE GUN BACK AND FORTH AS A REACTION. I DON'T KNOW WHY THE GUN WENT OFF. I THOUGHT BOTH SAFETIES WERE ON. I JUST WANTED TO SEE HOW SHE WOULD REACT WHEN I TOLD HER I WAS GOING TO KILL MYSELF. I DIDN'T MEAN TO SHOOT HER. WHEN THE GUN WENT OFF I PUT MY HANDS ON MY HEAD. I PANICKED.** (Emphasis added).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). "**The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed**." State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (emphasis added); see State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969) (finding "that to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatever tending to reduce the crime from murder to manslaughter"); State v. Chatham, 336 S.C. 149, 151, 519 S.E.2d 100, 101 (1999). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial." State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000); see State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000) ("A trial court commits reversible error if it fails to give a requested charge on an issue raised by the

evidence."); State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (finding a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence).

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002); State v. Chatham, 336 S.C. 149, 519 S.E.2d 100 (1999). For an involuntary manslaughter charge to stand, the accompanying unlawful act must not be a felony nor naturally tend to cause death or great bodily harm. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998). A person who points and presents a loaded or unloaded firearm at another is guilty of a felony. S.C. Code Ann. § 16-23-410 (2003). The unlawful carrying of a pistol is a misdemeanor. S.C. Code Ann. § 16-1-100(C) and § 16-23-20 (2003). The negligent handling of a loaded gun will support a finding for involuntary manslaughter. State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); State v. White, 253 S.C. 475, 478, 171 S.E.2d 712, 714 (1969).

In State v. Crosby, the South Carolina Supreme Court held that the evidence presented at trial warranted a jury instruction on involuntary manslaughter. The court explained:

> A defendant is, however, entitled to a charge on involuntary manslaughter where the evidence shows a reckless disregard of the safety of others. (citation omitted)
>
> . . . .
>
> The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. Involuntary manslaughter is (1) the unintentional killing of another without

malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Chatham, 336 S.C. 149, 519 S.E.2d 100 (1999). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C. Code Ann. § 16-3-60 (1985). In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), this Court held that a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In Burriss, the defendant was threatened and then attacked by the victim and another male. After being pushed to the ground, the defendant drew a gun and fired two rounds into the ground. One attacker backed away, but urged his accomplice—the victim—to attack the defendant again. At this point, the defendant was on the ground, separated from his gun. When the victim began moving threateningly toward Burriss, he snatched his gun up and it fired. Burriss stated he was scared and his hand was shaking when the gun went off: "It was an accident. I didn't try to shoot nobody." Burriss, 334 S.C. at 263, 513 S.E.2d at 108. At one point, however, Burriss also testified that "my hand was on the trigger. The trigger was pulled or whatever."

. . . .

. . . **In his statement** to police immediately after the shooting, Crosby stated, "I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger. I was scared. I seen my life in danger. I didn't know how to react."

In our view, the only evidence which appears to directly support the Court of Appeals' ruling is **Crosby's statement** to police in which he stated he closed his eyes and pulled the trigger. **However, this ignores the fact that Crosby**

> **immediately added that he didn't even know he had pulled the trigger. The effect of the Court of Appeals' holding is that if there is any evidence a shooting was intentional, all evidence from which any other inference is may be drawn is negated. This is not the law of this state.** State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993) (charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). We hold Crosby was entitled to a jury charge on the law of involuntary manslaughter.

355 S.C. 47, 51-53, 584 S.E.2d 110, 111-113 (2003) (emphasis in original and emphasis added).

Additionally, Knoten is instructive in this case. The State argued that because Knoten retracted his confession at trial, the trial court correctly refused to charge voluntary manslaughter. The court held that because the confession was introduced at trial, it would support a charge on voluntary manslaughter regardless of the fact that the defendant withdrew this confession:

> In support of its second argument, that because Appellant recanted **his statement** he was properly denied the requested voluntary manslaughter charge, the State cites a single case, State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975). In that case, the Court held there was no error in denying the defendant's request to charge that if the jury found the arresting officer used unreasonable force in effecting the arrest, the defendant's resistance would not have been unlawful. At trial, the defendant denied that he resisted arrest. The officer testified that he did not use unreasonable force in effecting the arrest. The defendant had made no pre-trial statement which would have supported the requested charge. The record contained no evidence that the officer used unreasonable force, and therefore the requested charge was not warranted. See State v. Cole, supra. Weaver is distinguishable from the instant case. Moreover, the State's argument does not accurately reflect the law of this State. In

State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965), the defendant was charged with, and convicted of, assault and battery of a high and aggravated nature. The trial court refused his requested jury charge on simple assault and battery, despite testimony that the victim had received only slight injuries. The defendant testified that he had been elsewhere when the incident occurred, and under the defense's theory, he could have been not guilty of even simple assault and battery. The Court held that the refusal to charge on the lesser included offense was reversible error. The Court stated that,

> In determining the issues to be submitted to the jury . . . **all of the testimony, both for the State and the defense**, must be considered. . . . The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State.

Id. at 420-21, 140 S.E.2d at 781.

Because there was evidence—**in this case introduced by the State**—supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse Appellant's conviction in the slaying of Kimberly Brown.

347 S.C. 296, 308-09, 555 S.E.2d 391, 397-98 (emphasis added).

The efficacy of Knoten is that when the State introduces a statement or confession, that statement or confession **may** support an involuntary manslaughter charge.

