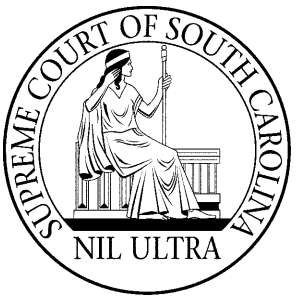

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
June 29, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Vincent Neuman, Sr., Appellant.

Appeal From McCormick County
William P. Keesley, Circuit Court Judge

Opinion No. 26676
Heard March 17, 2009 – Filed June 29, 2009

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Michelle J. Parsons, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BEATTY: Vincent Neuman appeals from his conviction for "Taking of Hostages By an Inmate."[1] His sole contention is that the trial judge erred in not dismissing this charge on the ground the applicable statute, section 24-13-450[2] of the South Carolina Code, is unconstitutionally vague. Pursuant to Rule 204(b), SCACR, this Court certified the case from the Court of Appeals. We affirm.

FACTS

A McCormick County grand jury indicted Neuman for "Taking of Hostages by an Inmate" and attempted escape following an incident at the McCormick Correctional Institution where Neuman was incarcerated.

At trial, Cornell Lyons, a correctional officer at the McCormick Correctional Institution, testified that during the early morning hours of February 17, 2001, Neuman "attacked" him when he turned his back to use a microwave. As Lyons confronted Neuman, he was grabbed from behind by Andre Waters, another inmate. During the struggle, Neuman

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[1] Neuman was also convicted of attempted escape. He has not appealed this conviction or the consecutive five-year sentence.

[2] This section provides:

> An inmate of a state, county, or city correctional facility or a private entity that contracts with a state, county, or city to provide care and custody of inmates, including persons in safekeeper status, acting alone or in concert with others, who by threats, coercion, intimidation, or physical force takes, holds, decoys, or carries away any person as a hostage or for any other reason whatsoever shall be deemed guilty of a felony and, upon conviction, shall be imprisoned for a term of not less than five years nor more than thirty years. This sentence shall not be served concurrently with any sentence being served at the time the offense is committed.

S.C. Code Ann. § 24-13-450 (2007).

and Waters attempted to handcuff Lyons. When Lyons asked the inmates what they were doing, they responded "we're tryin' to get outta here."

Once the inmates successfully handcuffed Lyons, they took his keys and locked him in a storage closet. Approximately five minutes later, the inmates brought Tammy Mason, another correctional officer, to the storage closet. Mason testified that during her count of the inmates around 1:30 a.m., she was accosted by Neuman and Waters and then handcuffed before she was brought to the storage closet. Shortly thereafter, Neuman and Waters brought inmate Franklin Mackey, who was visibly injured, to the storage closet. According to Mason, Mackey made the comment that he was beaten up by Neuman and Waters.

After approximately thirty minutes, Neuman and Waters returned to the closet, opened the door, and asked for medical assistance as they were severely injured as a result of their attempted escape over razor wire surrounding the correctional facility. Neuman then took Lyons to a telephone where a call was made alerting other correctional officers about the physical condition of Neuman and Waters. The responding officers then apprehended Neuman and Waters.

After the incident, Neuman provided a statement to Investigator Jeff Bentley in which Neuman admitted to his involvement in the incident with Waters. As part of the investigation, it was discovered that Neuman's wife and a childhood friend of Neuman's had attempted to aid Neuman in his escape.

Waters testified for the defense. Prior to Neuman's trial, Waters had pled guilty to the charges arising from the escape attempt. According to Waters, it was his idea to escape and that Neuman "decided to come along" after helping Waters restrain Lyons. Waters claimed he was the one who handcuffed Lyons and Mason and put them in the storage closet before attempting to escape.

During reply, Investigator Bentley discounted Waters's testimony. When Bentley interviewed Waters the day of the incident, Waters claimed the escape was Neuman's idea and they were both involved in restraining Lyons, Mason, and Mackey and locking them in the storage closet.

After the State's case, Neuman's counsel moved for a directed verdict and made a motion to dismiss the indictment for the taking of hostages by an inmate on constitutional grounds. At the close of the testimony, Neuman's counsel renewed his motion. The judge denied both of these motions.

The jury convicted Neuman of attempted escape and taking of hostages by an inmate. Pursuant to the recidivist statute,[3] the trial judge sentenced Neuman to life without parole for the hostage-taking charge and a consecutive five-year sentence on the escape charge.

Neuman appeals his conviction for taking of hostages by an inmate.

DISCUSSION

Neuman asserts the trial judge erred in refusing to dismiss the taking of hostages by an inmate charge on the ground section 24-13-450 is unconstitutionally vague. Because the statute does not include the word "unlawfully," Neuman claims the statute effectively criminalizes lawful activity. Without the word "unlawfully," Neuman contends the statute does not contain the "language necessary to narrowly tailor the statute to apply only to unlawful activity."

A.

As a threshold issue, the State asserts Neuman's argument is not preserved for appellate review because Neuman did not specifically rely on the void for vagueness doctrine when he challenged section 24-

[3] S.C. Code Ann. § 17-25-45 (2003 & Supp. 2008).

13-450 at trial. Because Neuman only referenced the overbreadth doctrine in his trial argument, the State claims Neuman did not preserve his argument for this Court's review.

At trial, Neuman's counsel moved to dismiss the indictment for taking of hostages by an inmate. In making this motion, counsel argued:

> [W]e move to dismiss the prosecution based on this indictment of hostage taking as the statute is overbroad (inaudible) objection the constitution is defective in that it encompasses about 5 to 10 elements of other crimes making it almost impossible to defend against constitutionally and we would move to dismiss the indictment at this time based on its constitutional defect under the - - 4th, 5th, 6th, 8th and 14th amendments of the United States Constitution and the applicable South Carolina statutes.

The trial judge denied Neuman's motion to dismiss. In his ruling, however, the judge recognized that the statute "is unusual and it is very broad." The judge also expressed his concern that the statute did not include "an unlawful purpose of criminal intent." Based on this concern, the judge indicated that he would include in his charge that there "has to be an unlawful purpose." Applying a "reasonable construction," the judge ultimately concluded that the statute was sufficient for the State to prosecute Neuman.

Although the State is technically correct that Neuman did not specifically raise the vagueness doctrine in his trial argument, we find this issue was sufficiently preserved for this Court's review.

First, Neuman's counsel's use of the term "overbroad" is not necessarily dispositive. Clearly, a challenge to section 24-13-450 would not have been based on the overbreadth doctrine. This statute could not conceivably suppress protected speech or conduct. Without such a First Amendment concern, the overbreadth doctrine would not

have been an appropriate ground to challenge the statute. See In re Amir X.S., 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006) (noting a person raising a First Amendment overbreadth doctrine challenge to a statute must demonstrate that the statute could cause someone to refrain from constitutionally-protected expression); State v. Bouye, 325 S.C. 260, 265, 484 S.E.2d 461, 464 (1997) ("The overbreadth doctrine applies only to First Amendment cases where the challenged law would have a 'chilling effect' on constitutionally protected forms of speech.").

Secondly, a review of Neuman's counsel's argument reveals that he listed multiple constitutional amendments in an effort to challenge the statute as constitutionally defective. We find counsel's assertions regarding the Fifth and Fourteenth amendments, as well as his assertion that the statute was "almost impossible to defend," necessarily included a due process challenge. In turn, these arguments were sufficiently broad to incorporate the vagueness doctrine. See Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution."); Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 394 (1973) ("The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional." (citation omitted)).

Finally, the trial judge interpreted Neuman's counsel's argument as one for vagueness. In his ruling, the judge recognized the omission of the term "unlawful" in the statute. Thus, Neuman's appellate argument was sufficiently raised to and ruled upon to be preserved for this Court's review. See State v. Nelson, 331 S.C. 1, 6 n. 6, 501 S.E.2d

716, 718 n. 6 (1998) (stating "the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court").

B.

Having found that Neuman's argument is proper for appellate review, we now turn to the merits of Neuman's constitutional challenge.

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.'" In re Treatment and Care of Luckabaugh, 351 S.C. 122, 134-35, 568 S.E.2d 338, 344 (2002) (quoting Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). "A possible constitutional construction must prevail over an unconstitutional interpretation." Curtis, 345 S.C. at 569-70, 549 S.E.2d at 597.

"The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." State v. Houey, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." In re Amir X.S., 371 S.C. at 391-92, 639 S.E.2d at 150. "A statute is not unconstitutionally vague if a person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal." State v. Curtis, 356 S.C. 622, 629, 591 S.E.2d 600, 603 (2004). This concept has been explained as follows, "[a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and

differ as to its application." Curtis v. State, 345 S.C. at 572, 549 S.E.2d at 598. "One to whose conduct the law clearly applies does not have standing to challenge it for vagueness." Id.

Initially, we note that Neuman does not have standing to challenge section 24-13-450 for vagueness. As we view the evidence, Neuman's conduct falls within even the most restrictive application of the statute. Neuman, an inmate, admitted his culpability in acting in concert with Waters, another inmate. Both Correctional Officers Lyons and Mason testified that Neuman physically assaulted them, handcuffed them, forced them into the dayroom, and ultimately locked them inside a closet in an effort to escape from prison. In view of this evidence, we believe Neuman lacks standing to challenge the constitutionality of the statute. See State v. Michau, 355 S.C. 73, 77, 583 S.E.2d 756, 759 (2003) (concluding appellant lacked standing to challenge statute as unconstitutionally vague given the statute clearly applied to his conduct); In re Amir X.S., 371 S.C. at 392, 639 S.E.2d at 150 (finding appellant did not have standing to challenge statute on grounds of vagueness where appellant's conduct fell within the most narrow application of the statute).

At oral argument, however, Neuman claimed that section 24-13-450 did not apply to his conduct in that he did not hold the correctional officers as "hostages" as that term is usually defined.[4] Specifically, Neuman disputed that the incident at the McCormick Correctional Institution constituted a hostage-taking situation. Given the confinement of the correctional officers was not with intent of using the officers to secure demands from a third party, Neuman claimed his conduct was akin to that of kidnapping. Because the statute did not apply to his conduct, he contended he has standing to challenge the constitutionality of section 24-13-450.

[4] Although the trial judge in his ruling expressed concern that the term "hostage" was not defined in the statute, we note that Neuman did not raise any argument at trial or in his brief challenging this term.

Even if Neuman correctly interprets the term "hostage," his argument does not negate the fact that his conduct still fell within the purview of the statute. As previously stated, an inmate may be found guilty of taking of hostages by an inmate if "acting alone or in concert with others, who by threats, coercion, intimidation, or physical force takes, holds, decoys, or carries away any person as a hostage **or** for any other reason whatsoever." S.C. Code Ann. § 24-13-450 (2007) (emphasis added). In view of this disjunctive language, the correctional officers in the instant case did not necessarily have to be hostages[5] for Neuman to be convicted of this offense. Instead, Neuman could have been found guilty if he had taken, held, decoyed, or carried away the officers "for any other reason whatsoever." In this case, Neuman admitted he and Waters detained the officers in an effort to escape the correctional facility. Thus, we find Neuman does not have standing because the statute at issue clearly applied to his conduct.

[5] We note the term "hostage" is not defined in section 24-13-450 or in any other statute within the South Carolina Code. During oral argument, Neuman asserted that "hostage" should be narrowly defined as it has been in other jurisdictions. See, e.g., Ingle v. State, 746 N.E.2d 927, 937 (Ind. 2001) (holding "a consistent definition of hostage would refer to one who is taken to secure some separate demand from another party"); Jenkins v. State, 248 S.W.3d 291, 297 (Tex. Crim. App. 2007) (concluding the term "hostage" within the aggravated kidnapping statute means "the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person"). In contrast, the State argued that the term should be broadly defined as it is generally understood. Specifically, the State asserted "hostage" should be defined as "one that is involuntarily controlled by an outside influence." This definition may be found at http://www.merriam-webster.com/dictionary/hostage.

Because Neuman has not claimed the evidence was insufficient to support his conviction, particularly with respect to the hostage element, we decline at this juncture to adopt a definition of "hostage" within the context of section 24-13-450.

