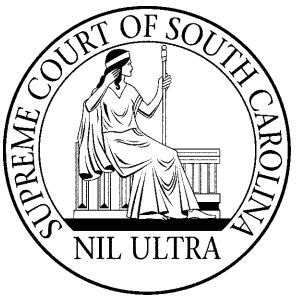

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 12, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2010-UP-353-S.C. Department of Social Services v. Stephanie C.
(Horry, Judge Wylie H. Caldwell, Jr.)

PETITIONS FOR REHEARING

4672-State v. Porter	Denied 07/07/10
4674-Brown v. James	Pending
4680-State v. Garner	Pending
4685-Wachovia Bank v. Coffey	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4694-Sherlock (London I v. Enterprise)	Pending
4696-State v. Huckabee	Pending
4697-State v. D. Brown	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
2010-UP-276-Ford v. S.Carolina	Pending
2010-UP-298-Graham v. Babb	Pending
2010-UP-300-Motsinger v. Williams	Pending
2010-UP-302-McGauvran v. Dorchester	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-314-Clems v. SCDPPPS	Pending

2010-UP-317-State v. C. Lawrimore Pending

2010-UP-330-Blackwell v. Birket Pending

2010-UP-331-State v. Rocquemore Pending

2010-UP-340-Blackwell v. Birket #2 Pending

2010-UP-343-Birket v. Blackwell Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page Pending

4370-Spence v. Wingate Pending

4451-State of South Carolina v. James Dickey Pending

4474-Stringer v. State Farm Pending

4476-Bartley, Sandra v. Allendale County Pending

4480-Christal Moore v. The Barony House Pending

4491-Payen v. Payne Pending

4493-Mazloom v. Mazloom Pending

4510-State v. Hicks, Hoss Pending

4518-Loe #1 and #2 v. Mother Pending

4525-Mead v. Jessex, Inc. Pending

4526-State v. B. Cope Pending

4529-State v. J. Tapp Pending

4541-State v. Singley Pending

4545-State v. Tennant Pending

4548-Jones v. Enterprise Pending

4553-Barron v. Labor Finders	Pending
4554-State v. C. Jackson	Pending
4560-State v. C. Commander	Pending
4561-Trotter v. Trane Coil Facility	Pending
4574-State v. J. Reid	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Pending
4604-State v. R. Hatcher	Pending
4605-Auto-Owners v. Rhodes	Pending
4606-Foster v. Foster	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending

4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4630-Leggett (Smith v. New York Mutual)	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4653-Ward v. Ward	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending
4666-Southeast Toyota v. Werner	Pending
4670-SCDC v. B. Cartrette	Pending

4671-SCDC v. Tomlin	Pending
2008-UP-126-Massey v. Werner	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-668-State v. S. Terry	Pending
2009-UP-148-State v. J. Taylor	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-204-State v. R. Johnson	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-276-State v. Byers	Pending
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Baby Spires	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-359-State v. P. Cleveland	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-396-McPeake Hotels v. Jasper's Porch	Pending

2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-585-Duncan v. SCDC	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-596-M. Todd v. SCDPPPS	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-111-Smith v. Metts	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending

2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-162-State v. T. Washington	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-178-SCDSS v. Doss	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-197-State v. D. Gilliam	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending
2010-UP-225-Novak v. Joye, Locklair & Powers	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nicholas Boan, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Marlboro County
Paul M. Burch, Circuit Court PCR Judge
John M. Milling, Circuit Court Trial Judge

Opinion No. 26832
Submitted June 25, 2010 – Filed July 12, 2010

REVERSED AND REMANDED

Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, Nicholas Boan (Petitioner) appeals the denial of his request for post-conviction relief (PCR).

FACTS/PROCEDURAL BACKGROUND

Petitioner was convicted of criminal sexual conduct with a minor first degree and two counts of lewd act upon a child. At sentencing, the trial judge orally pronounced Petitioner would serve twenty years for the first offense, fifteen years for the second offense, and ten years for the third offense. The first two sentences were to run concurrently, and the ten year sentence was to run consecutively. The written sentencing order for the first offense, however, indicated that Petitioner was to serve thirty years. Trial counsel did not make any motions regarding this discrepancy.

Petitioner's direct appeal was dismissed by the court of appeals, and Petitioner filed for PCR on numerous grounds. The PCR judge denied Petitioner's request for relief on all grounds, finding no error in sentencing because the written sentencing order controlled. Petitioner appealed, and this Court granted the writ of certiorari.

STANDARD OF REVIEW

In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

Petitioner argues trial counsel provided ineffective assistance for failing to file a motion regarding the ten-year discrepancy between the oral pronouncement of the sentence and the written sentencing order. We agree.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Lomax v. State,* 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. at 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Id.* at 693, 104 S. Ct. at 2052.

In this case, the trial judge orally pronounced a twenty-year sentence from the bench, but signed a sentencing sheet ordering a thirty-year sentence. Counsel did not make any objections or motions regarding this significant variance. Counsel's performance was deficient for failing to make a motion for clarification or a motion to conform to the oral pronouncement. Petitioner clearly was prejudiced by this mistake because an additional ten years was added onto his sentence.

Having determined counsel was deficient and Petitioner was prejudiced by that deficiency, we must determine next whether there is a reasonable probability Petitioner would not have been sentenced to an additional ten years if counsel properly had brought the discrepancy to the trial court's attention. We find this element is satisfied.

Although this Court has not previously spoken on the issue of whether an oral pronouncement of a sentence controls over a conflicting written sentencing order, the majority of jurisdictions that have considered this point hold the oral pronouncement controls. *See, e.g., U.S. v. Osborne*, 345 F.3d 281 (4th Cir. 2003); *Plourde v. State*, 975 So. 2d 558 (Fla. Dist. Ct. App. 2008). *But see Bradley v. State*, 864 P.2d 1272 (Nev. 1993) (holding an oral pronouncement is modifiable by the judge, and the sentence is only final once signed by the judge and entered by the clerk). Some of these decisions are founded on a federal or state rule of criminal procedure that requires a defendant to be present at sentencing. *See, e.g., U.S. v. Turner*, 532 F. Supp. 913, 916 n.2 (D. Cal. 1982) (finding FRCrimP 43 provides greater protection than the Constitution, and a defendant's right to be present at sentencing is based in the Rule). South Carolina does not have this rule. Other courts, however, have held that a criminal defendant has a constitutional right to be present at sentencing. *See, e.g., U.S. v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001) (holding a defendant's constitutional right to be present at sentencing mandates an oral pronouncement prevail over a conflicting written sentence). In the background of most of those decisions is *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985), in which the United States Supreme Court stated that a defendant has a due process right to be present at all stages of the trial to the extent that a fair and just hearing would be thwarted by his absence.