Evidence must exist that the killing was unintentional and without malice, in addition to either an unlawful activity not naturally tending to cause death or great bodily harm or a lawful activity with reckless disregard

for the safety of others. The State introduced **Reese's statement** where the jury could infer Reese's intent was to threaten to kill himself and he did not point or present the gun to her; thereby finding the shooting of the gun was unintentional. Reese stated:

> I pulled the gun out and told her I was going to kill myself. . . . I was moving the gun back and forth as a reaction. I don't know why the gun went off. I thought both safeties were on. I just wanted to see how she would react when I told her I was going to kill myself. I didn't mean to shoot her. When the gun went off I put my hands on my head. I panicked.

Accordingly, evidence does exist in the record that would allow the jury to infer the lesser-included offense of involuntary manslaughter was committed. The trial judge committed reversible error by failing to charge the jury on involuntary manslaughter, which resulted in prejudice to the Reese.[1]

REVERSED AND REMANDED.

BEATTY, J., concurs.

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

HEARN, C.J.: In my view, even if the jury believed Reese's statement that he shot his wife accidentally, he was not entitled to an involuntary manslaughter or accident charge because the shooting occurred while Reese was engaged in the felony of pointing or presenting a firearm. Further, although I agree the trial judge erred by allowing the solicitor to urge jurors to speak for the victim, I believe the error was harmless. Thus, I respectfully dissent.

I. Involuntary Manslaughter and Accident Charge

[1] In view of our reversal of the case on the identified issues, we decline to address any other arguments.

If there were any evidence from which it could be inferred that Reese committed involuntary manslaughter, Reese would undoubtedly be entitled to receive a jury charge on that lesser-included offense. See State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) ("The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed."). Likewise, a charge on accident would be warranted if any evidence suggested that the victim's death resulted from an accidental shooting. However, I believe no such inferences can be drawn based on the record before me.

It is undisputed that Reese and the victim were separated at the time of the shooting, and the victim was living with her parents. The evening before the shooting, the State introduced phone records showing that Reese had called the victim's cell phone fifty-one times between 9:45 p.m. and 2:00 a.m. When the victim was returning home during the early morning hours on the day of the shooting, Reese was waiting for her at a stop sign in front of her parents' street. The two drove separately to the home of the victim's parents, and they talked outside. As the majority opinion quoted, Reese made a statement to the police claiming that while they were talking, he "pulled the gun out" and did not "know why the gun went off" when he was "moving it back and forth." Importantly, Reese never denied pointing the gun at the victim. Rather, he stated that he was surprised by the shooting because "he thought both safeties were on." Moreover, in addition to Reese's admission that he was waving the gun back and forth, numerous witnesses testified (and the tragic result makes clear) that the gun was pointed in the victim's direction. In fact, the crime scene investigator, the deputy coroner, and a forensic pathologist all testified that the gun was not only pointed at the victim, but was very near to or right against the victim's head.[2] There is simply nothing in the record to contradict this evidence.

[2] The deputy coroner testified that "[t]he gunshot wound appeared to be a contact or very near a contact type wound." The crime scene investigator also testified that upon observation of the body he believed the victim's death was caused by a either "soft contact or a close contact type wound." Likewise, the forensic pathologist, who performed an autopsy on the body, testified that there was a "loose contact gunshot wound to the left side of the

To warrant a charge of involuntary manslaughter or accident, a homicide cannot have occurred during the commission of a felony.[3] In South Carolina, it is a felony "for a person to present or point at another person a loaded or unloaded firearm." S.C. Code Ann. § 16-23-410 (1976). Thus, whether or not Reese intended to shoot his wife, he would not be entitled to an involuntary manslaughter or accident charge because the only evidence in the record is that the shooting occurred while he was committing the felony of "presenting or pointing" a firearm. See State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996), *cert. denied*, 520 U.S. 1200 (1997) (defining involuntary manslaughter, in relevant part, as the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm); State v. Young, 319 S.C. 33, 39-40, 459 S.E.2d 84, 87-88 (1995) (finding the defendant was not entitled to a charge of involuntary manslaughter despite his statement that the gun "just went off" because his statement also indicated he was committing the felony of armed robbery at the time of the shooting).

The majority correctly notes that the negligent handling of a firearm supports a charge for involuntary manslaughter; however, where the mishandling of a weapon coincides with the commission of a felony or some other unlawful act that naturally tends to cause death or great bodily harm, an involuntary manslaughter charge is not warranted. In State v. Burris, 334

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head." The pathologist further explained that "[t]he gun was just brushing the skin."

[3] South Carolina courts have defined involuntary manslaughter as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others. State v. Tucker, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996), *cert. denied*, 520 U.S. 1200 (1997). For a homicide to be deemed an accident, there must be evidence that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994).