C.

Even assuming that Neuman has standing, we hold section 24-13-450 is not unconstitutionally vague.

First, we find a person of ordinary intelligence and judgment would be sufficiently apprised of conduct that would come within the purview of the statute. Clearly, one who is incarcerated in a correctional facility is aware of his status as an inmate and conduct the statute makes criminal. Because an inmate is undoubtedly cognizant of conduct that constitutes even minor infractions in a correctional facility, it would be difficult to conceive that an inmate would have to guess that taking someone by physical force, threats, coercion or intimidation and holding them as a hostage or for any other reason would not be conduct proscribed by section 24-13-450.

Secondly, the fact that the term "unlawful" is not referenced in section 24-13-450 does not deem the statute unconstitutionally vague. In support of his argument, Neuman compares section 24-13-450 with the kidnapping statute.[6] Because the kidnapping statute includes the terms "unlawfully" and "without authority of law," Neuman avers the specific language of the kidnapping statute, unlike section 24-13-450, excludes lawful activity.

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[6] Section 16-3-910 provides:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910 (2003).

In support of this contention, Neuman relies on this Court's decision in State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980). In Smith, this Court held the kidnapping statute was not unconstitutionally vague. In so holding, this Court stated, "[t]he terms of [the kidnapping] statute are clear and unambiguous. It proscribes the forceful seizure, confinement or carrying away of another against his will without authority of law." Id. at 166, 268 S.E.2d at 277.

Comparing section 24-13-450 with the kidnapping statute, we find section 24-13-450 supersedes as a specific statute the general criminal offense statute of kidnapping. See State v. Davis, 294 P.2d 934, 936 (Wash. 1956) (analyzing statutes designated to define offenses chargeable to prisoners of penal institutions with other offenses chargeable to "any person," and concluding specific statute relating to prisoners would "supersede the kidnapping statute, if ever applicable, in the situation where an inmate of a state penal institution holds or participates in holding an officer of that institution as a hostage by force or violence or the threat thereof"); see also Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992) (recognizing general principle that more recent and specific legislation supersedes prior general law); State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986) (noting laws giving specific treatment to a given situation take precedence over general laws on same subject, and later legislation takes precedence over earlier laws).

Moreover, a review of both statutes reveals that section 24-13-450 essentially incorporates all of the elements of kidnapping but confines the proscribed conduct to the limited environment of a correctional facility. See State v. East, 353 S.C. 634, 637, 578 S.E.2d 748, 750 (Ct. App. 2003) ("South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away."); see generally Don F. Vaccaro, Annotation, Seizure of Prison Official By Inmates as Kidnapping, 59 A.L.R.3d 1306 (1974 & Supp. 2008) (discussing cases

in which courts have consider the issue of whether and under what circumstances the seizure of a prison official by the inmates of a penal institution constitutes the offense of kidnapping).

Because section 24-13-450, which is part of Title 24 of the South Carolina Code regulating "Corrections, Jails, Probations, Paroles and Pardons," was intended to define offenses specific to prisoners of penal institutions, the conduct proscribed in the statute is by implication unlawful. Davis, 294 P.2d at 937 (recognizing that "[u]nless the intended victims of a defendant who is an inmate of a state penal institution, and of his co-conspirators, are officers of a state penal institution, [the statute] would have no application").

Notably, statutes from other jurisdictions which regulate the taking of a hostage by an inmate also do not include the "unlawful" element. See, e.g., Mass. Gen. Laws Ann. ch. 127, § 38A (2002) ("Any prisoner in any penal or reformatory institution who holds any officer or employee of such institution or any other person as a hostage shall be punished by imprisonment in the state prison for not more than twenty years."); Mich. Comp. Laws Ann. § 750.349a (2004) ("A person imprisoned in any penal or correctional institution located in this state who takes, holds, carries away, decoys, entices away or secretes another person as a hostage by means of threats, coercion, intimidation or physical force is guilty of a felony and shall be imprisoned in the state prison for life, or any term of years, which shall be served as a consecutive sentence."); Wash. Rev. Code Ann. § 9.94.030 (2003 & Supp. 2008) ("Whenever any inmate of a correctional institution shall hold, or participate in holding, any person as a hostage, by force or violence, or the threat thereof, or shall prevent, or participate in preventing an officer of such institution from carrying out his or her duties, by force or violence, or the threat thereof, he or she shall be guilty of a class B felony and upon conviction shall be punished by imprisonment in a state correctional institution for not less than one year nor more than ten years.").

Finally, we believe a conclusion that section 24-13-450 is constitutional comports with the legislative purpose underlying this statute. The General Assembly properly exercised its police power with the intention of protecting correctional officers by promulgating a distinct offense applicable solely to inmates. Cf. Guinyard, 260 S.C. at 226-228, 195 S.E.2d at 396 (finding statute prohibiting sexual intercourse with a patient or trainee of mental health facility was neither constitutionally vague nor defective despite Legislature's failure to make knowledge of the institutional status of the person molested an element of the offense).

Additional support for this analysis may be seen in this Court's finding that the prison riot statute,[7] which is also included in Title 24 of the South Carolina Code and omits the term "unlawful," is not unconstitutionally vague. See State v. Greene, 255 S.C. 548, 560, 180 S.E.2d 179, 185 (1971) (holding "prison riot statute," the pre-cursor to section 24-13-430, was not unconstitutionally vague in that it did not define the crime of "riot" given the statute in question was directed at prisoners and the common law offense of riot was well established by judicial definition and, therefore, "understood by the ordinary man").

CONCLUSION

We hold that section 24-13-450, proscribing conduct for the offense of taking of hostages by an inmate, is not unconstitutionally vague. Accordingly, we affirm Neuman's conviction and sentence.

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[7] Section 24-13-430 provides in relevant part:

> Any inmate of the Department of Corrections, city or county jail, or public works of any county that participates in a riot or any other acts or violence shall be deemed guilty of a felony and upon conviction shall be imprisoned for not less than five years nor more than ten years.

S.C. Code Ann. § 24-13-430(2) (2007).

AFFIRMED.

TOAL, C.J., WALLER and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree that the issue whether the statute is void for vagueness is preserved for our review since that is what the trial judge believed was being argued, and that is what he ruled upon. Moreover, I agree that appellant lacks standing to challenge the statute because his conduct clearly falls within its terms. In re Amir X.S., 371 S.C. 380, 639 S.E.2d 144 (2006). I would end the analysis here. Id. Finally, it is well-settled that an issue, unless a claim of lack of subject matter jurisdiction, cannot be raised for the first time at oral argument. S.C. Dep't of Soc. Serv. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001). I therefore do not join the remainder of the majority's discussion.

I concur in the decision to affirm appellant's appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of County Magistrate Patrick D. Sullivan, Respondent.

Opinion No. 26677
Heard May 27, 2009 – Filed June 29, 2009

DEFINITE SUSPENSION

Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for Office of Disciplinary Counsel.

Gregory Poole Harris, of Harris & Gasser, of Columbia, and Sherri A. Lydon, of Law Offices of Sherri A. Lydon, of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary case, respondent Magistrate Judge Patrick Sullivan admits altering a court order and a letter from the Commission on Continuing Legal Education and Specialization (hereinafter "CLE Commission"). The record supports the recommendation of the Commission on Judicial Conduct (hereinafter "the panel"), and we retroactively suspend respondent.

I.

Respondent failed to comply with Rule 510, SCACR and report his CLE hours for 2006-07 timely. Therefore, this Court suspended respondent.

Subsequently, respondent complied with Rule 510. Thus, the CLE Commission issued respondent a letter finding him in compliance and instructing him to contact this Court to be reinstated. This Court then reinstated respondent by court order, and the court order specifically stated the reinstatement was not retroactive.

Respondent then retook the bench. While conducting bond court, respondent was asked to submit evidence of his reinstatement to the county administrator. Respondent faxed copies of the CLE Commission's letter finding him in compliance and this Court's order reinstating respondent. The version of the letter and this Court's order sent by respondent were altered. Specifically, respondent removed the references that his reinstatement was not retroactive. Respondent explains the alterations of these documents as an innocent attempt to obscure notes he made on the documents as he did not have time to obtain the originals. Respondent admits he failed to notify the county administrator of the papers' alterations.

This Court placed respondent on interim suspension on October 12, 2007, due to this matter. The panel reviewed this case, heard testimony, and recommended retroactive suspension for a period not to exceed respondent's interim suspension. Neither the Office of Disciplinary Council (ODC) nor respondent filed any exceptions to the panel's report.

II.

ODC concedes it found no evidence respondent acted with fraudulent intent. However, as the panel found, regardless of motive, respondent deleted material information from an order from this Court and a letter from the CLE Commission. We find, as the panel did, respondent committed misconduct as defined by Rule 7(a), Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Specifically, respondent violated the following judicial cannons contained in the Code of Judicial Conduct in Rule 501, SCACR: Cannon 1 and 1A in failing to uphold the integrity of the judiciary and maintain a high standard of conduct; Cannon 2 and 2A in failing to avoid impropriety or the appearance of impropriety and act in a manner promoting public confidence in the judiciary; and Cannon 3B(2) in failing to be faithful to the law.

III.

We hold a suspension is a warranted sanction in this case under Rule 7(b), Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Respondent has been on interim suspension since October 12, 2007. We find this time period sufficient. Thus, respondent's suspension is retroactively applied to October 12, 2007, and respondent's suspension is dissolved as of the filing of this opinion. Lastly, under Rule 7(b), Rules of Judicial Disciplinary Enforcement, Rule 502, SCACR, respondent shall pay the costs associated with the disciplinary proceeding within ninety days of the date of the filing of this opinion. Failure to pay the costs may result in the imposition of civil or criminal contempt by this Court.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Craig S. Rolen, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Greenville County
James E. Lockemy, Circuit Court Judge

Opinion No. 26678
Submitted December 4, 2008 – Filed June 29, 2009

REVERSED

Deputy Chief Appellate Defender Wanda H. Carter, 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, and Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner Craig Rolen pled guilty to voluntary manslaughter and was sentenced to twenty-five years imprisonment. Petitioner filed an application for post-conviction relief (PCR) alleging that counsel was ineffective for failing to move to withdraw his guilty plea. The PCR court denied relief. This Court granted a writ of certiorari to review that decision.

FACTUAL/PROCEDURAL BACKGROUND

On October 4, 2001, Kedrick Mahon's (Victim) decomposed body was found in Petitioner's car at the bottom of a ravine. Petitioner was arrested for Victim's murder on July 16, 2003.[1] In September 2004, Petitioner contacted police and confessed to the murder and was subsequently charged.

Petitioner requested a trial and a jury was selected. However, immediately before trial, Petitioner decided to plead guilty. At the plea hearing, the solicitor told the plea judge that Petitioner confessed to stabbing the victim and driving the car into the ravine. Petitioner told the plea judge that he voluntarily made the confession and admitted to committing the murder. The plea judge formally accepted Petitioner's plea as voluntary and having a substantial factual basis. After members of Victim's family addressed the court, Petitioner suddenly exclaimed:

> All right, this has went on far enough, I didn't kill this man. This has went too far, I ain't doing this. I didn't kill your brother . . . I didn't kill this man, I can't do this . . . I don't know who did, I wish I did . . . I swear to God I didn't do it . . . Should have never pled guilty, I didn't do this.

[1] Petitioner testified at the PCR hearing that after he was arrested on the murder charges, he was released on bond and placed on house arrest.

Counsel did not move to withdraw the plea, and the plea judge sentenced Petitioner to twenty-five years imprisonment.

At the PCR hearing, Petitioner testified that the State previously offered him a deal to plead guilty to accessory after the fact to murder with a ten-year cap, but he turned down the offer because he was innocent. He testified he was depressed, suicidal, and heavily medicated at the time he gave his confession to police and that he confessed in hopes of receiving the death penalty. Petitioner stated that he pled guilty because counsel told him that the jury that had been impaneled would likely find him guilty. Finally, Petitioner testified that counsel did not inform him of his right to appeal his guilty plea.