We are persuaded by the reasoning of those courts, and find a trial's fairness is compromised when a trial judge increases a defendant's sentence outside his presence. Accordingly, in a situation such as the one on appeal, due process requires the judge's oral pronouncement control over a conflicting written sentencing order. Here, the trial judge announced one sentence from the bench in the presence of the defendant, but later increased that sentence in his written order. If trial counsel had made the appropriate motion regarding the sentencing discrepancy, the oral pronouncement would have controlled and Petitioner would have received the twenty-year sentence. Thus, Petitioner has demonstrated a reasonable probability the result would have been different if trial counsel had made the appropriate motion. Accordingly, we hold Petitioner has established the required elements for a

claim of ineffective assistance of counsel, and the PCR judge erred in denying his petition.

This Court has previously held that post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance. *Rolen v. State*, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 564 (1981) (recognizing that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation")). Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense. *See Dervin v. State*, 386 S.C. 164, 169, 687 S.E.2d 712, 714 (2009) (remanding for resentencing when defendant given a 25-year sentence but 10 years was the maximum allowed for the offense); *Davie v. State*, 381 S.C. 601, 616, 675 S.E.2d 416, 424 (2009) (remanding for resentencing).

CONCLUSION

For the foregoing reasons, the PCR judge's denial of relief is reversed, and the case is remanded[1] for resentencing on the offense of criminal sexual conduct with a minor first degree.

BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in result. PLEICONES, J., not participating.

[1] Judge John M. Milling has since retired. Therefore, this case will need to be reassigned to another circuit court judge for resentencing.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn Chester, as Personal Representative of the Estate of Sherman E. Boutte, Jr., Appellant,

v.

South Carolina Department of Public Safety, South Carolina Department of Transportation, South Carolina Forestry Commission, Gary Thomas LaSalle, COBRA Transport a/k/a Cobra Automobile Transporting, Alternative Transport Services, Florida Auto Transport, Vic Mullins as the Personal Representative of the Estate of Jacob Trey Hall, Robin H. Miller, as the Personal Representative of the Estate of Rory Miller, Jeremy Crye, Ryder Truck Rental, Inc., Darren Mosley, RSC Transportation, Inc., Randel Brigman, Ernestine Hare Arnette, Mayflower Movers a/k/a Mayflower Transit, LLC and American Way Moving and Storage, Inc., Defendants,

of whom the South Carolina Department of Public Safety, South Carolina Department of Transportation, and South Carolina Foresty Commission are the Respondents.

Appeal from Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26833
Heard June 8, 2010 – Filed July 12, 2010

REVERSED

Mark B. Tinsley, of Gooding and Gooding, of Allendale, and Robert Norris Hill, of Newberry, for Appellant.

Lisa A. Reynolds, of Anderson & Segui, of Charleston; R. Morrison M. Payne and Christy Scott, both of Scott & Payne, of Walterboro; and Roy Pearce Maybank, of Charleston, for Respondents.

PER CURIAM: Appellant contends the trial judge erred in ordering her, the plaintiff in this Tort Claims Act (TCA) suit brought against three state agencies (respondents), to join other alleged joint tortfeasors as defendants at respondents' request, in order to effectuate the respondents' right to a proportionate verdict under S.C. Code Ann. § 15-78-100(c) (2005). The trial judge agreed with respondents that he could require appellant to add party defendants, but ultimately dismissed the action because these co-tortfeasors

could not be joined since the appellant had already settled with them. See Rule 19, SCRCP. We agree with appellant that the trial judge lacks the authority to require her to sue additional alleged co-tortfeasors, and reverse.

FACTS

Appellant's decedent was killed in a multiple vehicle accident caused when heavy smoke from a controlled burn being conducted by respondent Forestry Commission allegedly obstructed visibility on Interstate 95. As a result of the number of vehicles involved and the alleged negligence of three different state agencies, there are numerous potential defendants. A number of passengers in these vehicles or their estates brought actions in Hampton County naming appellant as a defendant. Appellant then brought this suit against the three TCA defendants in Dorchester County, and subsequently received settlements from a number of other defendants in the original Hampton suits. The Dorchester TCA defendants contended, and the trial judge agreed, that they were entitled to have the judge order appellant to join other alleged tortfeasors (including many with whom appellant had already settled in Hampton County) as defendants under Rule 19, SCRCP. The statute upon which the respondents and the trial judge relied provides:

> In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.
>
> §15-78-100(c).

ISSUE

Can a TCA defendant require the plaintiff to sue other alleged tortfeasors?

ANALYSIS

It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue. E.g., Doctor v. Robert Lee, Inc., 215 S.C. 332, 55 S.E.2d 68 (1949); South Carolina Dep't of Health and Envior. Control v. Fed. Serv. Indus., Inc., 294 S.C. 33, 362 S.E.2d 311 (Ct. App. 1987). A ruling that a TCA defendant can compel a plaintiff to join other alleged tortfeasors as defendants in that suit would overturn this firmly entrenched common law principle. Moreover, a concomitant ruling that where these defendants cannot be joined because they have already settled with the plaintiff, the action must be dismissed, would thwart our strong public policy favoring the settlement of disputes. E.g., Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987). We are not persuaded that the General Assembly, in enacting § 15-78-100(c), giving a TCA defendant the right to a proportionate verdict "when an alleged tortfeasor is named a party defendant," intended to abrogate the tort plaintiff's right to choose her defendant, nor to effectively force the plaintiff to choose between settling with some parties and thereby forego her right to sue a TCA defendant, or going to trial against all co-tortfeasors. Compare Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002).

Where, as here, the plaintiff has settled with some co-tortfeasors the TCA defendants are not without a remedy. First, if the jury returns a verdict finding more than one respondent liable, then it will be required to apportion liability among these respondents. § 15-78-100(c). Moreover, under the procedure outlined in Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), any respondent found liable will be entitled to an equitable set-off against the settlements appellant has already received.

CONCLUSION

The trial judge erred in holding that under Rule 19, SCRCP, he could require appellant to join other co-tortfeasors in order to afford the respondents their potential right to proportionate liability under § 15-78-100(c).

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Johnell Porter, Appellant.

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

Opinion No. 4672
Submitted March 1, 2010 – Filed April 5, 2010
Withdrawn, Substituted, and Refiled July 7, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Julie M. Thames, all of Columbia; Solicitor Kevin Scott Brackett, of York, for Respondent.

WILLIAMS, J.: Johnell Porter (Porter) appeals his convictions for conspiracy to commit armed robbery, armed robbery, entering a bank with intent to steal, kidnapping, and possession of a firearm during the commission of a violent crime. On appeal, we must determine whether the trial court erred in (1) refusing to quash the indictments or dismiss the case when Porter was arrested in North Carolina by South Carolina officers who did not take him before a magistrate; (2) admitting into evidence items found in the parking lot where Porter's vehicle stopped; (3) excluding Porter from a bench conference during the trial when Porter was representing himself pro se; and (4) refusing to issue the kidnapping charge requested by the defense. We affirm.