S.C. 256, 2665, 513 S.E.2d 104, 109 (1999), our supreme court found that evidence on the record could support a finding that appellant was entitled to arm himself in self-defense and was therefore acting lawfully when his negligent handling of a loaded weapon caused the weapon to fire and kill the victim.[4] Likewise, in State v. Crosby, 355 S.C. 47, 50, 584 S.E.2d 110, 111 (2003), the supreme court held that involuntary manslaughter should have been instructed because there was evidence that the victim was charging the appellant with his hand behind his back, and the appellant closed his eyes and fired the gun, without even realizing he had pulled the trigger. In both of these cases, the appellants were entitled to a charge of involuntary manslaughter because there was evidence from which the jury could infer they were *lawfully* acting in self-defense when they unintentionally fired a gun.[5]

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[4] The majority also cites to State v. White, 253 S.C. 475, 478, 171 S.E.2d 712, 714 (1969), for the proposition that the negligent handling of a loaded gun supports a finding for involuntary manslaughter. Although White does cite that proposition of law, the opinion does not discuss whether the defendant was entitled to an involuntary manslaughter charge based on the negligent mishandling of a loaded gun. The issue in White was whether the trial judge erred in allowing an indictment for murder to go to the jury when the only charge submitted to the jury was involuntary manslaughter.

[5] The only other cases in which our appellate courts have found that a defendant's negligent handling of a loaded firearm supported a charge for involuntary manslaughter are State v. Causer, 87 S.C. 516, 517, 70 S.E. 161, 161 (1911) (defendant took a hunting rifle away from decedent, who had been pointing the gun at two little boys, and defendant was walking away with the gun when, "in some unexplained way it went off, killing the [decedent], who had walked up behind"); State v. Tucker, 86 S.C. 211, 212, 68 S.E. 523, 524 (1910) (defendant was "rubbing [a] pistol" while sitting next to his half-brother, and "without knowing that [the pistol] was loaded or that his brother was in front of him, [defendant] pulled the trigger without meaning to do so"); State v. Revels, 86 S.C. 213, 214-215, 68 S.E. 523, 523 (1910) (a decedent grabbed and pulled on the defendant's cocked gun when it fired, fatally shooting decedent in the knee); State v. Gilliam, 66 S.C. 419, 421, 45 S.E. 6, 7 (1903) (defendant and his decedent wife were "in a playful tussle" for the possession of a pistol when the gun unintentionally fired).

In the case at hand, Reese was not acting in self-defense. Rather, by his own admission, he was brandishing a gun in order to see how his wife would react if he threatened to shoot himself. While he had the gun in the air, he moved it back and forth, and according to all the evidence in the record, when it was very close to his wife's head, he shot her. Even if Reese did not intend to shoot his wife, he is not entitled to an involuntary manslaughter charge because, at the time of the shooting, he was pointing or presenting a weapon, which is a felony, and he was attempting suicide, an unlawful act naturally tending to cause death or great bodily harm. See State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1819) (stating that suicide is an unlawful act and that if A takes B's life when attempting suicide, A is guilty of murder) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Accordingly, I would affirm the trial judge's ruling denying Reese's request to charge the jury on involuntary manslaughter and accident.

II. Closing Argument

In regards to the solicitor's closing argument, which urged the jury to "speak for the victim," I agree with the majority's finding that this type of argument impermissibly asks the jurors to advocate for the victim. However, I find the judge's error in allowing the argument was harmless in light of the overwhelming evidence of Reese's guilt. See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (stating that an error is harmless when it could not reasonably have affected the result of the trial); see, e.g., State v. Primus, 349 S.C. 576, 577-578, 564 S.E.2d 103, 109 (2002) (applying harmless error analysis to improper comment by prosecutor during closing argument as to defendant's failure to call a witness).

In Reese's statement to police, he claimed he pulled out a gun and told the victim he was going to kill himself. He admitted that he was waving the gun back and forth and that the gun went off, though he denied purposefully killing her. Numerous witnesses testified that the victim died as a result of a single gunshot wound. Those witnesses also testified that the gun was either very near or right against the victim's head. Based on this overwhelming

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Notably, all of these cases differ from the case at hand because the negligent mishandling of the weapon coincided with lawful activities.

evidence of Reese's guilt, especially the uncontradicted evidence that he shot the victim in the head while feloniously presenting a firearm, I firmly believe the solicitor's improper comments during closing argument were harmless beyond a reasonable doubt.

III. Purported Hearsay Regarding Marital Problems

Because I propose to affirm Reese's convictions, I briefly address his other arguments on appeal. Reese contends the trial judge erred in allowing witnesses to testify that the victim had moved to her mother's home because of marital problems. Reese asserts such testimony was hearsay.

The victim's cousin testified without objection that "a week or two" before the victim was killed, she and Reese separated and she had moved back in with her parents. Because no objection was made to this testimony, subsequent testimony wherein witnesses stated that Reese and the victim had marital problems, without giving any details, was cumulative to the cousin's testimony, which was admitted without objection. Therefore, even assuming *arguendo* that the other witnesses' testimony was impermissible hearsay, any error in admitting their testimony was harmless. See State v. South, 285 S.C. 529, 535, 331 S.E.2d 775, 778 (1985) (finding that although the court erred by admitting officer's notes into evidence, the "error was harmless beyond a reasonable doubt since [notes were] cumulative to the abundant amount of similar evidence admitted at trial").

IV. State of Mind Hearsay Exception

Reese also argues the trial judge erred in allowing witnesses to testify that the victim was "afraid for her life" because such testimony did not meet the state of mind exception to the rule against hearsay. Our supreme court addressed the scope of the state of mind exception in State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), and found that "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." Reese contends that the witnesses's testimony that the victim was afraid for her life impermissibly related to the reason for the victim's state of mind. I disagree.

In Garcia, the witnesses repeated out-of-court statements that the defendant had kicked and threatened to kill the decedent and because of that, the decedent had been afraid. Here, the witnesses merely testified that Reese's wife feared for her life, which described the type of fear she experienced rather than the cause for such fear. As such, the trial judge correctly admitted the testimony under Rule 803(3), SCRE.