Counsel testified that he requested a competency test for Petitioner because he was concerned about Petitioner's mental state and that Petitioner attempted to commit suicide following the test.[2] Counsel stated that he did not move to withdraw the plea because he believed once the plea was accepted, it was final and could not be withdrawn. Counsel testified that he did not recall whether he discussed Petitioner's appellate rights with him.

The PCR court found that counsel was not ineffective for failing to move to withdraw Petitioner's guilty plea. The PCR court also found that counsel informed Petitioner of his right to appeal, but regardless, counsel was under no obligation to advise Petitioner of his right to appeal. Accordingly, the PCR court denied Petitioner relief.

This Court granted Petitioner's request for a writ of certiorari, and Petitioner presents the following issues for review:

I. Did the PCR court err in ruling that counsel was not ineffective for failing to move to withdraw Petitioner's guilty plea?

[2] Petitioner was found competent to stand trial.

II. Did the PCR court err in ruling Petitioner was not entitled to a belated direct appeal?

STANDARD OF REVIEW

The burden of proof is on the applicant in post-conviction proceedings 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

I. Withdrawal of Guilty Plea

Petitioner argues that the PCR court erred in ruling that counsel was not ineffective for failing to move to withdraw Petitioner's guilty plea. We agree.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. *Boykin v. Alabama*, 395 U.S. 238, 241 (1969). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

We find that counsel was deficient in failing to move to withdraw Petitioner's guilty plea. Petitioner requested a jury trial and only decided to

plead guilty after counsel advised him that the impaneled jury would likely find him guilty. Petitioner repeatedly asserted his innocence during the plea hearing before the plea judge sentenced him. In our view, at this point in the hearing, it was clear that Petitioner wanted to withdraw his guilty plea.

While counsel was deficient in failing to move to withdraw Petitioner's guilty plea, we must determine whether Petitioner was prejudiced by counsel's performance. The plea judge had formally accepted the guilty plea prior to Petitioner's protestation of his innocence. Therefore, even if counsel had moved to withdraw the guilty plea, the plea judge may have denied this request, and Petitioner could not have proceeded to trial. *See State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982) (holding that the withdrawal of a guilty plea is generally within the sound discretion of the trial court). In this way, the prejudice analysis in this case does not fit squarely within the traditional guilty plea prejudice framework as set forth in *Hill*. Nonetheless, we hold that Petitioner was prejudiced by counsel's deficient performance because due to counsel's failure to make such a motion, the plea judge was not able to exercise his discretion. Even if the plea judge had denied Petitioner's motion to withdraw his plea, Petitioner could have raised this issue on direct appeal. Moreover, Petitioner proved he would have insisted on going to trial had the plea judge granted the motion to withdraw.

Accordingly, we hold that counsel was ineffective for failing to move to withdraw Petitioner's guilty plea. However, we find that granting Petitioner the relief of an entire new plea hearing is inappropriate. Once the plea judge found that Petitioner's plea was voluntary and supported by a factual basis and formally accepted the plea of guilt, Petitioner forfeited his ability to withdraw the plea as a matter of right. *State v. Bickham*, Op. No. 26581 (S.C. Sup. Ct. filed Jan. 12, 2009) (Shearouse Adv.Sh. No.2 at 43) (Kittredge, J., concurring). Accordingly, we remand the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea. In our view, this tailored relief remedies the precise prejudice resulting from plea counsel's deficient performance.[3] *See United States v.*

[3] We disagree with the dissent's assertion that we are creating a new standard of prejudice or that this tailored relief is an extraordinary remedy. Rather, we

Morrison, 449 U.S. 361, 364 (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 and should not unnecessarily infringe on competing interests").

II. Belated Direct Appeal

Petitioner argues that the PCR court erred in ruling he was not entitled to a belated direct appeal. We decline to address this issue.

Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea, and the bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). Instead, there must be proof that extraordinary circumstances exist, such as where a defendant inquires about an appeal, in order for counsel to be required to advise a defendant of the right to appeal. *Id.*

We decline to rule on whether the PCR court erred in finding that Petitioner was not entitled to a belated direct appeal. Had Petitioner filed a direct appeal, any issues regarding withdrawal of the guilty plea would not have been preserved for the appellate court's review because counsel never made such a motion. Additionally, as stated above, we hold that counsel was ineffective for failing to make a motion to withdraw, and thus, the most appropriate relief is a new plea hearing. Because we find that a belated direct appeal would not afford Petitioner suitable relief, a ruling from the Court on this matter would have no practical effect. *See Seabrook v. Knox*, 369 S.C.

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have merely provided a remedy for what we find, under the specific facts of this case, to be ineffective assistance of counsel. *See Morrison*, at 365 (noting that the United States Supreme Court's "approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel"); *see also Davie v. State* (holding plea counsel was ineffective for failing to communicate a plea offer and crafting specific relief to remedy the violation).

191, 197, 631 S.E.2d 907, 910 (2006) (recognizing that this Court will not decide questions in which a judgment rendered will have no practical legal effect).

CONCLUSION

For the foregoing reasons, we reverse the PCR court's order denying relief and remand the case to the point after formal acceptance of the guilty plea. If the plea court grants the motion to withdraw the plea, the case shall be placed on the trial docket and proceed in the usual manner; if the court denies the motion to withdraw the plea, the prior sentence will stand, and Petitioner may pursue his right to a direct appeal.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. We granted certiorari to review a post-conviction relief (PCR) order denying petitioner's claim that his trial counsel was ineffective in failing to move to withdraw petitioner's plea. Since the question of "ineffectiveness" embraces both deficient performance and prejudice, we err if we decline to make a finding on both prongs. I would find no prejudice, and affirm.

Where an applicant claims his guilty plea counsel was ineffective, that applicant bears the burden of showing both that counsel's performance was deficient and that the deficient performance resulted in prejudice, that is, it affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). Ordinarily "prejudice" is established by evidence that had counsel not been deficient, there is a reasonable probability that the applicant would not have pled guilty but would instead have insisted on going to trial.[4] Id. As the Hill Court recognized, a determination of prejudice in this context will depend on the likelihood that had counsel done that which the applicant asserts he should have, counsel's act would have been successful, i.e., had counsel investigated, he would have found evidence causing him to change his advice to plead guilty. The Court acknowledged that in judging prejudice, it was necessary to make objective "predictions of the outcome at a possible trial." Id. at 59-60.

Speculation is a necessary component of most PCR cases since prejudice is judged by the "reasonable probability" standard: would the jury have acquitted had it not heard the improper evidence? Would the trial judge have suppressed the evidence had a suppression motion been made? Where, as here, counsel's deficiency is the failure to request some form of relief committed to the trial judge's discretion, the PCR applicant establishes prejudice by demonstrating that had the request been made, it would have been an abuse of discretion to have denied it. E.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (continuance).

[4] A different prejudice analysis is appropriate where, for example, the ineffective assistance claim is that plea counsel failed to communicate a plea offer. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009).

Here, the majority holds counsel was deficient in failing to make a motion to withdraw petitioner's plea. It acknowledges that whether to grant such a request lies in the plea judge's discretion. The Court then declines to decide whether petitioner has shown the requisite prejudice – i.e., whether it would have been an abuse of discretion to have denied the motion if made. Instead, the majority appears to create a new standard of prejudice: counsel renders ineffective assistance when she neglects to preserve an issue, whether or not that issue has merit, for direct appeal. Under this standard, the remedy is not a new proceeding, but instead a rewind,[5] returning all characters to the point in the guilty plea when petitioner maintains the motion to withdraw should have been made. Among the unanswered questions raised by this extraordinary remedy,[6] is whether, henceforth, a PCR judge who finds deficient performance will be able to avoid the prejudice issue by remanding the matter to criminal court.

The majority goes on to hold that if the motion is made and then denied, petitioner may appeal from this ruling made in the new proceeding. While ordinarily the State would not be able to appeal the granting of a motion to withdraw a guilty plea made in the plea proceeding, I question whether such an appeal would lie from a ruling on remand.

On the merits, I agree that counsel was deficient when she failed to move to withdraw petitioner's guilty plea. I do not find the requisite prejudice, however, since I do not find a reasonable probability that had such a motion been made it would have been granted. First, had the plea judge believed the integrity of the plea was in question, he should have *sua sponte*

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[5] Although characterized as a remand, such a remand is not possible since the matter before us is a civil action brought in the Court of Common Pleas, and the "remand" would be to a long-concluded proceeding in the Court of General Sessions.

[6] While the United States Supreme Court has held that in a direct appeal raising a claim of a 6th amendment violation the relief must be tailored based upon the violation, the Court still required the defendant demonstrate prejudice in order to receive relief in her criminal proceeding. United States v. Morrison, 449 U.S. 361, 366-367.

refused to continue. In my view, it is more likely that he viewed petitioner's outburst as unfortunate but not unusual. Since I find no prejudice from counsel's deficient performance, I would affirm the order denying petitioner's PCR application.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andre Kevin Rosemond, Petitioner,

v.

William D. Catoe, Commissioner, South Carolina Department of Corrections and Charles M. Condon, South Carolina Attorney General, Respondents.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

Opinion No. 26679
Heard April 22, 2009 – Filed June 29, 2009

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

David I. Bruck and Robert E Lominack, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of Andre Rosemond's application for capital post-conviction relief (PCR). Rosemond argues the PCR court erred in denying relief primarily due to a complete lack of mitigation evidence in the sentencing phase. We agree and affirm in part, reverse in part, and remand for a new sentencing hearing.

I.

Rosemond was convicted of murdering his live-in girlfriend, Christine Norton, and Norton's ten-year-old daughter. Rosemond confessed to killing Norton and her daughter and cooperated with law enforcement. There is no dispute regarding guilt. After a sentencing hearing, the jury sentenced Rosemond to death.

This Court affirmed Rosemond's conviction on direct appeal. *State v. Rosemond*, 335 S.C. 593, 598, 518 S.E.2d 588, 590 (1999). Rosemond then filed a PCR application. The PCR court ordered Dr. Pamela Crawford to evaluate Rosemond, and Dr. Crawford diagnosed Rosemond with schizophrenia, paranoid type. Subsequently, the PCR court stayed the PCR proceedings due to Rosemond's incompetence. Currently, Rosemond remains incompetent.

Despite Rosemond's incompetency, the PCR proceeding continued in response to this Court's ruling in *Council v. Catoe*, 359 S.C. 120, 129, 597 S.E.2d 782, 787 (2004) ("[W]e hold that a petitioner cannot delay his collateral review of his trial proceedings due to his incompetency. If, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding.").

The PCR court denied relief on all grounds and further acknowledged Rosemond's continued incompetency. This Court granted certiorari to review the PCR court's denial of relief.

II.

Rosemond argues the denial of PCR relief was improper for a multitude of reasons. We first address trial counsel's opening statement and the alleged *ex parte* contact as these arguments affect the guilt phase as well as the sentencing phase.

A. Opening Statement

Rosemond alleges the PCR court erred in finding no prejudice resulted from inappropriate comments in counsel's opening statement. We disagree.

During trial counsel's opening statement, counsel told the jury that some of the jury members were selected because they "were whatever was left." At the PCR hearing, trial counsel acknowledged the comments were inappropriate and explained the statements were made out of frustration over the racial composition of the jury. Counsel's remarks constituted deficient representation. Therefore, we transition to the second prong of the *Strickland* test to determine whether prejudice occurred. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). No prejudice occurred in the guilt phase as the State presented overwhelming evidence of guilt: Rosemond's confession and the murder weapon, which Rosemond helped the police locate. Further, in his confession, Rosemond admitted to planning the murder of his girlfriend.

Similarly, Rosemond was not prejudiced by trial counsel's opening statement during the sentencing phase of his trial. First, the opening argument was made on March 23, 1996, and the jury made its sentencing recommendation on March 30, 1996. Additionally, following the sentencing phase, the jury deliberated approximately eleven hours over two days before recommending a sentence of death. Significantly, the jury notified the trial court of its difficulty reaching a decision, which resulted in an *Allen* charge. It is apparent the jury discharged its duties in good faith and did not penalize

Rosemond for his counsel's improper comments at the beginning of the guilt phase. Rosemond suffered no prejudice. We find evidence supports the PCR court's determination that Rosemond is not entitled to relief on this ground.