FACTS/PROCEDURAL HISTORY

On December 22, 2006, at approximately 10:30 a.m., Porter, along with Kenneth Young (Young) and Donshavis Jones (Jones), entered the front door of the Lake Wylie Branch of the Bank of York (the Bank). All three men wore dark ski masks, dark clothing, and gloves. All three were armed with handguns and at least one had a canister of pepper spray. Porter and Young approached the teller line and the customer service desk, pointed their guns at the employees, and ordered them to lie down. Porter and Young then ordered some of the employees and customers to crawl into the main vault and told some of the tellers to open their individual vaults.[1] At the same time, Jones carried a pillowcase into the main vault and began filling it with money. After Jones retrieved roughly $18,000, the three men left, leaving all of the employees and customers locked in the main vault. The three men got into a

[1] According to testimony from Bank employees, each teller had his or her own individual vault contained within the larger, main vault.

rented Ford Taurus (the Taurus) driven by Angela Laws (Laws).[2] The Taurus exited the Bank's parking lot and drove east on Highway 49 towards Charlotte.

Fortunately, it was the Bank's policy to leave a key in the main vault at all times for such an event, so the employees and customers were able to get out of the main vault soon after the robbers left. The vice president of the Bank, Mike Lubiato (Lubiato), immediately called 9-1-1. While he was on the phone with the 9-1-1 dispatcher, Lubiato spoke to a customer who had been waiting outside at the drive through window. The customer stated the getaway car was a gray or bluish gray Ford Taurus with a dealer tag. Lubiato relayed this information to the dispatcher.

Officer Terry Vinesett (Officer Vinesett) of the York County Sheriff's Department was on duty in his patrol car on the morning of December 22, 2006, when he received a call about an armed robbery at the Bank. The dispatcher stated the robbery involved four to five people, and the robbers fled the Bank in a blue or gray Ford Taurus. Constable Wes Scott (Constable Scott) was riding along with Officer Vinesett that day. Driving directly behind Officer Vinesett was Officer Randy Gibson (Officer Gibson). While the officers were about to make a left turn onto Highway 49 from Carowinds Boulevard, Officer Gibson saw the Taurus turning south on Carowinds Boulevard towards York County. When Officer Gibson alerted Officer Vinesett over his radio that he had seen the Taurus, he and Officer Vinesett immediately made a U-turn and followed the Taurus. As soon as the Taurus crossed over the York County line, Officer Vinesett and Officer Gibson turned on their lights and sirens.[3] Upon seeing the officers' lights, Laws began to speed up and turned onto Interstate 77 northbound towards

[2] Young testified that prior to the robbery, he duct-taped a dealer tag over the South Carolina license plate of the Taurus.

[3] The activation of the lights automatically activated the dashboard cameras inside the patrol cars, which captured the ensuing chase of the Taurus until it stopped in the parking lot of an apartment complex in North Carolina. The video taken from the cameras was admitted into evidence without objection.

Charlotte. Laws traveled several miles on the interstate before exiting at Arrowood Road in Charlotte.

Eventually, Laws turned into the parking lot of an apartment complex and came to a stop. Jones, who was seated in the back seat on the driver's side of the Taurus, attempted to flee. Before he could exit the Taurus, however, Officer Vinesett drove his patrol car into the left side of the Taurus, injuring Jones's left leg. Officer Gibson arrived in the parking lot just as the collision occurred.

Officer Vinesett, Constable Scott, and Officer Gibson exited their respective patrol cars and ordered all four suspects out of the Taurus. The officers placed the suspects in handcuffs and searched them for weapons. They did not read the suspects their Miranda rights. A short time later, officers from the Charlotte Police Department arrived and took custody of the four suspects. Both Officer Vinesett and Officer Gibson testified they did not take any of the suspects before a magistrate that day.

On the back of the Taurus, Officer Vinesett found a dealer tag duct-taped over a South Carolina license plate. In the backseat floorboard of the Taurus, Officer Vinesett found bullets, a blue ski mask, rubber gloves, a revolver, and a pillowcase containing a nine millimeter pistol, several rounds of ammunition, and roughly $18,000. In the passenger seat, Officer Vinesett found a pack of cigarettes and a wig. On the ground outside the Taurus, Officer Vinesett found another blue ski mask, a pair of black gloves, a blue shirt, a pair of black boots with one containing a pocket knife, a black jacket, a pair of black tennis shoes, and a pillowcase containing a pair of white tennis shoes, a white dew rag, a can of pepper spray, and a black t-shirt.[4]

On December 27, 2006, officials from the York County Sheriff's Office obtained warrants for the four suspects and faxed them to the Charlotte Mecklenberg Police Department. Thereafter, York County officials commenced the extradition process in January 2007. In June 2007, Porter

[4] The State's forensic technicians all testified that none of the items found in the Taurus had any fingerprints on them.

was indicted for kidnapping, entering a bank with intent to steal, armed robbery, possession of a firearm during the commission of a violent crime, and conspiracy to commit armed robbery. Laws and Jones pled guilty to armed robbery. Young and Porter were tried before the Honorable John C. Hayes, III in July 2007. Porter proceeded pro se but was appointed standby counsel.

At trial, the State presented testimony from the employees and customers in the Bank. None of the employees or customers could identify any of the robbers because they were all wearing ski masks and gloves during the robbery. However, Lubiato testified that each teller at the Bank is instructed to keep a record of the serial numbers of five $100 bills in their vault at all times. This is commonly referred to as "bait money." In the event the Bank is robbed, the money stolen can be identified because it will contain the bait money. Lubiato testified that the $18,000 stolen from the Bank on the morning in question contained bait money. He further testified the money the police found in the Taurus and returned to the Bank contained all of the bait money from one of the teller's vaults at the Bank.

The State also presented video footage from security cameras mounted inside and outside the Bank and also from the dashboard cameras mounted inside Officer Vinesett's and Officer Gibson's vehicles. The footage from the Bank showed three men in dark clothing and ski masks enter the Bank, order the employees and customers at gun point into the main vault, and then leave in a gray Ford Taurus. The footage from the dashboard cameras showed the chase from Highway 49 into the apartment complex in Charlotte.

Finally, the State presented testimony from Laws and Jones, both of whom had already pled guilty to armed robbery. Both testified that on the morning of December 22, 2006, they, along with Porter and Young, drove a rented gray Ford Taurus to the Bank. They further testified Jones, Young, and Porter entered the Bank carrying guns and wearing dark clothing and ski masks. Jones specifically testified Porter had called him earlier that week to ask him to be the "money man" in a bank robbery and to bring a pillowcase to hold the money.

The jury found Porter guilty on all counts. The trial court sentenced Porter to life in prison without the possibility of parole for armed robbery, kidnapping, and entering a bank with intent to steal, and five years for both the conspiracy and possession of a firearm. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000).

LAW/ANALYSIS

a. Motion To Quash The Indictments or Dismiss The Case

Porter argues the trial court erred in refusing to quash the indictments or dismiss this case because the South Carolina officers who arrested him in North Carolina failed to comply with the North Carolina law that would have permitted his arrest. However, we do not believe this issue is preserved for our review.