V. Admissibility of Photographs

Finally, Reese argues the trial judge erred by allowing the State to admit photographs of the victim's body into evidence because the photographs were more prejudicial than probative. Generally, a trial judge's decision to admit evidence will not be reversed on appeal absent an abuse of discretion. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). Because Reese failed to provide this court with a copy of those photographs, I would not meet the merits of this issue. See Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (explaining that the appellant has the burden of presenting the appellate court with an adequate record).

CONCLUSION

I respectfully disagree with the majority's holding that Reese was entitled to a charge on involuntary manslaughter. Further, although I agree that the solicitor's closing argument was improper, I believe the error was harmless in light of the overwhelming evidence of Reese's guilt. All of Reese's other arguments on appeal are without merit. Therefore, I would affirm Reese's conviction for murder.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Seabrook Island Property Owners Association, Appellant,

v.

Marshland Trust, Inc., Orangehill Plantation, LLC and Michael Casa, Respondents.

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 3791
Heard December 9, 2003 – Filed May 3, 2004

AFFIRMED

David B. Wheeler & Edward T. Fenno, of Charleston, for Appellant.

Timothy A. Domin, of Charleston, for Respondents.

CURETON, A.J.: Seabrook Island Property Owners Association (the "Association") brought this action against Michael Casa and his development companies, Marshland Trust, Inc., and Orangehill

Plantation, LLC, (collectively, "Developers"), to prevent construction of a bridge from Seabrook Island to two nearby marsh islands. The circuit court found the Association did not have the right to deny the construction and denied the Association's request for an injunction. The Association appeals. We affirm.

FACTS

Seabrook Island is a restricted-access resort community in Charleston County, South Carolina. In 1972, the subdivision of Seabrook Island was zoned as a planned unit development ("PUD") for Charleston County, which allowed for multiple zoning uses without the need to obtain separate zoning approval for each use. Seabrook Island formed the Association to enforce the restrictive covenants within the PUD. In 1987, the incorporation of the Town of Seabrook Island shifted control of the area from the county to the Town, and the Town adopted the county's PUD provisions.

Casa owned two lots in Seabrook Island in Area 6 of the PUD. Area 6 was zoned mixed commercial and residential. One of the lots was located in the commercial area and another lot, Lot 5, was located in a primarily residential area known as Marsh Creek. Casa intended to develop patio homes on Lot 5. Marsh Creek is subject to the Association's Covenants.

In 1995, Developers outbid the Association and purchased from the United States Bankruptcy Trustee two islands, Islands A and B, located in the marsh near Seabrook Island. Developers originally sought a permit from the South Carolina Office of Ocean and Coastal Resource Management (OCRM) to build two bridges to access the islands – one 350 foot bridge from Lot 5 to Island B and a 750 foot bridge from Casa's commercial lot to Island A. Developers changed their proposal to using Lot 5 as the jumping off point for a bridge or "driveway" to both islands. A single 290 foot bridge, emanating from

Lot 5, would go to Island B, and a 600 foot bridge would emanate from Island B to Island A.[1]

After receiving permit approval from the OCRM for the single bridge proprosal, Developers submitted an application to the Association's Architectural Review Board ("ARB") for permission to install a curb cut on Lot 5 for access to Islands A and B. The ARB denied Developers' proposal, believing the islands were located outside the PUD.[2] The ARB informed Developers that it had no authority to approve a curb cut for access to property outside the PUD. The ARB denied Developers' appeal, stating it would continue to deny any plans showing an easement across Lot 5 to access the islands.

The Association then filed suit seeking: (i) a declaratory judgment on its right to regulate use of Lot 5; (ii) a permanent injunction against Developers from using Lot 5 or any other property within the Seabrook Island Development to access Islands A and B; and (iii) an injunction against Developers from using Lot 5 for any other nonresidential purpose. The circuit court found the Association did not have the right to deny Developers' use of Lot 5 as a "jumping off point" for the islands and denied injunctive relief. The judge stated although ARB approval is required for the bridge, Developers should

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[1] Interestingly, Developers informed the Court at oral argument that they had settled a separate dispute with the Town of Seabrook Island. As part of that settlement, Developers agreed to only develop Island B. Island A would remain a natural area. Thus, only one bridge, emanating from Lot 5, would be necessary and there would be less of an imposition on the natural marsh environment. However, because this settlement was not between the two parties in the current appeal and was not a matter in the Record before us, we cannot consider this agreement.

[2] The circuit court held the islands were within the PUD. The Association has not appealed this finding, and it is the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is the law of the case).

be allowed to use Lot 5; otherwise, access to the islands would be unreasonably restricted. The judge based his decision on favoring Developers' free use of property. The Association appeals.

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable in nature, but it takes on the tenor of the underlying action. Gordon v. Colonial Ins. Co. of California, 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000). "An action to enforce restrictive covenants by injunction is in equity." Kneale v. Bonds, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994). On appeal from an action at equity, tried by the judge alone without a reference, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001). "However, this broad scope of review does not require the appellate court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." Id.

LAW/ANALYSIS

I. RESTRICTIVE COVENANTS

The Association argues the restrictive covenants convey upon it and the ARB the right to deny Developers' plan to construct a bridge to Islands A and B. The Association further argues the circuit court erred in relying upon a zoning ordinance to supersede the authority found in the restrictive covenants. We disagree.