B. *Ex Parte* Communication

Rosemond next argues he is entitled to PCR because the Solicitor "chose" the judge to preside over Rosemond's trial and met with the judge to confirm his willingness to serve. We disagree. Former Chief Justice Finney assigned the trial judge to this case in February 1996.[1] We reviewed the record and find the able trial judge presided over this case in a fair and impartial manner.

III.

Next, Rosemond argues the PCR court erred in denying relief due to the complete lack of mitigation evidence in the sentencing phase. We agree.

During the PCR hearing, trial counsel testified he did not present evidence of Rosemond's alleged mental illness as a mitigating factor because the trial court found Rosemond competent to stand trial. Trial counsel mistakenly believed the ruling precluded him from presenting Rosemond's mental health mitigation evidence in the sentencing phase. Counsel's erroneous belief clearly constituted deficient representation. We turn to the prejudice prong of *Strickland*.

When determining if want of mitigation evidence resulted in prejudice, we must determine whether the "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability." *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (quoting *Williams*

[1] We acknowledge the practice of the prosecutor selecting the trial judge is inappropriate and troubling. We further note this alleged practice is no longer possible, as the Chief Justice of the South Carolina Supreme Court makes judicial assignments in death penalty cases in conjunction with Court Administration.

v. Taylor, 529 U.S. 362, 398 (2000)); *see also Rompilla v. Beard*, 545 U.S. 374, 393 (2005). In this regard, the United States Supreme Court held, "the likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). Accordingly, if trial counsel's complete failure to present mitigation evidence undermines confidence in the outcome, then Rosemond suffered prejudice.

We find this case analogous to our recent holding in *Council v. State*, 380 S.C. 159, 181, 670 S.E.2d 356, 368 (2008), in which this Court upheld the PCR court's grant of a new sentencing trial. In *Council*, only very limited mitigation testimony was presented and no medical evidence was presented. *Id*. at 177, 670 S.E.2d at 365. Thus, this Court held, "there was very strong mitigating evidence to be weighed against the [six] aggravating circumstances presented by the State. We believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of [Council's] culpability." *Id*. at 176, 670 S.E.2d at 365. Similarly, the United States Court of Appeals for the Fourth Circuit concluded, "'had the jury been able to place [mental disturbance] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.'" *Gray v. Branker*, 529 F.3d 220, 238 (4th Cir. 2008) (quoting *Wiggins*, 539 U.S. at 537).

In the case before us, we need not speculate about the mitigation evidence known by trial counsel as the evidence was presented during pretrial competency hearings. At one competency hearing,[2] Dr. Harold Morgan testified Rosemond was "clearly paranoid." Dr. Morgan described Rosemond's behavior during the interview as "very evasive from the beginning, very guarded, very distant, very aloof, sort of exuding tension and fear and hostility." Rosemond eventually terminated the interview with Dr. Morgan.

[2] A competency hearing is, of course, conducted outside the presence of the jury.

At the same competency hearing, Dr. Shea testified he learned Rosemond's brother was a paranoid schizophrenic and Rosemond scored an 84 on his I.Q. test, which is in the low average range. Dr. Shea, after many tests and interviews, testified, "[i]t's my belief that Mr. Rosemond has some sort of a paranoid process going on. I'm having a very difficult time making an exact diagnosis, because, quite frankly, he won't -- he won't discuss things with me to the extent that I need to make an accurate diagnosis." Dr. Shea described Rosemond's behavior as "even more odd" and progressively worsening. Dr. Shea's working diagnosis of Rosemond was he suffered from a delusional disorder or schizophrenia.

In a subsequent competency hearing, Dr. Schwartz-Watts of the Department of Mental Health testified she, Dr. Donald Morgan, and Dr. Geoffrey McKee evaluated Rosemond, and Dr. Schwartz-Watts believed him competent to stand trial. Dr. Shea agreed at this second competency hearing that Rosemond was competent to stand trial but reiterated Rosemond suffers from paranoia.

During the PCR hearing, Dr. Shea testified about a conversation with Dr. Schwartz-Watts, in which Dr. Schwartz-Watts stated Rosemond may have pulled himself together to appear competent. Further, according to Dr. Shea, Dr. Schwartz-Watts believed Rosemond may have been exhibiting the early stages of schizophrenia. Dr. Schwartz-Watts agreed to testify to her belief, and Dr. Shea passed this information on to trial counsel.

Evidence of Rosemond's purported mental illness was, therefore, available for the sentencing phase. However, trial counsel only called five witnesses, none of whom made any reference to Rosemond's mental health issues: Rosemond's father, Rosemond's pastor, two family friends, and Dr. Shea.

Rosemond's father testified Rosemond was a "good boy." Rosemond's pastor stated Rosemond belongs to a "wholesome, functional family." The family friends described Rosemond as obedient, intelligent, and respected and asked the jury to have mercy. Lastly, Dr. Shea testified in a conclusory manner that Rosemond could adjust to prison. On cross-examination, Dr.

Shea agreed he had not diagnosed Rosemond with a mental illness. In sum, **no** evidence was presented to the jury concerning Rosemond's troubling mental health issues. In fact, the theme of the evidence was the absence of any mental health concerns, for the evidence consistently portrayed Rosemond as a "good boy."

Rosemond's competence to stand trial in no manner precluded his counsel from presenting the mental illness information that was known. As no evidence of Rosemond's known mental health issues was presented, we reject the State's efforts to portray Rosemond's position as merely wanting to present a "fancier mitigation" case. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (affirming the denial of PCR finding Jones merely sought a "fancier" presentation of mitigation evidence).

Given the jury's struggle during the sentencing phase and the want of any mental health mitigation evidence, we hold the known evidence of Rosemond's mental health issues "'might well have influenced the jury's appraisal' of culpability." *Rompilla*, 545 U.S. at 393. As a result, Rosemond was prejudiced, as we find confidence in the outcome is substantially undermined. Thus, we reverse the denial of PCR on this issue and remand the case for a new sentencing hearing.

IV.

In light of Rosemond's entitlement to a new sentencing hearing, we need not address the remaining assignment of errors concerning the sentencing phase. *Hughes v. State*, 367 S.C. 389, 409, 626 S.E.2d 805, 815 (2006) (holding appellate court need not reach remaining issues when addressed issues are dispositive). We nevertheless elect to address Rosemond's challenge to trial counsel's failure to object to the trial court instructing the jury not to recommend a sentence of life based on mercy: "you may recommend a sentence of life imprisonment for any reason or for no reason at all *other than as an act of mercy*." (emphasis added). We agree with Rosemond and hold that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it.

In *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991), this Court held a defendant may present witnesses to ask for mercy in the sentencing phase. Further, our case law requires a trial court to instruct a jury it may impose a life sentence even if it finds a statutory aggravating circumstance. *State v. Hicks*, 330 S.C. 207, 218-19, 499 S.E.2d 209, 215 (1998).

During the sentencing phase, the testimony of two family friends was properly admitted and these witnesses asked the jury for mercy. In contrast, the trial court then instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy. Notably, the trial court's jury instruction mirrored the instruction found proper subsequent to Rosemond's trial in *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). We overrule *Hughey* to the extent it approved and sanctioned the charge given here.

It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion . . . ." *State v. Singleton*, 284 S.C. 388, 393, 326 S.E.2d 153, 156 (1985) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991).

V.

Due to the overwhelming evidence of guilt and want of prejudice, we affirm the PCR court's denial of relief regarding the assignment of errors related to the guilt phase of Rosemond's trial. We reverse the PCR court and hold Rosemond established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. We remand the case for a new sentencing

hearing.[3] We overrule *State v. Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

[3] As noted, Rosemond is currently not competent. A new sentencing hearing is contingent on Rosemond regaining competency.

The Supreme Court of South Carolina

In the Matter of David C. Danielson, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

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

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

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

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

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
June 22, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: David G. Cannon, Appellant,

Ex Parte: Georgia Attorney General's Office; South Carolina Attorney General's Office; Terry Brown, Romunzo Brown, Forlando Brown, Darren Lumar; M&T Bank; Tommie Rae Hynie Brown; Stephen L. Slotchiver, the GAL of James Brown, II; Larry Brown, Daryl Brown (individually and on behalf of his minor children Lindsey Delores Brown and Janise Vanisha Brown), Vanisha Brown; Deanna J. Brown Thomas (individually and on behalf of her minor child Jackson Brown-Lewis), Yamma N. Brown Lumar (individually and on behalf of her minor children Sydney Lumar and Carrington Lumar), Tonya Brown; Robert L.

Buchanan, Jr., and Adele J. Pope, as Special Administrators; Albert Dallas and Alfred A. Bradley, as Personal Representatives of the Estate of James Brown, a/k/a James Joseph Brown, Respondents,

In Re: The Estate of James Brown, a/k/a James Joseph Brown, Respondent.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4570
Heard May 12, 2009 – Filed June 23, 2009

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Jan L. Warner, of Columbia, for Appellant.

Adele J. Pope, of Columbia, Albert P. Shahid, Jr., of Charleston, Assistant Attorney General C. Havird Jones, Jr., of Columbia, David Bell, of Augusta, Senior Assistant Attorney General Grace Lewis, of Atlanta, James D. Bailey, of Aiken, Louis Levenson,

of Atlanta, Robert L. Buchanan, Jr., of Aiken, Robert Rosen, of Charleston, Ronald A. Maxwell, of Aiken, Stanley G. Jackson, of Aiken, Stephen H. Brown and Russell Grainger Hines, both of Charleston, Tressa T.H. Hayes, of West Columbia, for Respondents.

WILLIAMS, J.: David Cannon appeals the circuit court's order finding him in contempt of court and imposing a sanction of a six-month imprisonment sentence with the ability to purge the confinement upon the payment of specified fees and a fine. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

On August 1, 2000, James Brown signed an irrevocable trust agreement (the Trust) and a last will and testament (the Will). Cannon, Albert Dallas, and Alfred Bradley were named trustees of the Trust. Brown died on December 25, 2006, and the probate court appointed Cannon, Dallas, and Bradley as personal representatives of Brown's Estate (the Estate).

In January 2007, a petition for the removal of the personal representatives was filed in the probate court, alleging issues with the manner in which Cannon, Dallas, and Bradley handled both the Estate and the Trust. The case was removed to the circuit court on the probate court's own motion, and a hearing on the matter was held on February 9, 2007. The circuit court subsequently issued an order allowing for the appointment of limited Special Administrators (the SAs) for monitoring purposes. Robert Buchanan, Jr., and Adele J. Pope were appointed as the SAs. The order also limited the authority of Cannon, Dallas, and Bradley regarding the Estate and the Trust.

The circuit court granted the SAs access to files, books, and records of the Estate and the Trust in June 2007. Upon reviewing the Trust's checkbook, the SAs discovered a $900,000 check payable to an account at M

& T Bank (M & T) had been incorrectly deposited in the Trust's checking account. The entire $900,000 was removed from the Trust's account between August 1 and December 28, 2006. The SAs alleged Cannon, rather than Dallas or Bradley, was responsible for the transactions associated with the deposit and removal of the funds.

Because of the misappropriation, the SAs filed a motion seeking removal of one or more of the personal representatives and/or trustees. A hearing on the matter was held on August 10, 2007, and Cannon voluntarily submitted his resignation as personal representative, trustee, and fiduciary to the Estate and the Trust. Following the hearing, the circuit court issued an order immediately relinquishing Cannon's "signatory authority on all transactions, accounts, contracts, checks and/or instruments or undertakings of any kind for James Brown, the Estate, the Brown Entities, and the Brown Trusts." Cannon was ordered to pay the Estate $350,000 and to provide a full accounting to the SAs of all records related to the Estate and the Trust. Cannon paid the $350,000 that same day.

The circuit court held another hearing on September 24, 2007, and issued an order on October 2, 2007. In this order, the circuit court found Cannon in contempt for failing to account to the SAs. The circuit court scheduled a later hearing to determine the willfulness of Cannon's actions in failing to account.