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). In his brief, Porter argues:

> The trial judge erred in refusing to quash the indictments or to dismiss the case against appellant where appellant was arrested by South Carolina officers in North Carolina and where the officers

> failed to comply with the North Carolina statute which would have permitted such an arrest.

In that section of Porter's brief, however, he does not cite to any authority that supports this specific argument. The only citations in that section of his argument are to the North Carolina statute and to two cases that define an arrest. The statute itself does not state the consequences of violating the statute, either in North Carolina or anywhere else. Thus, the mere fact that Porter cited to the statute does not provide this court with any guidance as to why the South Carolina officer's failure to present him to a magistrate should result in the remedy he seeks, i.e., the quashing of the indictments or the dismissal of the case against him. While the argument contains citations to authority, those authorities do not support his specific argument whatsoever. Consequently, we hold this issue unpreserved for failure to cite any supporting authority. See State v. Howard, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct. App. 2009) (holding argument abandoned when defendant failed to cite any authority in specific support of his assertion that the trial court erred in denying his motion for a mistrial).

b. Admission of Items Found Near Car

Porter argues the trial court erred in admitting into evidence items[5] that were found in the parking lot near the Taurus because (1) there was no testimony tying these items to the defendants, (2) the items were not found in the possession of the defendants or in the car, and (3) the police found no fingerprints on the items. We disagree.

[5] Porter objected to the admission of (1) a blue ski mask, (2) a pair of black gloves, (3) a blue shirt, (4) a pair of black boots, (5) a pocket knife that was found in the left black boot, (5) a black jacket, (6) a pair of black tennis shoes, and (7) a pillowcase containing a pair of white tennis shoes, a white dew rag, a can of pepper spray, and a black t-shirt. Porter objected only to the admission of the pillowcase; he did not the object to the items contained inside the pillowcase.

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). 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). To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001).

We find no error in the trial court's decision to admit these items. First, we believe there was sufficient evidentiary support for the trial court's finding there was a nexus between these items, the defendants, and the robbery. See State v. Adams, 377 S.C. 334, 337, 659 S.E.2d 272, 274 (Ct. App. 2008) (holding the decision to admit evidence will not be reversed unless the conclusions of the trial court either lack evidentiary support or are controlled by an error of law). As to the ski mask, gloves, blue shirt, black jacket, black boots, and black tennis shoes, the State presented testimony from numerous Bank employees and customers that the robbers all wore ski masks, black or dark blue clothing, and gloves.

The same is true of the pillowcase. Several of the State's witnesses testified the robber who took the money from the Bank carried it in a pillowcase. Further, Jones testified Porter instructed him to bring two pillowcases to the robbery, and he took one of the pillowcases into the Bank on the day of the robbery. The mere fact that the pillowcase and the other items found in the parking lot were not in the defendants' exclusive possession when the police detained them does not render them inadmissible. See State v. Jackson, 265 S.C. 278, 283, 217 S.E.2d 794, 796 (1975) (holding exclusive possession of items by accused is not required for such items to be admissible in armed robbery prosecution; the accused need only bear a distinctive relationship to the property).

Second, to the extent any of these items were improperly admitted, their admission was harmless in light of the overwhelming evidence that established Porter's guilt. See State v. Allen, 269 S.C. 233, 242, 237 S.E.2d 64, 68 (1977) (holding overwhelming proof of guilt rendered harmless the admission of the evidence in question). In this case, the money found in the Taurus contained the bait money that was stolen from the Bank. Furthermore, surveillance video from the Bank showed three men in dark clothing and ski masks exit the Bank with a pillowcase filled with money and get into a grey Ford Taurus. When the defendants were arrested, they were wearing dark clothes, and they were driving a grey Ford Taurus in which the police found a pillowcase filled with money, ski masks, and other dark clothing. Finally, Laws and Young both testified in specific detail as to Porter's involvement in the robbery.

Accordingly, we find no error in the admission of these items at trial.

c. Exclusion of Porter from Bench Conference

Porter argues the trial court erred in excluding him from a bench conference during jury selection. We believe this issue is not preserved for review.

The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). A contemporaneous objection is required to preserve issues for direct appellate review. State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005). Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001).

During jury voir dire and selection, the trial court stated, "Let me ask counsel to come up here and Mr. Porter, I'll ask Mr. Jamison to tell you what I mention up here."[6] The court then held a conference in Porter's absence. However, Porter did not make a contemporaneous objection to his exclusion. Consequently, we believe this issue is not preserved for our review.[7]

d. Kidnapping Charge

Porter argues the trial court erred in refusing to instruct the jury if they found Porter guilty of armed robbery, then in order for them to also find him guilty of kidnapping, they would have to find Porter did something more than constrain the bank employees and customers for the purposes of robbing them. In other words, the jury could not base a conviction for kidnapping on the restraint of the employees and customers that was incidental to the armed robbery. We disagree.

Generally, the trial judge is required to charge the current and correct law of South Carolina. State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). Pursuant to section 16-3-910 of the South Carolina Code (Supp. 2009), a person is guilty of kidnapping if he "unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s] or carr[ies] away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, ..." Kidnapping is a continuous offense that commences when one is wrongfully deprived of

[6] Mr. Jamison was counsel for Porter's co-defendant, Young.

[7] Porter urges this court to adopt the reasoning of the First Circuit Court of Appeals in Oses v. Comm. of Mass., 961 F.2d 985 (1st Cir. 1992). In that case, the court found the appellant's Sixth Amendment right of pro se representation was violated due to his exclusion from over seventy bench and lobby conferences. Id. at 986. However, Oses is distinguishable because Oses actually moved to be admitted to any bench or lobby conferences held during the trial. Id. In this case, neither Porter nor his standby counsel moved to be admitted to any bench conferences either before or during the trial.

freedom and continues until freedom is restored. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). Armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996).

Logically, in order to commit armed robbery, an assailant must constrain his victim's activities in some way; otherwise, the victim could simply walk away. The issue here is whether the same act of constraining the employees and customers that was necessary to commit the armed robbery could also be the basis for a kidnapping conviction.

Our supreme court has held "[w]hen a single act combines the requisite ingredients of two distinct offenses, the defendant may be severally indicted and punished for each." State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 173 (1950). The question of whether an act of confinement can constitute kidnapping when that confinement is incidental to the commission of another crime was raised in State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). In that case, the victim was abducted at knifepoint as she placed a call from a phone booth. Id. at 75, 310 S.E.2d at 430. The perpetrator forced the victim to walk to an adjacent pool area where he sexually assaulted her and forced her to walk to different locations around the pool. Id. At each location, the perpetrator assaulted the victim. Id. On appeal of his conviction for assault and battery of a high and aggravated nature, first degree criminal sexual conduct, and kidnapping, Hall argued the trial court erred in failing to charge the jury that in order to establish kidnapping, the State must prove the confinement of the victim was more than incident to the commission of another crime. Id. at 77, 310 S.E.2d at 431. Our supreme court disagreed, holding the restraint of the victim constituted kidnapping "regardless of the fact that the purpose of the seizure was to facilitate the commission of a sexual battery." Id. at 78, 310 S.E.2d at 431.[8]

[8] Interestingly, the South Carolina rule appears to be the minority view among other jurisdictions that have considered this issue. See State v. Anthony, 817 S.W.2d 299, 305 (Tenn. 1991) (citing to at least fifteen states' appellate court

In this case, the State presented voluminous testimony from Bank employees and customers that they were confined while the robbery was taking place. Under Hall, that single act of confinement could support a finding of kidnapping regardless of whether it was merely incidental to the commission of the armed robbery. Moreover, the testimony established there were people in the Bank who were being confined against their will but were not being robbed. We believe this act of confining the customers would support the kidnapping conviction independently of the confinement required to commit the armed robbery.