A.

The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863

(1998). "[A]s voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy." Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994). Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenant. Taylor, 332 S.C. at 4, 498 S.E.2d at 864. Although an architectural review board has discretion regarding approval of proposed construction, that discretion is "constrained only by reasonableness and good faith." River Hills Prop. Owners Ass'n v. Amato, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997); O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992).

The Association first argues: (1) the Covenants apply to Lot 5, the Covenants give the Association broad discretion to reject the bridge proposal, and (2) it is reasonable for the Association to deny construction of the bridge. As explained below, we agree with the circuit court that it is unreasonable for the Association to deny construction of the bridge on Lot 5.

Developers' counsel admitted, and Casa testified at trial, that Lot 5 was subject to the Association's Covenants. Further, the deed to Lot 5 provided that the property was subject to the Covenants. The Covenants grant the Association the right to adopt and enforce regulations pertaining to "planning, construction and design of improvements on property or alterations thereto." Association Covenants § 2. The Covenants give sole discretion to the Board or the ARB to approve or disapprove of plans "based upon any ground, including purely aesthetic conditions." Id. at § 19. The sections of the Covenants pertinent to this appeal provide as follows:

> "No building of any kind or description, fence, swimming pool, or other structure, shall be erected, placed, or altered on any Lot in the Seabrook Island Development, until the proposed building plans . . . shall have been approved in writing by the . . . [Association's] Architectural Review Board . . . ." Association Covenants § 19.

> "The design and location of [bridges] on Property which is . . . subject to these Covenants, must be approved by the ARB." Id. § 25.

The circuit court held the islands were listed within the County's original PUD, which was adopted by the Town of Seabrook Island. The court found Lot 5 was subject to the restrictions in the Covenants, but the restrictions conflicted with the mixed commercial/residential use permitted in Area 6. Although the court found that the "driveway"/bridge from Lot 5 to the islands would be a "building . . . or other structure" subject to the ARB's approval under Covenant § 19, Developers were nevertheless entitled to use Lot 5 as a driveway to the island. The court found that otherwise, "access to the islands would be unreasonably restricted, and [Developers] would be . . . unjustifiably denied the free use of its property."

Reviewing the restrictive covenants and strictly construing them in favor of free use of the property, we find the circuit court did not commit error. The Covenants grant the ARB the right to approve or disapprove building plans, even for purely aesthetic reasons. Lot 5, as admitted by Developers and pursuant to deed, is subject to those restrictions. However, to outright deny building a driveway/bridge from Lot 5 would deny access to the islands. Although the ARB had the power to generally approve or disapprove of specific bridge plans "on any grounds," to outright deny the building of a bridge that would give access to the islands would be an unreasonable exercise of that power. Based on a preponderance of the evidence, the circuit court correctly held that it would not grant the Association a declaratory judgment finding the Association had the authority to deny Developers' request to build a bridge.

B.

In its next argument, the Association states the circuit court erroneously relied upon a "zoning ordinance" to supersede the effect of the Covenants. The Association, however, essentially argues the court

erred in relying upon the permitted uses of the PUD for Area 6. We find the circuit court did not commit error.

The Covenants appear to restrict their residential provisions to residential property. Covenant § 5 provides that "[a]ll property shown in the PUD as residential property which is now or hereafter becomes, by express reference or otherwise, subject to these Covenants, shall be used for residential purposes only." Covenants § 5 (emphasis added). As previously discussed, Lot 5 is located in a section known as Area 6, and Area 6 is "shown in the PUD" as allowing a mixture of commercial and residential use. As admitted by Developers, Lot 5 is subject to the Covenants by deed.

Reviewing the conflict between the restriction in application in the Covenants to properties shown in the PUD as residential and the mixed commercial/residential use allowed in the PUD for Area 6, the circuit court noted as follows:

> I find that while Lot 5 is subject to the foregoing provisions of the [Association] covenants, these provisions, as applied to [Developers], conflict with the permitted use of the property in Area 6. If [sic] find that these provisions should not be interpreted to prohibit [Developers'] use of its property considering the mixed use allowed for other property located in Area 6. I find that when read as a whole the entire [Association] covenants and PUD documents do not give the [Association] the right to deny [Developers] the right to use the property as the "jumping off point" for the two islands.

The Association points to this portion of the circuit court's order as proof that the judge erroneously relied upon the uses allowed for Area 6 instead of relying upon the applicable Covenants. Clearly, the circuit court did not rely on the allowed uses for Area 6; instead, the court merely pointed out the conflict between the restriction in the Covenants to residential uses "as shown in the PUD" and the allowance of commercial uses listed in the PUD for Area 6. Despite the conflict,

the circuit court found that nothing granted the Association the right to deny complete access to the islands. To deny complete access to the islands would be an unreasonable exercise of the Association's authority. Resolving this conflict in favor of free use of the property, we find the circuit court did not commit any error. See S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) ("A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.").

The Association further asserts the circuit court erred by failing to find that Lot 5 was "set" as a residential property, despite the mixed commercial/residential use allowed in the PUD for Area 6.

Developers submitted plans to build patio homes on Lot 5, in addition to using Lot 5 as the starting point for the "driveway"/bridge to the islands. The area surrounding Lot 5, Marsh Creek, contained purely residential developments. The Association argues this makes it clear that the character of Lot 5 has been set as residential, and the circuit court erred in relying upon the mixed use allowed by the PUD for Area 6 to overcome the restrictions on building bridges as found in the Covenants.