In an effort to recoup funds owed to the Estate, the circuit court additionally ordered Cannon to pay the Estate $373,000 in the October 2, 2007 order. This sum was found to be the remaining amount owed from the misappropriated $900,000. The circuit court also ordered Cannon to pay $30,000 as a deposit towards claims related to attorneys' fees and costs.

Subsequently, a hearing was held on November 15 and 20, 2007, to determine both the willfulness of Cannon's failure to account and whether Cannon had paid the Estate $373,000 and $30,000 as mandated by the circuit court's October 2, 2007 order. At the hearing, Cannon testified he paid the $30,000 but did not have the ability to pay the $373,000. Cannon also stated he participated in the amendment of tax returns for James Brown Enterprises

Corporation (the Corporation) after his resignation and the circuit court's August 10, 2007 order relinquishing all of his authority, including his signatory authority.

On December 18, 2007, the circuit court issued an order finding Cannon in contempt of court for failing to pay the Estate $373,000 and for failing to relinquish all of his authority; he was not, however, found to be in willful contempt for failing to account. Cannon was ordered to be imprisoned for a period of six months, but Cannon could "purge himself of this confinement by the payment of the aforementioned $373,000, the payment into [the circuit] court of $50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties, and the payment of a fine of $10,000.00." Cannon had until "January 25, 2008[,] to completely purge himself."

Cannon filed a motion to reconsider, which the circuit court denied. This appeal followed.

I. JURISDICTION

STANDARD OF REVIEW

Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived. Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984). Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653-54 (Ct. App. 1998).

LAW/ANALYSIS

A. SUBJECT MATTER JURISDICTION

Cannon argues the circuit court lacked subject matter jurisdiction to issue any orders regarding his acts as trustee of the Trust. Specifically, Cannon argues section 62-7-201 of the South Carolina Code (2009) does not

provide the circuit court with subject matter jurisdiction over internal trust matters. We disagree.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Majors v. S.C. Sec. Comm'n, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Peterson v. Peterson, 333 S.C. 538, 547, 510 S.E.2d 426, 431 (Ct. App. 1998).

When construing a statute, the cardinal rule is to ascertain the intent of the legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Id. at 22-23, 579 S.E.2d at 336. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Id. at 23, 579 S.E.2d at 336.

"The legislature's intent should be ascertained primarily from the plain language of the statute." Id. If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. Id. at 25, 579 S.E.2d at 337-38. The construing court may additionally look to the legislative history when determining the legislative intent. State v. Byrd, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976).

In determining whether the circuit court possessed subject matter jurisdiction in the instant matter, we must first examine the statutes Cannon argues give the probate court exclusive jurisdiction. The South Carolina Probate Code grants the probate court "exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." § 62-7-201(a). This exclusive jurisdiction, however, is subject to section 62-1-302(c), which states, "The probate court has jurisdiction to hear and determine issues relating to paternity, common-law marriage, and

interpretation of marital agreements in connection with estate, trust, guardianship, and conservatorship actions pending before it, concurrent with that of the family court . . . ." S.C. Code Ann. § 62-1-302(c) (2009).

Section 62-7-201(a) specifically deals with the internal affairs of trusts and grants exclusive jurisdiction to the probate court in those proceedings. Section 62-7-201(a) also states, however, that the probate court's exclusive jurisdiction is "[s]ubject to the provisions of [s]ection 62-1-302(c)," meaning there is one instance when this exclusive jurisdiction may be taken away from the probate court. Section 62-1-302(c), on the other hand, has no language divesting the probate court of exclusive jurisdiction. Rather than divesting the probate court of jurisdiction, section 62-1-302(c) provides the probate court with additional jurisdiction it did not previously have. Section 62-1-302(c) gives the probate court concurrent jurisdiction with the family court to determine, in specific circumstances, issues of paternity, common-law marriage, and the interpretation of marital agreements. It is, therefore, difficult to reconcile section 62-7-201(a) with section 62-1-302(c). Consequently, the plain language of section 62-7-201(a) referencing section 62-1-302(c) gives rise to uncertainty. We, therefore, look to the language of the two statutes as a whole and the legislative history to determine the legislative intent of section 62-7-201(a). See Georgia-Carolina Bail Bonds, Inc., 354 S.C. at 25, 579 S.E.2d at 337-38 ("If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. . . . In construing a statute, the court looks to the language as a whole in light of its manifest purpose.").

After reviewing both the language of section 62-7-201 and section 62-1-302 as a whole and the legislative history of the two statutes, we believe the reference to section 62-1-302(c) in section 62-7-201(a) to be a scrivener's error.[1] We find the legislative intent was to reference section 62-1-302(d),

[1] While our analysis does not rely on or give weight to the proposed amendment, we note on March 26, 2009, the South Carolina House of Representatives proposed a bill to amend section 62-7-201(a) to read,

which specifically discusses divestment of the probate court's "exclusive jurisdiction" and reads,

> Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, . . . must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) trusts . . . .

S.C. Code Ann. § 62-1-302(d) (2009).

Section 62-7-201 of the South Carolina Trust Code was enacted May 23, 2005. Act No. 66, 2005 S.C. Acts 280, 317. At that time, section 62-1-302(c) was the current section 62-1-302(d), discussing the issue of the circuit court's concurrent jurisdiction with the probate court. S.C. Code Ann. § 62-1-302(c) (1987). Subsequently, on June 3, 2005, section 62-1-302 was amended, and the legislature added the current section 62-1-302(c) and reassigned the sub-section regarding a party's right to remove a proceeding to the circuit court to section 62-1-302(d). Act No. 132, 2005 S.C. Acts 1528. Therefore, when section 62-7-201 was enacted and section 62-1-302(c) was referenced, the legislature was referencing what is the current section 62-1-302(d), meaning the legislative intent was to give the circuit court jurisdiction to hear trust matters removed from the probate court.

Further, the "South Carolina Comment" section of section 62-7-201 states:

> [South Carolina Trust Code] subsections 62-7-201(a) and (b) incorporate former South Carolina Probate Code Section 62-7-201 regarding the Probate Court's

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"Subject to the provisions of Section 62-1-302(c) and (d), ..." H.R. 3803, 118th Sess. (S.C. 2009) (emphasis in original).

> exclusive jurisdiction over the internal affairs of trusts. . . . Such exclusive jurisdiction is subject to Section 62-1-302(c) of the South Carolina Probate Code regarding a party's right to remove a proceeding to the *circuit court*.

(emphasis added). As the current section 62-1-302(c) discusses the family court's jurisdiction and makes no reference to removal of a proceeding or the circuit court, this comment can only indicate the legislature intended to refer to section 62-1-302(d).

Based on the language of the statutes as a whole, the statutes' comments, and the legislative history, we find the legislative intent of section 62-7-201(a) is to allow removal of internal trust matters, by a party or the probate court on its own motion, to the circuit court. Therefore, it was proper for the probate court to remove the matter to the circuit court on the court's own motion, giving the circuit court subject matter jurisdiction to hear the case.

B. PERSONAL JURISDICTION

Cannon argues he was never made a party to any proceedings in his capacity as trustee, has never been served with a rule to show cause for contempt, and was only before the circuit court in his capacity as personal representative, and therefore, the circuit court lacked personal jurisdiction over him. We disagree.

"By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person." S.C. Code Ann. § 62-3-602 (2009). "By accepting the trusteeship of a trust having its principal place of administration in this State . . . the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust." S.C. Code Ann. § 62-7-202(a) (2009).

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007). "Voluntary appearance by [a] defendant is equivalent to personal service . . . ." Rule 4(d), SCRCP. "A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case." State v. Dudley, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003); see Cheraw Motor Sales Co. v. Rainwater, 125 S.C. 509, 513 119 S.E. 237, 239 (1923) ("The defendant filed his answer and tried his case on the affidavit in attachment, and thereby waived his right to his motion [to dismiss the proceedings because there was no summons and complaint served].").

This failure to object resulting in waiver of personal jurisdiction applies equally in constructive contempt cases. See Bakala v. Bakala, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (finding constructive contempt proceedings are commenced by a rule to show cause and that the record indicated service of the rule to show cause was not accomplished correctly, but because the appellant never raised the issue, his objections to personal jurisdiction were waived).

Shortly after Brown's death, a petition for the removal of Cannon as trustee was filed in the probate court. A certificate of service was served upon Cannon's counsel. The probate court, on its own motion, removed all matters to the circuit court, with no objection by Cannon. Later, a petition for accounting was filed, and Cannon's counsel signed an "Acknowledgement of Service," which waived all objections to defects in service of process.

Cannon and his counsel appeared at the August 10, September 24, and November 15 and 20, 2007 hearings and never made a motion or an objection as to the personal jurisdiction of the circuit court. At the August 10, 2007 hearing, counsel for the SAs began by discussing their "motion related to the recommendation that one or more of the [personal] representatives and trustees be removed." Counsel stated, "[A]lthough some of these captions bear the name Estate, this is an order that clearly extends to the estate – a

recommendation that it extends to the estate, the trusts, and what we call the Brown entities . . . ." Again, no objection was made by Cannon or his counsel. Cannon then specifically consented to the terms of the August 10, 2007 order, which formed the basis for all contempt proceedings.

Before the conclusion of the August 10, 2007 hearing, the circuit court issued an "oral subpoena" ordering Cannon to be present at the September 24, 2007 hearing, ready "to be called for testimony subject to cross examination . . . ." As before, no objection was made. With this oral subpoena, the circuit court gave Cannon actual notice of the proceedings in which he was a party, and in response, Cannon and his counsel appeared and again argued the merits.

Cannon clearly had notice of all proceedings and waived any defects that might have occurred. See Stickland v. Consol. Energy Prods. Co., 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); H.S. Chisholm, Inc. v. Klinger, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (1956) ("[T]he appellants had actual notice of the issuance and contents of the rule [to show cause, which was improperly filed] by the personal service of it upon them, and in response to it they appeared by counsel."). Cannon never raised the issue of improper service of process and, consequently, never objected to personal jurisdiction of the circuit court. See Bakala, 352 S.C. at 629, 576 S.E.2d at 165 (finding husband never raised the issue of improper service of rule to show cause in constructive contempt case and, therefore, waived his objection to personal jurisdiction). By appearing and arguing the merits of the action multiple times before the circuit court, we find Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction.[2]

[2] We additionally note, Cannon's counsel conceded the circuit court had personal jurisdiction over Cannon at oral arguments.

Finding the circuit court had both subject matter jurisdiction and personal jurisdiction to hear this matter, we now address the merits of Cannon's appeal.

II. CONTEMPT

STANDARD OF REVIEW

"A decision on contempt rests within the sound discretion of the [circuit] court." Floyd v. Floyd, 365 S.C. 56, 71, 615 S.E.2d 465, 473 (Ct. App. 2005). It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court. Miller v. Miller, 375 S.C. 443, 454-55, 652 S.E.2d 754, 760 (Ct. App. 2007). On appeal, this Court should reverse the contempt decision only if it is without evidentiary support or the circuit court abused its discretion. Floyd, 365 S.C. at 71-72, 615 S.E.2d at 473. Additionally, the finding of contempt is immediately appealable. Id. at 72, 615 S.E.2d at 473-74.

LAW/ANALYSIS

Cannon argues the circuit court erred by converting his civil contempt into criminal contempt and by not affording him due process. We disagree.

All courts have the inherent power to punish for contempt, which "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Miller, 375 S.C. at 453, 652 S.E.2d at 759. "Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Miller, 375 S.C. at 454, 652 S.E.2d at 759-60 (internal quotations and citations omitted).

"In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." Id. at 455, 652 S.E.2d at 760. "[J]udges have the authority to [sua sponte] use contempt proceedings to preserve the authority and dignity of their courts." McEachern v. Black, 329 S.C. 642, 649, 496 S.E.2d 659, 662-63 (Ct. App. 1998).

"Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order." Miller, 375 S.C. at 454, 652 S.E.2d at 760. If, through no fault of his own, the contemnor is unable to obey a court order, the contemnor cannot be held in contempt. Id.

There is a distinction between constructive and direct contempt. Floyd, 365 S.C. at 75, 615 S.E.2d at 475. "Constructive contempt is contempt that occurs outside the presence of the court." Id. "In contrast, direct contempt involves contemptuous conduct occurring in the presence of the court." Id.