Accordingly, we find no error in the trial court's refusal to issue the kidnapping charge that Porter requested.

CONCLUSION

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

AFFIRMED.[9]

SHORT, and LOCKEMY, JJ., concur.

---

decisions on this issue and stating that "[b]y an overwhelming margin, the majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other crimes"); see also Model Penal Code § 212.1 (2001) (requiring movement over a substantial distance or confinement for a substantial period of time).

[9] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christie L. Richitelli and Steve Richitelli, Appellants,

v.

Motiva Enterprises, LLC d/b/a Texaco; and H.D. Payne & Co., Inc., H.D. Payne and Co. of Greenwood; and Hayne B. Workman, et al., Respondents.

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4707
Heard December 10, 2009 – Filed July 7, 2010

AFFIRMED

Billy J. Garrett, Jr., of Greenwood, John Paul Detrick, of Hampton, and John S. Nichols of Columbia, for Appellants.

W. Francis Marion, Jr., Joel M. Bondurant, Jr., and Kenneth N. Shaw, all of Greenville, for Respondents.

THOMAS, J.: In this personal injury action arising from a motor vehicle collision, Christie L. Richitelli and Steve Richitelli appeal the grant of summary judgment to Respondents Motiva Enterprises, LLC, d/b/a Texaco ("Texaco"); H.D. Payne & Co., Inc., and H.D. Payne & Co. of Greenwood (collectively "Payne"); and Hayne B. Workman. The trial court held as a matter of law that the Richitellis failed to show Respondents (1) had either an agency relationship with the employer of the driver of the wrecker that collided with their vehicle or (2) operated a joint venture or partnership with the driver's employer. We affirm.

FACTS AND PROCEDURAL HISTORY

On or about August 6, 2001, while driving her car north on U.S. Highway 25 in Greenwood County, Christie Richitelli was struck from behind by a wrecker driven by Harry E. Parker and belonging to Parker's employer, North Main Texaco.

At the time of the accident, Parker was using the wrecker to move a vehicle from North Main Texaco to a body shop. Each door of the wrecker displayed a decal saying "North Main Texaco, Greenwood South Carolina."

C. Thomas Sprott purchased the business, then known as "Terry's Texaco and Wrecker Service" in 1987 and later renamed it "North Main Texaco." The property on which the business was located belonged to Payne, which also served as the "jobber" for the gasoline and petroleum products sold by North Main Texaco.[1] Hayne Workman was the managing partner of Payne.

[1] A "jobber" is a distributor through which an oil company sells branded petroleum products. BP Oil Co. v. Federated Mut. Ins. Co., 329 S.C. 631, 634, 496 S.E.2d 35, 37 (Ct. App. 1998). The jobber in turn sells these company-branded petroleum products purchased from the oil company to retailers, such as convenience stores and service stations. Id.

In 1998, Texaco provided a Marketer Agreement to Payne and Workman. This agreement required Payne to sell Texaco brand motor fuels at all Texaco-branded facilities, including North Main Texaco. Although the agreement expressly stated that retail facilities were at all times independent business entities, they were to meet certain Texaco-branded identification. Failure to comply with this requirement could subject a facility to "deidentification" from the Texaco name. The agreement also required Payne to (1) submit to Texaco any promotional material or advertising before use, (2) require its retail operators to participate in training provided by Texaco on customer service, operations, and marketing; and (3) ensure compliance by its retail operators with the Texaco Wholesale Marketer Credit Card Agreement and other similar agreements.

Texaco also provided a "Retail Facility Standards Manual" covering identity, facility appearance, signage, fuel dispensers, and use of promotional materials. In addition, Texaco regularly evaluated its retail facilities. In station evaluations of North Main Texaco, Texaco noted concerns such as employees not being appropriately dressed, lack of approved landscaping, lack of proper signage, unavailability of "pay at the pump," and substandard maintenance of the facilities.

On August 13, 2002, Christie Richitelli filed an action against Parker, the Sprotts, and North Main Texaco for damages arising from the collision. Following discovery, Christie Richitelli and her husband Steve Richitelli settled with Parker and the Sprotts and signed a covenant not to execute.

On July 20, 2004, the Richitellis filed an "Amended Complaint" under a different case number. In addition to Parker and Sprott, the Richitellis included Texaco, Payne, and Workman as defendants. In their new lawsuit, the Richitellis alleged (1) Parker and North Main Texaco were agents of Texaco, (2) Payne was acting at Texaco's agent at all pertinent times, and (3) all the defendants operated a joint venture or partnership for their shared financial benefit.

Respondents subsequently moved for summary judgment. In support of their motion, Respondents argued the Richitellis (1) failed to establish that Parker was the actual or apparent agent or servant of any of the defendants and (2) there was no evidence of a joint venture or partnership between Respondents and either Sprott or Parker.

The trial court heard the matter on June 5, 2006, and by order dated June 29, 2006, granted summary judgment on the ground that the Richitellis, as a matter of law, could establish neither an agency relationship between Parker and Respondents nor the existence of a joint venture or partnership.[2]

On July 17, 2006, the Richitellis moved to alter or amend the summary judgment order. The trial court denied the motion by form order filed February 26, 2008, whereupon the Richitellis filed this appeal.

ISSUE

The only ground for summary judgment the Richitellis challenge in their appeal is the trial court's ruling that no evidence showed a master-servant relationship existed as to Parker's operation of the wrecker on the date of the accident. The Richitellis do not dispute the trial court's finding they could not, as a matter of law, prove a joint venture or partnership.

STANDARD OF REVIEW

"An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to

[2] Respondents also maintained they were entitled to summary judgment based on the covenant not to sue; however, the trial court declined to use this ground as an additional basis for summary judgment.

the non-moving party." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007).

LAW/ANALYSIS

The Richitellis argue the trial court erred in ruling no evidence showed a master-servant relationship existed as to Parker's operation of the wrecker on the date of the accident. They maintain that they presented evidence that Texaco had the right to control North Main Texaco and that it is this right, not its exercise, that is the decisive test in determining the existence of a master-servant relationship. As evidence of the right to control, the Richitellis point out that notwithstanding the express disclaimers in the Marketing Agreement of any agency relationship, (1) North Main Texaco used Texaco's signs, logos, products, advertising, and uniforms, all of which were under the control of Texaco and (2) the Marketing Agreement provided Texaco with the right of control over the type of fuel sold, the manner in which it was delivered, the manner in which retailers advertised their businesses and maintained their facilities, and the way their employees interacted with their customers.