Although the developments surrounding Lot 5 in Marsh Creek have been strictly residential, the circuit court correctly pointed out in its order that "nothing in the governing PUD limits the use of Area 6 and Marsh Creek to residential use only." Thus, nothing in either the Covenants or the PUD indicates that the type of development located on Lot 5 has to be residential. Despite pointing out this conflict, the circuit court relied on the potential restriction of free use of property if the Association were allowed to completely bar construction of a driveway/bridge. Thus, the circuit court did not rely upon the PUD provisions to "override" the Covenants; the court merely found the Association's denial of a driveway unreasonable. Accordingly, there is no merit to the Association's argument.

We further note that it is unreasonable for the Association to deny construction of the bridge because the bridge is essentially a driveway to a single-family residence, and therefore, clearly a residential use. Developers' proposal states the bridge would be wooden and would be only 14 feet wide and a total of 890 feet long. The bridge would begin on Lot 5, continue 290 feet to Island B, then 600 feet to Island A. A bridge emanating from the commercial lot would be longer and more of an imposition to the natural marsh environment. OCRM did not approve a proposal concerning a bridge emanating from the commercial lot. The only approved plan was a bridge from Lot 5. Considering the proposed size and general appearance of the bridge, it would be unreasonable for the Association to deny construction of the bridge based on the argument it is commercial.

While Lot 5 is subject to the Association's Covenants, we find the circuit court judge committed no error in finding the Association does not have the right to deny Developers the use of the property as a jumping off point for access to the islands.

II. DENIAL OF ACCESS

The Association also argues denying construction of the bridge on Lot 5 would not unreasonably restrict access to the islands because Developers can access the islands from Casa's adjacent commercial property on Landfall Way. However, Casa testified using Lot 5 as the jumping off point would lead to a much more efficient and aesthetically pleasing way to build the bridge. Casa stated although he could use his commercial property as a jumping off point, that would require using two separate bridges for a total length of 1100 feet, whereas using Lot 5 allows the project to be consolidated into one bridge that has less impact on the environment. Further, OCRM approved the plan with the bridge coming from Lot 5, not the plan with two bridges.

Because using Lot 5 as the jumping off point allows the most efficient and aesthetically pleasing way to construct the bridge, we find

it was proper for the circuit court judge to find Developers would be unreasonably restricted from using Islands A and B if Lot 5 could not be used as a jumping off point.

III. DENIAL OF INJUNCTIVE RELIEF

The Association argues the circuit court erred in failing to grant its request for injunctive relief to enforce its valid restrictive covenants. We disagree.

"The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected." LeFurgy v. Long Cove Club Owners' Ass'n, Inc., 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994). "The issuance of an injunction depends upon the equities between the parties and if great injury will be done to the [party sought to be enjoined] with little benefit to the other property owners, it is proper for the trial court to deny equitable relief." Kneale, 317 S.C. at 268, 452 S.E.2d at 843.

Reviewing the evidence before this Court, we find the circuit court correctly denied the Association's request for an injunction. The Association sought to deny the construction of any bridge to the islands, thus denying complete access. The circuit court held there was no likelihood of irreparable harm to the Association if the injunction were denied and great harm, in the form of denial of the free use of property, to Developers if the injunction were granted. Although the Covenants give the Association the right to approve or disapprove of plans, including bridges, these restrictions must be strictly construed in favor of the free use of property. Taylor, 332 S.C. at 4, 498 S.E.2d at 864. Because an injunction on the building of a bridge to the islands would greatly harm Developers' ability to access the property, we find the circuit court correctly denied the injunction.

CONCLUSION

In order to allow Developers free use of Islands A and B, some form of access to the islands is required. We find using Lot 5 as a jumping off point is both a residential use of property and the most efficient and aesthetically pleasing way to construct the bridge. Based on the above, the decision of the circuit court is

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clotell Bateman, Respondent/Appellant,

v.

Helen V. Rouse, Appellant/Respondent.

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

Opinion No. 3792
Heard March 11, 2004 – Filed May 3, 2004

REVERSED and REMANDED

Craig E. Burgess, of Atlanta, for Appellant-Respondent.

Deena Smith McRackan, of Charleston, for Respondent-Appellant.

HEARN, C.J.: Clotell Bateman brought this action against Helen V. Rouse alleging conversion and wrongful withholding of certain funds and personal property due to the widow of Robert L. Bateman. The trial court issued an order awarding certain items of property to each party. Both parties appeal. We reverse and remand for a new trial.

FACTS

Clotell Bateman married Robert Bateman in 1944 when she was sixteen years old. The couple lived together continuously until 1968. On November 14, 1983, Robert Bateman purportedly obtained a divorce from Clotell. In 1988, Robert married Helen Rouse. Robert died on August 9, 1994. Upon his death, Helen received survivor's pension benefits, worker's death benefits under Social Security, survivor's insurance policy proceeds, and a flag from the Veterans Administration.

In 1996, Clotell filed a motion to vacate the order of divorce, contending that the decree was void and that Robert's marriage to Helen was invalid. On July 7, 1997, the family court declared the 1983 divorce decree void ab initio due to Robert's misrepresentations and fraud upon the court in obtaining service by publication in his action for divorce. Therefore, the family court found the divorce decree and Robert's marriage to Helen were void, and declared Clotell to be Robert's wife at the date of his death. The family court ordered that "any funds due to the widow of [Robert] be paid over to [Clotell]." This order was not appealed.