Further, "[c]ontempt can be either civil or criminal." Id. "The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards." Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009). "Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence." State v. Passmore, 363 S.C. 568, 571-72, 611 S.E.2d 273, 275 (Ct. App. 2005). Additionally, civil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt. Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998).

In determining whether the contempt is civil or criminal, the major factor to consider "is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed." Id. at 111, 502 S.E.2d at 88. "The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the

complainant[,]" while "[t]he primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." Id. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. Id. If it is for criminal contempt, the sentence is punitive and meant to vindicate the authority of the court. Id.

"[A]n unconditional penalty is considered criminal contempt because it is solely and exclusively punitive in nature." Ex parte Jackson, 381 S.C. at 258-59, 672 S.E.2d at 587. When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature. Poston, 331 S.C. at 112, 502 S.E.2d at 89.

> The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do. If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order. Those who are imprisoned until they obey the order, carry the keys of their prison in their own pockets. If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order.

Id. at 112-13, 502 S.E.2d at 89.

In the present case, Cannon was found to be in willful contempt of court for failure to pay $373,000 to the Estate as ordered by the circuit court at the September 24, 2007 hearing, and for failure to relinquish all authority in relation to the Estate, the Trust, and all other related entities as ordered by the circuit court on August 10, 2007. The circuit court ordered Cannon to six months imprisonment but allowed him to "purge himself of this confinement by the payment of the . . . $373,000, the payment into [the circuit court] of

$50,000.00 to be applied towards the payment of attorneys' fees as incurred by the various parties, and the payment of a fine of $10,000.00." Although Cannon was held in contempt in part for disobeying the circuit court's order to relinquish all authority associated with the Estate and the Trust, the purpose of the contempt order was to coerce Cannon to comply with the circuit court's order to pay $373,000 to the Estate. Additionally, Cannon was not subject to an unconditional, fixed term of imprisonment; he could avoid confinement by complying with the circuit court's order. Thus, we find the contempt to be civil in nature. See Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982) (stating a purpose of civil contempt is to coerce the defendant to comply with a court order); Miller, 375 S.C. at 462, 652 S.E.2d at 764 (finding the contempt proceeding was civil in nature because the term of imprisonment was not unconditional or fixed and the contemnor could obtain release by complying with the court's directive).

Finding civil contempt, the record must contain clear and convincing evidence of Cannon's contemptuous behavior. See Durlach v. Durlach, 359 S.C. 64, 70-71, 596 S.E.2d 908, 912 (2004) (stating an appellate court should reverse a decision regarding contempt if it is without evidentiary support or the circuit court abused its discretion, and clear and convincing evidence must support a finding of civil contempt). Cannon provided the circuit court with clear and convincing evidence, through his testimony and conduct, upon which to base its decision, including admitting to not complying with either circuit court order. Cannon went so far as to testify that he knowingly and willfully disregarded an order of the circuit court.

As for Cannon's failure to pay the Estate $373,000 as ordered by the circuit court on October 2, 2007, Cannon readily admitted he did not pay the fee. Cannon, however, argued he did not have the ability to pay the fee and, therefore, could not comply with the court order. The circuit court did not find this testimony to be credible. This finding was in light of the evidence of Cannon's earnings from the previous seven years, the purchase of land in Honduras, and his entry into a contract for the construction of a home on that land.

According to Cannon's federal income tax returns,[3] Cannon's adjusted gross income from 2000 to 2006 was as follows: $1,397,000; $959,851; $169,334; $749,639; negative $514,509;[4] $348,831; and $1,058,790, respectively. Additionally, Cannon claimed $1,529,000 in deductions from his business income in 2003. Further, $1,323,972 in income was reported on a Schedule C form attached to Cannon's 1999 tax return. When asked by the circuit court to provide a current financial statement, Cannon provided one showing his current net value to be negative $311,592.38.

Cannon also testified as to the land and the contract to build a home he and his wife purchased in Honduras around August 16, 2007. This purchase took place less than one week after the hearing where the circuit court ordered Cannon to pay the Estate $350,000 of the $900,000 that had been misappropriated, where the circuit court raised serious questions about those remaining funds, and where the circuit court made it clear the payment of $350,000 was only a partial payment. Cannon testified he and his wife planned to retire in Honduras, which was the reason for building in that location. Cannon and his wife formed a corporation in Honduras called Bay Island Hermitage in order to buy property in the country; Cannon and his wife equally own 99% of the corporation while a Honduran attorney owns 1%, which is required by Honduran law. Cannon stated he paid $223,000 for the lot in Honduras and then $866,000 for a "turn-key contract" for the construction and furnishing of a home. Cannon stated he paid the entire cost

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[3] Due to IRS and SLED investigations involving Cannon's income, Cannon continually invoked his Fifth Amendment privilege on questions concerning his income. The circuit court was, therefore, only able to use the numbers listed on his federal income tax returns, with no explanations or discussions, to determine Cannon's income from 2000-2006.

[4] The circuit court's December 18, 2007 order incorrectly stated Cannon's adjusted gross income for 2004 was $514,509. Cannon's 2004 federal income tax return showed Cannon had a business income of $203,226 and took deductions of $721,601. Cannon's adjusted gross income for 2004 was negative $514,509. During this testimony, Cannon again invoked his Fifth Amendment privilege, giving the circuit court no explanation of the significant deductions taken in 2004.

up front in cash, and the property is unencumbered. He also testified, however, that the funds used for these purchases belonged to his wife.

Based on the record, we find there was clear and convincing evidence Cannon was in contempt of the October 2, 2007 court order requiring him to pay the Estate $373,000. Remaining mindful the circuit court was in a better position to judge the credibility of the witnesses, we also find Cannon failed to carry his burden of proving he was without fault in not being able to satisfy the circuit court's order. See Reed v. Ozmint, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007) (deferring to the circuit court because the judge, who saw and heard the witnesses, was in a better position to evaluate credibility and assign comparative weight to their testimony); Thornton v. Thornton, 328 S.C. 96, 112, 492 S.E.2d 86, 94-95 (1997) (stating that in response to the husband's argument he could not pay child support and should, therefore, not be held in contempt for failure to pay, our Supreme Court looked at factors which included: "(1) Husband's ownership of valuable property, as evidenced by his own financial declaration; [and] (2) Husband's extensive history of lying to virtually everyone about his assets or hiding those assets"); see generally 17 Am. Jur. 2d *Contempt* § 141 (2008) ("The defense of inability to comply with a court order is not available where the contemnor has voluntarily created the incapacity or, said another way, when the inability to comply is self-induced."). Thus, the circuit court did not abuse its discretion in holding Cannon in contempt.

As for Cannon's failure to relinquish all authority relating to the Estate, the Trust, and the related entities by participating in the amendment of some of the Corporation's tax returns, Cannon unequivocally stated that despite knowing the circuit court's order prohibited him from doing so, he disregarded the order and amended the tax returns with no authority. At the hearing to determine the willfulness of Cannon's failure to account and whether he had paid specified sums to the Estate, Cannon admitted he amended corporate tax returns for the Corporation, which were filed September 26 and October 16, 2007, after his resignation as personal representative and trustee on August 10, 2007. When questioned as to whether he was aware of the circuit court's order relinquishing his duties effective upon his resignation, he stated he had notice of the order and

understood he did not have the authority to take the actions he took. Cannon informed the circuit court "[he] knew that probably [he] would have to take the heat for [amending the tax returns without authority], but [he] would rather take the heat for doing it than not doing it."

The record contains clear and convincing evidence that Cannon was in contempt of the circuit court's August 10, 2007 order, and again, Cannon failed to carry his burden of proving a defense for his actions. Consequently, there was no abuse of discretion in the circuit court's finding of contempt.

Finding the circuit court was correct to hold Cannon in civil contempt, we must also review the sanction imposed by the circuit court. Cannon was sentenced to six months imprisonment with the ability to purge his confinement by paying specified fees and fines. We find no abuse of discretion in the circuit court's imposition of the six-month prison sentence or in handing Cannon the keys to his prison by allowing him to purge the confinement upon the payment of $373,000 as previously ordered by the court. We do, however, take issue with the $50,000 award towards attorneys' fees, and we find the $10,000 fine to be an abuse of discretion.

Regardless of whether a six-month imprisonment sentence is imposed for civil or criminal contempt, a contemnor has no right to a jury trial for an imprisonment sentence of six months or less. See Curlee, 277 S.C. at 385, 287 S.E.2d at 919 ("If [the contempt] was civil, [the contemnor's] sentence of one year without a right to jury trial is proper. If it was criminal, [the contemnor] had a constitutional right to a jury trial before a sentence of *more than six months* could be imposed.") (emphasis added); Passmore, 363 S.C. at 572, 611 S.E.2d at 275 ("Currently, these provisions [of the Constitution] require a contemnor to be allowed a jury trial when facing a serious sentence-i.e., one of *greater than six months in prison*.") (emphasis added). Cannon was, therefore, not deprived of any due process rights with the imposition of a six-month imprisonment sentence, especially in this civil contempt proceeding.

Furthermore, Cannon's sentence was made conditional on his compliance with the circuit court's order. As we have already stated, looking

at the evidence in the record and deferring to the circuit court on matters of credibility, we find Cannon either had the ability to pay the $373,000 to purge his confinement or was unable to pay this fee as a direct consequence of his own actions and behavior from the start of the proceedings. See Miller, 375 S.C. at 454, 652 S.E.2d at 760 (stating contemnor must be without fault in his inability to comply with the court order); cf. Thornton, 328 S.C. at 104, 492 S.E.2d at 90-91 (stating the family court found husband had the ability to pay arrearages of $21,000 and was, therefore, in contempt for failure to pay, despite his claim that he lacked the means to pay because husband had received approximately $350,000 from a recent legal settlement, he had a "substantial" lifestyle, and he owned several properties, including a lien-free Georgetown office valued at $250,000 and a one-half interest in a Colorado vacation home valued at $600,000).

"Courts, by exercising their contempt power, can award [attorneys'] fees under a compensatory contempt theory." Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 609, 567 S.E.2d 514, 520 (Ct. App. 2002) (citation omitted). The award of attorneys' fees is not a punishment but an indemnification to the party bringing the action. Miller, 375 S.C. at 463, 652 S.E.2d at 764-65. Because the record lacks sufficient evidence from which the circuit court could determine the appropriate amount of attorneys' fees required for reimbursement, we find the $50,000 award for attorneys' fees to be an abuse of discretion. We reverse and remand the issue of attorneys' fees to the circuit court for findings of fact as to the proper amount of attorneys' fees required for indemnification.

Courts may also impose fines on a party held in contempt. Cheap-O's Truck Stop, Inc., 350 S.C. at 609, 567 S.E.2d at 520. "If the sanction is a fine, it is punitive when it is paid to the court." Poston, 331 S.C. at 112, 502 S.E.2d at 89. A fine may also be "remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine . . . ." Miller, 375 S.C. at 457, 652 S.E.2d at 761 (citations omitted). However, "[a]ny component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party." Cheap-O's Truck Stop, Inc., 350 S.C. at 609, 567 S.E.2d at 520.

The circuit court imposed an additional $10,000 fine on Cannon. The order did not state whether this fine was to be paid to the court as a form of punishment or whether it was to be paid to the Estate as a means of compensation, but regardless, we find the circuit court abused its discretion by imposing the additional fine. If the fine was imposed for compensation purposes, it was improper because the record contains no reasonable relationship between Cannon's contemptuous conduct and the imposition of the $10,000 fine. If the additional fine was imposed as punishment, it was improper because we find Cannon was held in civil contempt, making the imposition of any criminal sanction an abuse of discretion. Consequently, we reverse the $10,000 fine imposed. Cf. id. (reversing the circuit court's improper imposition of a fine on the contemnor).

Cannon also argues the circuit court erred in (1) finding Cannon in civil contempt for conduct that took place after August 10, 2007, and (2) imposing a purge remedy based upon the assets or financial strength of Cannon's wife. We find these arguments abandoned on appeal due to Cannon's failure to cite any legal authority in support of either argument. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (stating an issue is deemed abandoned on appeal when no legal authority is cited to support the argument).