We agree with the Richitellis that the critical question here is the right of the purported master to control the actions of the purported servant rather than the actual exercise of this right. See Jamison v. Morris, 385 S.C. 215, 221, 684 S.E.2d 168, 171 (2009) ("The decisive test in determining whether the relation of master and servant exists is whether the purported master has the right or power to direct and control the servant in the performance of his work and in the manner in which the work is to be done."). We disagree, however, with their argument that the various indicia of control that they cited were sufficient to create a jury issue regarding Respondents' vicarious liability for Christie Richitelli's injuries.

In Jamison, the South Carolina Supreme Court reversed vicarious liability verdicts against both a jobber and an oil company, holding there was no evidence that a company-branded gas station that illegally sold alcohol to the driver of the vehicle in which the plaintiff was seriously injured was the

actual agent of either appellant. As in the present case, the oil company in Jamison required retailers of its gasoline products to enforce specific standards regarding employee appearance and conduct, as well as the appearance and maintenance of the business premises. Id. at 223, 684 S.E.2d at 172. The gas station in Jamison was also required to participate in a "Mystery Shopper Program," through which the oil company and the jobber evaluated branded stations on their compliance with certain designated standards. Id. at 224, 684 S.E.2d at 172-73.

Notwithstanding this evidence, the court held the trial court erred in submitting the issue of vicarious liability to the jury, stating: "A franchisor is not vicariously liable for a tort committed at an independent gas station unless the plaintiff can show that the franchisor exercised more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees." Id. at 222-23, 684 S.E.2d at 172. The court further held it found no evidence to support a finding that either the oil company or the jobber "had the right or power to control the retailer in the performance of its retail alcoholic beverage sales or in the manner in which that work was done." Id. at 225, 684 S.E.2d at 173 (emphasis added). Based on this ruling, we agree with Respondents that liability against Payne or Texaco required evidence of a master-servant relationship " 'between the wrongdoer and the person sought to be charged for the result for the wrong at the time and in respect to the very transaction out of which the injury arose.' " Holder v. Haynes, 193 S.C. 176, 7 S.E.2d 833, 838 (1940) (emphasis added) (quoting Linville v. Nissen, 77 S.E.1096, 1099 (N.C. 1913)).

This court requested and received supplemental briefs from counsel on the applicability of Jamison, which was issued by the Supreme Court after the briefs in the present appeal were filed. In their supplemental brief, the Richitellis attempt to distinguish Jamison by emphasizing the attenuated relationship between alcohol sales and the general operation of a service station in that case. In the present case, however, neither the Marketer Agreement nor the Retail Facility Standards Manual addresses the provision of wrecker services by an individual retailer, and the Richitellis have not called to our attention any other evidence in the record that would support a

determination that either Texaco or Payne attempted to regulate this activity. We therefore do not agree that the allegedly attenuated relationship between alcohol sales and the general operation of a service station is a valid reason to distinguish Jamison from the matter presently before us.

CONCLUSION

We hold Jamison is the controlling authority in this case and affirm the trial court's finding that the Richitellis failed to show the presence of a genuine issue of material fact as to whether either Texaco or Payne had the right to control the operation of the wrecker service by North Main Texaco.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Webb, Appellant.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4708
Heard March 2, 2010 – Filed July 7, 2010

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Mark R. Farthing, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia; Solicitor John Gregory Hembree, of Conway, for Respondent.

LOCKEMY, J.: Thomas Webb appeals his convictions for kidnapping, armed robbery, and first-degree burglary, arguing the trial court erred in (1) allowing the State to refer to Webb as a "wild animal" in its opening statement and closing argument; (2) allowing the State to include facts about Webb's hair in its closing argument; and (3) not allowing defense counsel to fully cross examine Joy Hines and Officer Mann regarding the charges against co-defendant Randy Gaunt. We affirm.

FACTS

Webb was indicted on two counts of kidnapping, two counts of armed robbery, and one count of first-degree burglary. The State alleged Webb robbed Ellis and Fairey Price at gunpoint at 5:00 a.m. on October 22, 2005, in their Myrtle Beach motel room. At trial, the Prices testified two men identified themselves as maintenance workers at the motel and claimed they needed to check the room for a water leak. After entering the room and looking around, one of the two men left and returned with a gun. The two men threatened to kill the Prices and stole their cash, credit cards, jewelry, and camera before pulling the phone lines out of the wall and telling the Prices not to leave the room.

Officer Selena Mann, a detective with the Myrtle Beach Police Department, testified she received information that one of the Price's stolen credit cards was used at a nearby Wal-Mart within an hour of the robbery. Officer Mann obtained the Wal-Mart security tapes, which showed two men and a woman using the Prices' credit card. Officer Mann recognized Webb and his girlfriend Joy Hines and testified she knew where the two lived. Officer Mann obtained a search warrant for their apartment where police collected a revolver and the Prices' stolen camera. While executing the search warrant, Hines, who appeared at the residence, received a phone call from Webb telling her where the gun was hidden in the apartment and asking her to bring it to him. Police followed Hines to Webb's location, and he was arrested. Jewelry belonging to Mrs. Price was found on Webb at the time of his arrest. Hines and Gaunt, who was in possession of the Prices' Sears credit card, were also arrested.

Hines testified for the State. She testified she drove Webb and Gaunt to the Prices' hotel and stayed in the car while the two men went inside. Hines testified that when Webb and Gaunt returned to the car they had a wallet, "fanny pack," and camera with them. She further testified Webb had a revolver that belonged to her, and he pointed it at her and told her to drive. According to Hines, Webb and Gaunt then counted the cash, and she drove to a gas station where she used a credit card from the wallet to pay for the gas. The three then drove to Wal-Mart where they used the Prices' stolen credit card.

The jury returned guilty verdicts on all charges against Webb, and the trial court sentenced him to thirty years' imprisonment on each kidnapping charge, fifteen years on each armed robbery charge, and thirty years for the burglary charge. All of Webb's sentences were to run concurrent with the exception of one armed robbery, which was to run consecutive to the others. This appeal followed.

LAW/ANALYSIS

I. "Wild Animal" Statements

Webb argues the trial court erred in allowing the solicitor to refer to him as a "wild animal" in his opening and closing argument. Specifically, Webb alleges the solicitor's statements inflamed the passions and prejudice of the jury. We disagree.

A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003). "The appropriateness of a solicitor's . . . argument is a matter left to the trial court's sound discretion." Id. at 548, 586 S.E.2d at 156. "An appellate court will not disturb a trial court's ruling regarding [a solicitor's] argument unless there is an abuse of that discretion." Id. "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context

of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Rudd at 550, 586 S.E.2d at 157. "The appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In his opening argument, the solicitor stated:

> Folks, I wonder if anybody here has ever seen a hyena, a dog-like creature, wild, feral, a scavenger, a predator. Not terribly bright, not king of the jungle but its vicious, malevolent, and it hops on weak, easy prey, a mean little thing. And I asked you that question because that's what this case reminds me of.