Clotell brought this action on May 12, 2000 seeking to recover the following items that had been disbursed to Helen in her capacity as Robert's widow:

a) $41,619.48 received from Robert's pension;
b) a death benefit of $10,000 under the Pension and Welfare Fund;
c) $35,000 survivor's insurance policy proceeds under the Welfare Fund;
d) certain other bonuses and benefits;
e) a flag and certificate from the Veterans Administration; and

f) Robert's discharge papers.

Clotell alleged Helen committed conversion and wrongful withholding[1] by obtaining these items that rightfully belong to Clotell, as Robert's widow under the 1997 family court order. Helen answered Clotell's complaint, specifically requesting a jury trial and asserting several equitable defenses. The case was set on the jury roster in Charleston County. Immediately before the trial began, the trial judge ruled on his own motion that Helen did not have a right to a jury trial because the claims and defenses were equitable in nature. In denying Helen's request for a jury trial, the trial judge stated:

> Now, bottom line is this. No matter which way you couch it, [Clotell's] action arises upon the basis of a family court decision unappealed from, finding that their marriage was never ended, because jurisdiction in the '82 divorce action was never conferred upon the family court in Charleston County. That's it.
>
> The defenses as raised, even though it may be styled as conversion, the defenses as raised are all equitable. In an equity cause of action the trial court has to find matters of fact and matters of law in order to resolve equitable issues. Just because there's a question of fact in an equitable defense does not

[1]Bateman's claim for wrongful withholding arises from her assertion that Rouse retained her property without authorization and after demand was made. This court can find no South Carolina case recognizing a cause of action for wrongful withholding, as distinguished from conversion, except for an action for the wrongful withholding of wages by an employer. See e.g., Kimbrell v. Jolog Sportswear, Inc., 239 S.C. 415, 420-21, 123 S.E.2d 524, 527 (1962) (discussing a cause of action for the tortious withholding of wages due to an employee by the employer).

> mean it's a trial by jury. It can't be. If that were the case, then you could never have a trial by court only, under equity, master in equity, or other issues, because in every single case there has to be a finding of fact, conclusion of law, an order in order to resolve the case
>
> . . . .
>
> Now, it is equity, no matter which way you cut it. The reason it is equity is because the family court made a decision that gave rights to [Clotell], perhaps. Whether it should be here or in probate court, I'm not going to address that issue except perhaps in a final order.
>
> . . . .
>
> I find as a matter of law that this is in essence an equitable action pursuant to the code section – excuse me, not the code section, Rule 39(a) and (b). I do not find that [Helen] has a jury issue in this particular case. I find further that [Clotell] in her filing did not request a trial by jury, and therefore we're going to go forward today as a nonjury trial. Obviously both sides' rights are protected pursuant to my decision.

The trial judge then advised counsel that the jury trial issue was not immediately appealable and denied Helen's motion to hold the matter in abeyance to allow for appeal. The case proceeded to trial that same day after a brief recess.

At the close of her case in chief, Clotell moved to amend the pleadings to include causes of action for recoupment and unjust enrichment. The judge took the matter under advisement until the conclusion of the case.

In the final order dated June 17, 2002, the trial judge found sufficient evidence to support the causes of action for conversion and wrongful withholding, but did not find sufficient evidence to support the claim for recoupment. In addition, the judge found that while Helen had been unjustly enriched at Clotell's expense, Clotell's original claims for conversion and wrongful withholding afforded her sufficient relief. He therefore granted judgment against Helen in the amount of $41,619.48 for the survivor's pension benefits and $255 for the worker's death benefit under Social Security. He also awarded Clotell the flag from the Veterans Administration. Clotell's claims for return of the $35,000 survivor's insurance proceeds under the Welfare Fund and the $10,000 death benefits were denied on the grounds that Robert's designation of Helen as beneficiary was evidence of his intent that she receive the proceeds and benefits. Helen appeals, arguing the trial judge erred in (1) denying her right to a jury trial, (2) refusing to grant her motion for directed verdict, and (3) denying her equitable defenses. Clotell also appeals, asserting the trial judge erred by (1) failing to award her the $35,000 insurance proceeds, and (2) excluding certain testimony.

LAW/ANALYSIS

I. Denial of the request for a jury trial

Helen argues the trial judge erred in ruling she did not have a right to a jury trial because Clotell's claim for conversion was an action at law. We agree.

The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). See also Rule 38 (a), SCRCP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived."). "Generally, the relevant question in determining the right to trial by jury is whether an action

is legal or equitable; there is no right to trial by jury for equitable actions." Lester, 327 S.C. at 267, 491 S.E.2d at 242 (citation omitted). Whether an action is legal or equitable is primarily determined by the allegations in the complaint. See Nat'l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). Furthermore, either party may demand a trial by jury of any issue triable by jury. See Rule 38 (b), SCRCP.