Finally, Cannon argues the circuit court erred in requiring him to pay $373,000 into the circuit court regarding a disputed civil claim even though Cannon had not been served with a summons and complaint affording him an opportunity to be heard and to engage in discovery, thereby placing him in the position of being estopped with regard to any claim that may be brought against him for the funds that are at issue. We disagree.

Cannon begins his argument with the premise that the circuit court held him in both civil and criminal contempt. As previously discussed, we find the present contempt proceedings to be civil in nature, meaning the additional constitutional safeguards required in criminal contempt proceedings were not triggered. See Ex parte Jackson, 381 S.C. at 259, 672 S.E.2d at 588 ("The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards."). Further, even if the

contempt proceedings were criminal in nature, Cannon was not entitled to a jury trial on the matter because his imprisonment sentence did not exceed six months. See Curlee, 277 S.C. at 385, 287 S.E.2d at 919 ("If [the contempt] was civil, [the contemnor's] sentence of one year without a right to jury trial is proper. If it was criminal, [the contemnor] had a constitutional right to a jury trial before a sentence of *more than six months* could be imposed.") (emphasis added); Rhoad v. State, 372 S.C. 100, 107, 641 S.E.2d 35, 38 (Ct. App. 2007) ("[A] contemnor may be tried without a jury under certain circumstances, as long as the sentence imposed is no longer than six months."); Passmore, 363 S.C. at 572, 611 S.E.2d at 275 ("Currently, these provisions [of the Constitution] require a contemnor to be allowed a jury trial when facing a serious sentence-i.e., one of *greater than six months in prison*.") (emphasis added).

Cannon continues his argument by stating the circuit court sanctioned him without first determining whether the sanction was appropriate. An issue must be raised to and ruled upon by the circuit court to be preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Cannon failed to raise this argument to the circuit court despite his many opportunities to do so. Thus, we will not address this argument.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kevin Dwayne Goodwin, Appellant.

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

Opinion No. 4571
Heard April 21, 2009 – Filed June 23, 2009

AFFIRMED

Appellate Defender Elizabeth A. Franklin, of Columbia, for Appellant.

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

SHORT, J.: Kevin Dwayne Goodwin appeals his convictions and sentences for first-degree burglary and murder. Goodwin argues the trial court erred in admitting his statements into evidence and denying his mistrial motion. We affirm.

FACTS

On June 7, 2004, Dr. Joseph Dillard's residence was burglarized. Sometime during the burglary, Dillard returned home, surprised the intruder, and was fatally shot. During a search of Dillard's home, a cigar butt containing DNA evidence was found near the point of entry, which was a broken window in the back of the house.

Five days later, Officer Derwood Joseph Barton, Jr. was contacted by a DNA analyst who informed him the DNA found on the cigar butt matched Goodwin's DNA.[1] As a result, Barton visited three locations he suspected Goodwin frequented to obtain physical descriptions for potential search warrants. At the same time, Officer Bryant William Hinson, Jr. was in transit to get the magistrate to sign an arrest warrant alleging Goodwin was responsible for burglarizing Dillard's home.

When Barton arrived at one of the three locations he suspected Goodwin frequented, he observed Goodwin outside. Barton asked him for assistance in an attempt to dispel suspicion, but Goodwin shook his head and walked back inside the house. Barton then moved his vehicle to the entrance of the dead-end road where he could maintain visual surveillance, and called for backup. Hinson heard Barton's request for backup and responded before he obtained the magistrate's signature on the arrest warrant.

After additional officers arrived, Goodwin attempted to leave the house in a car with his grandmother. The officers stopped his vehicle and arrested Goodwin for the burglary charge. After the arrest, officers arrived with a search warrant and searched the residence.

[1] Goodwin's DNA was in the police database C.O.D.I.S.

Goodwin was transported to the police station where he was interrogated by Hinson and Barton. The interrogation was audio-taped. Hinson advised Goodwin of his right to remain silent and his right to an attorney. When asked if he understood his rights, Goodwin replied in the affirmative. Hinson asked Goodwin if he was willing to speak with them, and Goodwin replied: "I'll listen, yeah I'll listen." Then Hinson asked Goodwin if he would be willing to sign the waiver of rights form, and the following colloquy took place:

> Hinson: Okay. Are you willing to sign this?
>
> Goodwin: So what is it say . . . .
>
> Hinson: All it is . . . .
>
> Goodwin: . . . sign over my rights?
>
> Hinson: All it is, is your basically saying that we told you these, you understand them and you're willing to talk to us. As you read, you don't have to say a thing if you don't want to.
>
> Barton: Right. You're not signing any rights away, I'll [sic] you gotta do, if you don't want to talk to us, don't talk to us. If, if you want to stop, you can stop.
>
> Goodwin: Yeah, I'll sign. Yeah, I'll listen.

As a result, Goodwin signed the waiver.

Once the interrogation began, Hinson informed Goodwin they had DNA and fingerprint evidence linking him to the burglary. However, at that point in their investigation, the palm print found at Dillard's house had not yet been matched to Goodwin. Additionally, Hinson informed Goodwin that Dillard's neighbors saw him at the time of the burglary. However, during his

cross-examination at trial, Hinson testified the neighbor indicated they saw someone at Dillard's before the police arrived, but did not identify Goodwin as the perpetrator. Moreover, Hinson pressed Goodwin about the guns stolen from Dillard's house:

> And we'd like to get the guns. I mean, we've already been in a couple of houses, we're fixing to go to a couple of more houses. I mean I don't want to waste our time anymore than we have to, going all over these places harassing people, going in people's houses that had absolutely nothing to do with this and putting them in, ya know, putting them out and staying there hours on end cause these are your loved ones that we going to these houses, or your friends, that we going to these houses. I mean, I don't want to do that. I'm sure you don't want us to have to do that or you don't want it for them anyway.

Eventually, Goodwin admitted to breaking into the house, but denied killing Dillard. Barton asked: "Alright, you didn't kill nobody, but, who took you to the house?" Goodwin responded: "I'm saying I can have some time to think on this here? I can think on this?" Hinson replied: "Well, you think on that and we'll think of something else to ask you. How about that. You think, you think about that." The officers began to question Goodwin about the stolen guns.

Shortly thereafter, the officers began questioning Goodwin about the stolen jewelry. Additionally, Barton began discussing what Goodwin could be charged with: "You, you understand, you understand, you, you're in the house, were in the house, you admitting to being in the house, you admitting to taking the gun. If you take one gun or if you take the whole house, it's still burglary [first]." The officers then began to tell Goodwin it would be in his best interest to tell them what happened, and Barton stated: "[T]he longer you wait, the more chance that somebody else is going to tell your story or tell their side of a story that doesn't sound good for you and you won't get to tell your story because we won't need to talk to you."

As a result, Goodwin began talking about how he would receive a life sentence regardless of whether he identified the murderer because of the burglary charge and his previous conviction. Then, Barton pointed out that South Carolina also employed the death penalty. Goodwin replied that the death penalty would be better than a life sentence.

Next, the officers began to push Goodwin to talk by discussing Goodwin's family and their reactions to the burglary and murder:

> Barton: Do you know how bad tore up your daddy is right now?
>
> Goodwin: Huh, yeah.
>
> Barton: And your momma.
>
> Goodwin: um, yeah.
>
> Barton: I mean they good people . . .
>
> Hinson: And your girlfriend too
>
> Goodwin: Yeah, I know.
>
> Barton: But you want your kids, your 6 and 11 year old child to think that you're a cold blooded murderer, that you would just put somebody down and shoot them in the back of the head. Not that you had, you know, that's, but if you don't tell your side, you don't tell that somebody else was there or whatever, they'll never know.

Goodwin began telling the officers that he entered the house to rob it after he noticed it was already burglarized. He admitted to stealing a gun, some jewelry, and urinating in the bathroom. Hinson then instructed Goodwin they

were matching footprints found at the scene to shoes taken from the search of his residence. Moreover, Hinson explained some of the items recovered from Goodwin's residence were items stolen in another burglary incident on Lake Shore Drive.

Additionally, the officers told Goodwin that the jury would consider his cooperation because at trial, the prosecutor would ask them if he was cooperative. Barton attempted to push Goodwin to confess to murder, stating: "using your logic and your reality, okay, that life sentence, you going to get it anyway, right?" Barton also tried to get Goodwin to confess by saying the shooting was an accident: "And your momma and daddy don't have to deal with the fact they raised somebody that killed somebody in cold blood, shot him in the back of the head." Barton stated:

> [Y]ou're telling me, that your [sic] cooked anyway, that your [sic] going to get life one way or the other. It's time you start thinking about the other people in your life. And I, I'm using your logic, I'm not putting this on you. I'm not saying that's what I think. I'm just saying using your own, using your own words, if you're done anyways, you need to start thinking about the people in your life. [Because] your daddy said that today, he said Lord, I can't even leave out my house. You got two boys. What they going to think? Daddy's a murderer or daddy did some bad things in life and some shit happened bad and he had to do what he had to do. It was him or, or me. There's a big difference.

At this point in the interrogation, Goodwin began to ask the officers about a plea bargain. Hinson instructed Goodwin only the solicitor's office could offer a plea bargain, but stated:

> I mean, but there's no plea bargain I can see. I mean there's, there's really no room except for maybe life to, [I] mean from a death penalty to life without a

> chance of parole . . . but I can't say. We don't have the authority to make that but I, but I can assure you it won't go any lower than that. There's no way.
>
> . . . .
>
> You, in fact you really think they going to plea bargain on something like that [(murder)]. I mean, I ain't even going to sit here and try to tell you something that you, you know. That ain't going to happen. I mean, but when it comes down to was he cooperative, was he not, it can make a difference on where you're going. What happens with you when you get to SCDC. Those types of things can, can always be worked out.

Finally, Goodwin admitted to shooting Dillard, and claimed Dillard startled him while he was robbing the house. Goodwin also stated he flushed all the jewelry he stole down the toilet, and got rid of the guns. The officers then asked Goodwin to handwrite a statement, and Goodwin declined. However, Goodwin did agree to sign a typed statement, and also admitted to taking a television and cigar box from the other burglarized house on Lake Shore Drive.

As a result, the officers took Goodwin across the hall into their offices and typed a statement. According to Barton and Hinson, the three discussed the burglary and murder in more detail, typed and printed the statement, and Goodwin read over the statement and signed it. Additionally, Goodwin admitted the boots found during the search of his residence were the boots he wore during the burglary. Goodwin asked the officers if he could make a phone call and called his girlfriend. The officers overheard him say, "It's all over. They know everything."

The next day, Officers Hinson and Barton visited Goodwin at the jail to discuss the location of the missing guns because they were having trouble finding them. Goodwin was not re-advised of his rights. The officers

returned the next day and took Goodwin out of jail to point out the exact location where he disposed of the guns.

During pretrial motions, Goodwin argued the officers lacked probable cause to arrest him because the only evidence they had was the DNA match on the cigar butt, which did not amount to probable cause for an arrest. The State maintained the cigar butt placed Goodwin within inches of the point of entry where a house was burgled and a man was fatally shot; thus, there was probable cause because the officers believed Goodwin was guilty of a felony. Goodwin contended the cigar butt did not place him inside the house, and the palm print was not matched to his until much later. The trial court found probable cause existed for Goodwin's arrest based on the cigar butt containing his DNA found so close to the point of entry.

Next, a Jackson v. Denno, 378 U.S. 368 (1964), hearing was held to determine the admissibility of Goodwin's statements. Hinson testified he informed Goodwin of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), using the form on his computer. Hinson stated he believed Goodwin was not under the influence of alcohol or drugs, seemed coherent, seemed to understand what he was saying to the officers, and seemed to understand the circumstances of the interrogation. Hinson maintained the interrogation lasted seventy minutes. Additionally, Hinson contended Goodwin never invoked his right to remain silent or asked to speak to an attorney.

Barton testified Goodwin was coherent, understood what was going on, responded appropriately, was advised of his rights, and signed the Miranda waiver. Barton also stated Goodwin never asked for an attorney or to stop the questioning, and he and Hinson did not threaten or coerce Goodwin, or promise him anything in return for his statement.