The solicitor then argued: "So, [Mr. Price] goes to open the door. That's when those wild animals strike. They want what they want. They have to have it right then, and they rush in the room." Later, the solicitor remarked: "Merely forty-five minutes to an hour after these wild animals robbed . . . . " After this third statement, defense counsel objected to the characterization of Webb as a wild animal arguing it inflamed the passions of the jury. The trial court overruled the objection and determined the solicitor "wasn't referring to this individual . . . . He was referring to an act of someone." Defense counsel argued the term "wild animals" clearly referred to Webb, and the trial court responded: "I have permitted this. He's not talking to him. He's talking generally as to folks who might do this. He has not indicated him." The solicitor then agreed to say "armed robbers." Later, during his closing argument, the solicitor stated:

> Well, I started off talking to y'all about hyenas. Once again, they are vicious animals, predatory scavengers always looking for the easy prey. They want - - they don't want too hard for them (sic). Not terribly bright, and I think after listening to the facts of the case you understand why this case reminds me of hyenas.

The solicitor further remarked: "Like I said, hyenas aren't bright animals. They go to Wal-Mart with all the nice bright lights, big cameras, and that's where they're caught." The solicitor concluded by stating: "Folks, you've been left firmly convinced. All I ask is that you do your job and you cage this wild animal. Put him away for what he did." Defense counsel did not object to the solicitor's closing argument.

Webb contends the solicitor's comments likening him to a hyena were prejudicial and deprived him of a fair trial. Specifically, Webb maintains the hyena comment was the first statement made by the solicitor to the jurors and thus was the first impression the jurors were given of Webb. Given the facts of this case, we find the solicitor's comments did not infect the trial with unfairness so as to deprive Webb of a fair trial. This case is similar to Randall, 356 S.C. 639, 591 S.E.2d 608. In Randall, our supreme court held a solicitor's closing argument wherein he referred to the defendant drug dealers as "dirty cockroaches" did not require a new trial because there was strong evidence of the defendants' guilt. 356 S.C. at 643, 591 S.E.2d at 610. The court also noted the solicitor's "dirty cockroach" argument only consisted of ten lines of the transcript and was not repeated throughout the trial. Id. at 643, 591 S.E.2d at 611.

Here, there was strong evidence of Webb's guilt. Joy Hines testified she dropped Webb and Gaunt off at the motel the night of the robbery, and they returned to the car with the gun, wallet, camera, and stolen credit cards. Webb, Gaunt, and Hines were also caught on surveillance cameras at Wal-Mart a short time after the robbery using the Prices' stolen credit cards. Moreover, Webb was arrested with Mrs. Price's jewelry in his possession, and the gun and stolen camera were found inside his apartment. Furthermore, the objected-to "wild animal" argument was not repeated throughout the trial. Accordingly, we find the solicitor's comments did not so infect the trial with unfairness as to make Webb's conviction a denial of due process.

II. Hair Statements

Webb argues the trial court erred in allowing the State to include in its closing argument facts about his hair which were not in evidence. We disagree.

During his closing argument, the solicitor stated:

> You heard the description that the Prices gave. Detective Mann told you of the description the Prices gave of the two men. All descriptions indicate that the man with the longer hair, the big man, he's the one with the gun. Mrs. Price told you she got a good look at the man with the gun. She's sitting there looking at him, the man with the gun on her saying, "Give me what you got. You're lying to us." The man she was so frightened of, that was the man with the tattoo on the upper arm. Both defendants had tattoos on the upper arm but she said he was definitely a big man with longer hair.

Defense counsel objected on the basis that the statement by Mrs. Price was not in evidence. The trial court overruled the objection and stated: "No, sir. I'll let the jury determine what's in the testimony."

"A solicitor may not rely on statements not in evidence during closing argument." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). "Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal." Id. "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. Webb argues the solicitor's statements were prejudicial because his hair was long at the time of the robbery, and Mrs. Price testified that the gunman's hair was not long. Mrs. Price testified she knew the man with the gun had a tattoo on his right arm because his shirt sleeve was rolled up. Mrs. Price further testified the man with the gun looked like a "big biker guy" because "his arms were muscular." She testified that because she was looking at the gun during the robbery, she "wasn't looking at the hair that much." While Mrs. Price admitted she told police shortly after the robbery the gunman's hair "wasn't really long," she clarified her earlier description by saying "I also said he looked like a big biker which they have long hair . . . I said he was a big biker or looked like a big biker, and to me the biker that I have in my mind has longer hair."

Webb's argument that the solicitor's comments regarding his hair were prejudicial is without merit. While there was conflicting testimony from Mrs. Price regarding the length of the gunman's hair, the jury is the ultimate fact finder. See McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 492, 626 S.E.2d 52, 56 (Ct. App. 2006) (holding it is "up to the jury, as the finder of fact, to judge the credibility of the witnesses and to resolve any conflicts in their testimony"). Furthermore, other evidence in the record demonstrates Webb had longer hair than Gaunt during the robbery. Joy Hines testified Webb had a mullet haircut at the time of the robbery and that his hair went down his back. Officer Mann testified the Prices described the gunman as having longer hair than the other robber. Officer Mann further testified Webb's hair was longer than Gaunt's during the robbery. Moreover, in addition to the testimony at trial, the Wal-Mart video showed the different appearances of the suspects. Because the solicitor's argument was supported by evidence in the record, the trial court did not abuse its discretion by allowing his statement.

Even assuming the trial court did err in allowing the solicitor's statement regarding the length of Webb's hair, it was harmless error because there was overwhelming evidence of Webb's guilt in evidence. See State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this [c]ourt will not set aside a conviction for insubstantial errors not affecting the result.").

III. Cross-Examinations of Hines and Mann

Webb argues the trial court erred in not allowing defense counsel to fully cross-examine Hines and Officer Mann regarding the charges against Gaunt. We disagree.

On cross-examination, defense counsel questioned Hines regarding her pending charges and asked her whether Gaunt had already pled to the charges against him. The State objected, arguing Hines was not Gaunt's attorney and would not have knowledge of whether Gaunt had pled. The trial court sustained the objection and informed defense counsel that information was not pertinent to the present inquiry, and he was not going to allow it.

Later, defense counsel cross-examined Officer Mann regarding the disposition of the charges against Gaunt. Officer Mann testified she believed the case was "disposed of," but she did not know anything about Gaunt's sentence. Defense counsel asked Officer Mann whether during the course of the investigation, she learned from Gaunt that Hines wanted to commit the robberies. Defense counsel then presented Mann with a transcript of her interview with Gaunt. The State objected, arguing Gaunt was not available for cross-examination, and his statement constituted inadmissible hearsay. Defense counsel argued he only wanted to refresh Mann's memory regarding her investigation.