"An action for damages for conversion is an action at law." Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986) (citation omitted). In this case, Clotell asserted causes of action for conversion, wrongful withholding, recoupment, and unjust enrichment. In addition to seeking equitable relief in the form of possession of items of personal property, Clotell asserted a legal cause of action for conversion and sought damages in the amount of the funds received by Helen as Robert's widow, and pre- and post-judgment interest. Furthermore, Helen properly endorsed upon her answer a demand for a jury trial. See Rule 38(b), SCRCP. Helen's assertion of equitable defenses does not change the nature of Clotell's conversion claim from an action at law to one in equity. Rather, such equitable defenses are equitable issues for determination by the court. See Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 526, 167 S.E.2d 420, 424 (1969). Accordingly, we hold the trial judge erred in denying Helen's request for a jury trial on Clotell's claim for conversion. See Floyd, 306 S.C. at 379, 412 S.E.2d at 398-99.

II. Failure to immediately appeal

Clotell argues that Helen waived her right to a jury trial by not immediately appealing the trial judge's denial of her request for a jury trial. We disagree.

Not only did the trial judge err in finding Helen did not have a right to a jury trial, but he also erred in finding the denial of a right to a jury

trial is not immediately appealable. Orders of the trial judge denying a request for a jury trial involve the mode of trial, affect substantial rights under section 14-3-330(2) of the South Carolina Code (1976 & Supp. 2003), and are immediately appealable. See Lester, 327 S.C. at 266, 491 S.E.2d at 241. The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues. Id.

In Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997), an attorney brought an action to collect attorney's fees from a client. The client made at least two pre-trial motions for a jury trial. The circuit court rejected the client's motion for a jury trial and placed the case on the non-jury roster. The denial of the motion was not appealed from; rather, the client renewed his motion that the case be transferred to the jury roster at trial. The circuit court found the question moot because the client had not appealed from the previous order. Id. at 265, 491 S.E.2d at 241. The supreme court agreed, finding the client waived his right to a jury trial by not immediately appealing the order denying his motion for a jury trial.

Here, Helen had no opportunity to immediately appeal from the trial judge's sua sponte decision to hold a non-jury trial because the trial was held that same day after only a brief recess. When Helen requested that the case be continued to allow her to appeal, the trial judge refused her request, declaring that a right to a jury trial was not immediately appealable. Thus, while the judge's denial of Helen's request for a jury trial was immediately appealable, we find this case is not controlled by the waiver principles expressed in Lester.

Moreover, in other cases in which our supreme court has required an immediate appeal from the denial of a jury trial, the moving party had the opportunity to appeal when the trial court issued an order of reference to a master-in-equity. See, e.g., Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (holding that the trial court's unappealed order of reference to a master-in-equity became the law of the case); Creed v. Stokes, 285 S.C. 542, 542-43, 313 S.E.2d 351, 351 (1985) (finding the appellant waived his objection to the order of reference by not immediately appealing the order). In this case, however, no order of reference was ever issued.

Because the judge also denied Helen's motion to hold the case in abeyance and because the non-jury trial proceeded shortly after the judge made his erroneous finding that Helen had no right to a jury trial, Helen had no meaningful opportunity to immediately appeal. The judge's denial of Helen's motion to hold the trial in abeyance placed counsel in an untenable position, as Helen's counsel could not both proceed with the trial and immediately appeal the jury trial issue.

Furthermore, the purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party's constitutional rights that would otherwise be lost. See generally S.C. Const. Art. I, § 14; S.C. Code Ann. §14-3-330(2) (1976). In this case, Helen's constitutional right to a trial by jury on the conversion issue was lost through no fault of her own. Helen made every effort to assert her right to a jury trial and to immediately appeal the issue. However, due to the trial judge's errors, Helen's constitutional right to a trial by jury was lost. As a result, we find Helen did not waive her right to a jury trial because she was afforded no opportunity to immediately appeal the issue.

Clotell asserted in oral argument that Helen further waived her right to a jury trial by not appealing following the non-jury trial.[2] Specifically, Clotell argues that Helen should have served a notice of appeal immediately after the non-jury trial concluded rather than waiting until after the judge issued a written order resolving the case. We disagree.

As previously noted, the purpose of requiring an immediate appeal is to preserve a party's constitutional rights that would otherwise be lost. See generally S.C. Const. Art. I, § 14; S.C. Code Ann. §14-3-330(2) (1976). Here, Helen's constitutional right to a jury trial was lost despite her best efforts to secure a jury trial. Once the case was tried non-jury, Helen's right to a jury trial had already been forfeited. Under these circumstances, we do not believe the policy behind requiring an immediate appeal would have been furthered had Helen appealed at the conclusion of the non-jury trial.

[2] Helen did not file her notice of appeal until after she received the judge's written order, which was more than four months following the non-jury trial.

Moreover, once the case was tried non-jury, Helen arguably was required to wait for a written order prior to appealing. See Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment . . . . When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment."); Ford v. State Ethics Com'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court."). Thus, we find Helen preserved her right to a jury trial by timely serving her notice of appeal after the final judgment.

CONCLUSION

The trial judge erred in denying Helen's request for a jury trial and compounded that error when he ruled that the denial of a right to a jury trial was not immediately appealable. Because Helen had no opportunity to appeal from the trial judge's ruling prior to commencing the non-jury trial, we hold she did not waive her right to a jury trial. This case presents both legal and equitable issues, and as such, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd, 306 S.C. at 380, 412 S.E.2d at 399. If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court. Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). Therefore, we reverse and remand for a new trial.[3]

REVERSED AND REMANDED.

[3] Because we reverse and remand for a new trial on the denial of a jury trial issue, we need not reach the parties' remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues is dispositive).

ANDERSON and BEATTY, JJ., concur.