The trial court allowed the cross-examination to continue, and defense counsel asked Mann whether she "learned through the investigation that [Gaunt] says that [Webb] had the billfold?" The State objected, and the trial court stated: "I tell you that if you want that individual to testify, I will make him available to you. I will not permit his testimony through this witness. That is rank hearsay." Defense counsel went on to question Officer Mann about her conversation with Gaunt. The trial court stopped the questioning and informed defense counsel he could not try and get Gaunt's testimony into the record through Officer Mann. Thereafter, the trial court instructed the jury on the hearsay rule and explained why Gaunt's statements were inadmissible.

Webb maintains his right to confront and cross-examine witnesses is essential to due process. He argues the limits placed on Hines' and Officer Mann's testimony regarding Gaunt were prejudicial and prevented him from presenting a complete defense. Webb contends their testimony was significant to his case because there was a reasonable probability that Gaunt was the one with the gun in the hotel room. The State alleges defense counsel failed to object to any limitation of his cross-examinations of Hines and Officer Mann, and thus, Webb's argument is not preserved for review. The State notes defense counsel did not argue at trial the same grounds for allowing his cross-examination of Hines and Officer Mann that Webb now asserts on appeal.

We find Webb's argument is not preserved for our review. Defense counsel did not object to the trial court's limitations on cross-examination,

and therefore, Webb's argument is not preserved for our review. See State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003) ("In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."); see also State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that where counsel acquiesces in judge's limitation of his cross-examination and makes no further objection, appellate review of the issue is procedurally barred).

CONCLUSION

Accordingly, the ruling of the trial court is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Murr, Appellant,

v.

Nationwide Mutual Insurance Company, Respondent.

Opinion No. 4709
Heard April 13, 2010 – Filed July 7, 2010

Appeal From Anderson County
J.C. Buddy Nicholson, Jr., Circuit Court Judge

REVERSED AND REMANDED

Donald Leverette Allen, of Anderson, for Appellant.

Raymond Allen Tate, Jr., of Anderson, for Respondent.

LOCKEMY, J: In this appeal, Richard Murr argues the circuit court erred in granting Nationwide Mutual Insurance Company's (Carrier) motion

for summary judgment. Specifically, Murr maintains he was entitled to liability coverage under the "temporary substitute" provision of his policy with Carrier. We reverse and remand.

FACTS

Carrier denied Murr coverage after he was involved in an accident on May 27, 2006. Thereafter, Murr initiated a declaratory judgment action to determine whether he was covered under his policy with Carrier. The facts of the accident are not in dispute.

Murr suffered injuries when riding as a passenger in his stepson's Saturn. Murr's wife, Elaine Murr (Wife) was driving the Saturn and negligently turned left into the path of an oncoming vehicle. Murr's stepson, Redgel Eugene Lawrence, lived with the Murrs when the accident occurred. At the time of the accident, the Murrs' vehicle, a 1998 Pontiac Bonneville, was inoperable. Murr sought to extend the liability coverage on his Pontiac to the accident because the Saturn's liability insurance was tendered in full. Murr's insurance policy on the Pontiac provided liability coverage for "temporary substitute" vehicles in the event the insured vehicle became inoperable.

Depositions of the Murrs indicated the Pontiac became inoperable four months prior to the accident when the battery died and the motor exhibited problems. As a result, Lawrence furnished the Murrs with the Saturn, and he purchased a Jeep for himself. According to Wife, she and Lawrence made the car payments on the Saturn, and Lawrence added Wife to the Saturn's insurance policy. After Lawrence purchased the Jeep and before the accident, he drove the Jeep exclusively and Wife drove the Saturn exclusively. At the time of the accident, the Murrs were in the process of moving. When they finished moving, five months later, they left the Pontiac in a fenced area at their former residence. Later that month, when Murr returned to retrieve the Pontiac, to "continue the process of getting it fixed," Murr discovered the vehicle had been stolen.

After Murr filed his declaratory judgment motion, both Carrier and Murr moved for summary judgment. After a hearing, the circuit court granted Carrier's motion. Ultimately, the circuit court found the Pontiac's insurance policy could not act as excess liability coverage because the Saturn was not a "temporary substitute." This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 865 (1997). In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Id. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is proper when no issue of any material fact exists and the moving party is entitled to a judgment as a matter of law.

LAW/ANALYSIS

Murr argues the circuit court erred in granting Carrier's summary judgment motion because he and Wife were using the Saturn as a temporary substitute. We agree.

Murr maintains his policy with Carrier provides coverage when he is using other motor vehicles because of "a) breakdown; b) repair; c) servicing; or d) loss" of his automobile. Murr argues that his policy does not define "temporary," and the lack of a definition creates an ambiguity in the policy. Thus, the meaning of "temporary substitute" was a genuine issue as to a material fact under the insurance policy. Murr argues the circuit court erred in ruling he had no intention of repairing the Pontiac. Specifically, Murr maintains a genuine issue of material fact exists as to whether Murr had the intention to make the necessary repairs to the Pontiac. We agree with Murr and find a jury issue was created regarding whether the Murrs intended to repair the Pontiac.

Recently, our supreme court addressed a similar "temporary substitute" issue in Zurich American Insurance Company v. Tolbert, 387 S.C. 280, 692 S.E.2d 523 (2010). There, Tolbert was involved in an accident while driving a Honda that he owned. 387 S.C. at _, 692 S.E.2d at 524. However, at the time of the accident, he was leasing a BMW from his employer. 387 S.C. at _, 692 S.E.2d at 523. Tolbert and his wife sought underinsured motorist coverage (UIM) on the BMW under its "temporary substitute" provision. 387 S.C. at _, 692 S.E.2d at 524. In his affidavit, Tolbert reasoned he was driving his Honda instead of the BMW at the time of the accident because the BMW needed servicing and an oil change. Id.

Zurich brought a declaratory judgment action to determine if coverage existed. Id. Both Zurich and Tolbert moved for summary judgment. Id. There, the circuit court granted Zurich's motion, denying Tolbert UIM coverage. Id. This court reversed and found there was a genuine question of material fact under the "temporary substitute" vehicle endorsement. Id. Our supreme court affirmed the ruling and reasoned Tolbert's statement from his affidavit "constituted the scintilla of evidence necessary to withstand summary judgment . . . ." 387 S.C. at _, 692 S.E.2d at 524-25.

We find Zurich controlling. As a result, Murr's statements in his deposition constitute the scintilla of evidence needed to survive a summary judgment motion. There, Murr characterized the Pontiac's inoperability as temporary. Further, he stated when he discovered the Pontiac was stolen, he was retrieving it to continue the repair process. Therefore, we find Murr's testimony presents a genuine issue of material fact. The factual question of whether the Murrs' use of the Saturn was for a temporary period until the Pontiac was repaired or whether the Murrs permanently substituted the Saturn for the inoperable Pontiac should have been submitted to the jury. Therefore, we hold the circuit court erred in granting Carrier's motion for summary judgment.

CONCLUSION

Accordingly, the circuit court's grant of summary judgment is

REVERSED AND REMANDED.

SHORT AND WILLIAMS, JJ., concur.