The State argued it proved the voluntariness of the statement through the officers' testimony which was corroborated by the audio tape where Goodwin was advised of his rights, stated he understood his rights, and signed the waiver. The State defended the officers' discussion of the death penalty and asserted the officers' statements were that they did not have

authority to make any kind of plea deal with Goodwin. Additionally, the State maintained the officers' encouraging Goodwin to tell the truth was not equivalent to promising Goodwin something in exchange for a confession. Moreover, the State contended there was a continuation between the six statements, and Goodwin never asked to end the two questionings at the police station and the follow-up questionings at the jail.

Goodwin conceded he never requested an attorney. However, he maintained his statement, "let me think about this," invoked his right to remain silent. Additionally, Goodwin argued his will was overborne because the officers were lying to him about the evidence, bringing up his family's perception, and discussing the death penalty. Moreover, Goodwin pointed out he was never re-advised of his constitutional rights after the first audio-taped interrogation.

In reply, the State argued the officers were trying to find out the truth, were not overbearing, and, while Goodwin said he would listen and did not expressly state he would converse, he signed the Miranda waiver indicating he was willing to talk. The trial court found by the preponderance of the evidence the initial waiver was voluntarily and knowingly made, there was no coercion and no promises made, and there was no evidence Goodwin's will was overborne. Accordingly, the trial court admitted all six statements,[2] finding they were all a continuation and Goodwin never invoked his right to remain silent.

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[2] The six statements were:

1. Audio taped interrogation at the police station.
2. Written statement at the police station.
3. Statement admitting the boots recovered at his residence were the ones he wore during the burglary and murder.
4. Overheard statement to his girlfriend on the phone: "It's all over. They know everything."
5. Written statement taken the day after his arrest while he was in jail.
6. Statement taken two days after his arrest when he was taken out of jail by the officers to identify the location of the guns.

During the State's closing argument, the solicitor stated:

> Do you remember I asked Special Agent Barton on the stand, this is about the audiotape and about the interview, subsequent interviews: Question, "Through all your extensive training in the area, is there anything that you did, or anybody did, in interrogation of the defendant in this case that's not accepted interview procedure.?" . . . Special Agent Barton, "Nothing, Nothing." . . . Uncontradicted testimony.

Goodwin objected, arguing the State impermissibly shifted the burden of proof. The trial court overruled the objection. After the State finished its closing argument, Goodwin moved for a mistrial based on the burden shifting objection. The trial court responded: "I don't believe that the comment made during the closing rises to the level of burden shifting. The motion was denied, but your position is stated on the record."

Before the court charged the jury, Goodwin took exception to the charge that the waiver of the right to remain silent is a permanent one. The trial court acknowledged Goodwin's objection, stating it would allow him to take exception once the charge was given. Accordingly, the trial court charged the jury extensively on the voluntariness of statements, how much weight to afford statements during deliberation, and the State's burden to prove beyond a reasonable doubt that the statement was given freely and voluntarily. The jury convicted Goodwin as charged, and he was sentenced to life imprisonment without the possibility of parole. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. Admissibility of Goodwin's Statements

Goodwin argues the trial court abused its discretion in admitting his statements into evidence, asserting various arguments. We address each argument individually.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. 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. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007).

When seeking to introduce a confession, the State must prove that the statement was voluntary and taken in compliance with Miranda. State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession. Dickerson v. U.S., 530 U.S. 428, 434 (2000). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693 (1993) (omitting internal citations). Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. Frazier v. Cupp, 394 U.S. 731, 739 (1969). "Coercion is determined from the perspective of the suspect." Miller, 375 S.C. at 386, 652 S.E.2d at 452.

The question of whether law enforcement complied with the requirements of Miranda is for the court, not the jury. State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). "Once the court determines that a defendant received and understood his rights, the court allows a confession into evidence." Davis, 309 S.C. at 342, 422 S.E.2d at 143. "It then is for the jury ultimately to decide whether the confession was voluntary." Id.

Although the court must make the initial determination of admissibility, the trial court must instruct the jury that it cannot consider any confession unless it finds beyond a reasonable doubt that the accused gave his statement freely and voluntarily under the totality of the circumstances. Davis, 309 S.C. at 342-43, 422 S.E.2d at 143. An express waiver is unnecessary to support a finding that the defendant has waived his or her Miranda rights. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). Once a voluntary waiver is made, it continues until the individual being questioned indicates he wants to revoke the waiver and remain silent or circumstances exist which establish that his will has been overborne and his capacity for self-determination critically impaired. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990).

a. Overborne Will

Goodwin maintains the trial court abused its discretion by admitting his statements into evidence when the officers created an environment that caused his will to be overborne. We disagree.

Here, Goodwin maintains his will was overborne by the culmination of police tactics used during his interrogation. Specifically, he cites the officers' lying about evidence, threatening inappropriate and unjustifiable police action against his family members, strongly suggesting they could influence the State's decision to seek the death penalty, and numerous emotional appeals relating to his family.

When considering the Withrow factors to determine the voluntariness of Goodwin's statement, we find the trial court properly admitted Goodwin's statements. Goodwin evidenced his knowledge of the judicial system in the audio taped interview when he initiated a conversation about his probable sentence. The initial interrogation lasted seventy minutes, and Goodwin was offered food, drink, and the opportunity to use the facilities. Moreover, the first four statements were at the police station, in an interview room and in the officers' offices. The fifth interview was at the jail, and the sixth was during an excursion from jail. Furthermore, the questioning was at the most a continuous seventy minutes, and while there were six individual statements, all occurred within a three-day period. At no time during the three days did Goodwin state he wished to stop the questioning, and he never requested an attorney. Finally, no evidence exists to suggest Goodwin was suffering from a mental or physical condition.

While we do not condone the officers' statements regarding their evidence and Goodwin's family, we do not find they overbore Goodwin's will. The argument that the officers' had influence over the State's decision to seek the death penalty is factually without merit for two reasons: Goodwin initiated the discussion about sentencing and the death penalty, and the officers repeatedly stated that they had no influence over plea negotiations. Accordingly, we find the officers did not create an environment that caused Goodwin's will be to overborne, and when viewing the totality of the circumstances surrounding Goodwin's statements, evidence exists to support the trial court's determination that the statements were voluntary.

b. Right to Remain Silent

Goodwin argues the trial court abused its discretion by admitting his statements into evidence because the State failed to: (i) show by a preponderance of the evidence that he voluntarily waived his right to remain silent; and (ii) scrupulously honor his invocation of his right to remain silent. We disagree.

i. Preponderance of the Evidence

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. State v. Turner, 373 S.C. 121, 126 n.1, 644 S.E.2d 693, 696 n.1 (2007). Because this issue was never raised to the trial court, it is unpreserved for our review.

ii. Failure to Honor Goodwin's Invocation of his Right to Remain Silent

In examining the record, we do not find an instance where Goodwin invoked his right to remain silent. Goodwin argues his statements during the audio-taped interrogation that he would listen and he wanted some time to think about a question, invoked his right to remain silent. We find when the statements are viewed in context, and with their surrounding dialogue, they do not indicate he invoked his right to remain silent. Accordingly, evidence supports the trial court's admission of the statements.

c. Fruit of an Arrest without Probable Cause

Goodwin contends the trial court erred in admitting his statement into evidence because the statement was the fruit of an arrest unsupported by probable cause. We disagree.

Generally, an arrest must be supported by probable cause to believe that a crime has been committed and that the person to be arrested committed the crime. Tennessee v. Garner, 471 U.S. 1, 7 (1985). The standard for an arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. Gerstein v. Pugh, 420 U.S. 103, 111 (1975).

Here, a cigar butt with Goodwin's DNA was discovered within inches of the point of entry to a house that had been burglarized. These facts and circumstances are sufficient to warrant a prudent person in believing

Goodwin committed the burglary. Accordingly, evidence supports the trial court's findings and we find the trial court properly determined there was probable cause for Goodwin's arrest, and properly admitted his statements which arose therefrom.

II. Mistrial

Goodwin asserts the trial court erred in denying his motion for mistrial because the State's closing argument impermissibly shifted the burden of proof regarding his statement. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). "The court's discretion will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes stated into the record by the trial court. Id. at 34, 615 S.E.2d at 460. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." Id. "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." Id. "'The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.'" Id. (quoting State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983)). "'Whether a mistrial is manifestly necessary is a fact specific inquiry.'" Id. (quoting State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000)).

A trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury. State v. Condrey, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325 (Ct. App. 2002). Ordinarily, the court's rulings on such matters will not be disturbed. Id. at 196, 562 S.E.2d at 325-26. An appellate court must review the argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). "The relevant

question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Here, the State's closing argument did not present the requisite urgent circumstances for a mistrial. The comment was not so grievous that its alleged prejudicial effect could not be removed in any other way. After reviewing the record in its entirety, we do not believe the solicitor's comments so infected the trial with unfairness as to make Goodwin's conviction a denial of due process. Moreover, any alleged error was cured by the trial court's extensive jury charge on voluntariness of statements, and the State's burden to prove voluntariness of a statement beyond a reasonable doubt.[3] Accordingly, we find the trial court properly denied Goodwin's mistrial motion.

CONCLUSION

For the foregoing reasons, we find the trial court did not err in admitting Goodwin's statements and properly denied Goodwin's mistrial motion. Accordingly, the trial court is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

[3] The trial court charged: "The State must prove the voluntariness of a statement beyond a reasonable doubt. If you determine beyond a reasonable doubt that a statement was given freely and voluntarily, then you may give the statement such further consideration as you deem proper."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger Dale Watt, Respondent,

v.

Piedmont Automotive and Piedmont Chrysler Plymouth, Employers, and AmComp and S.C. Automobile Dealers Association, Carrier, Appellants.

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4572
Heard March 17, 2009 – Filed June 25, 2009

REVERSED

Weston Adams, III, Jillian M. Benson, Ashley B. Stratton, and Helen Hiser of Columbia, for Appellants.

Louise E. Mozingo, of Camden, for Secondary Appellants.

William N. Epps, Jr., Samantha P. Nelson, of Anderson, for Respondent.

HUFF, J.: Piedmont Automotive and Piedmont Chrysler Plymouth, Employers, and AmComp and South Carolina Automobile Dealers Association, Carriers, (collectively Employers) appeal the order to the circuit court reversing the Appellate Panel of the Workers' Compensation Commission's decision denying Roger Dale Watt's claim for benefits. We reverse.

FACTS/PROCEDURAL HISTORY

Watt began working with Piedmont Honda as a technician and team leader in 1991. He was quickly promoted to service manager. In 1993 he became the parts and service director and served in that position for a year until another parts manager was hired. He was promoted to service director of both the Honda dealership and Piedmont Chrysler Plymouth in 1995. He was removed as service director of the Chrysler dealership in January of 2000, but retained his position as service manager of the Honda dealership. On January 30, 2001, he was terminated from this position.

The next day Watt saw his cardiologist, Dr. Ware, who diagnosed him as experiencing the signs and symptoms of congestive heart failure and unstable angina pectoris. Dr. Ware had Watt admitted to Anderson Memorial Hospital for a heart catherization, which showed three blockages. Watt was transferred to Greenville Hospital, where he had triple by-pass surgery. Since that time, Watt has been unable to work by doctor's orders.

Watt has had heart problems and has been under the care of a cardiologist since 1991. He has been diagnosed with coronary atherosclerotic disease and congestive cardiomyopathy. In addition, he has chronic hypertension and hyperlipidemia.

Watt filed this workers' compensation action claiming he suffered an accidental injury to his heart and cardiovascular system, which culminated in total disability on or about January 30, 2001. He asserted Piedmont Honda's implementation of a "Net Profit" program in January of 2000 produced an extraordinary working condition causing him stress that aggravated his cardiovascular disease and caused the blockage of his coronary arteries. Employers denied the claim. The single commissioner held that pursuant to section 42-1-160 of the South Carolina Code, Watt did not sustain a personal injury because he failed to establish the stressful employment conditions causing the injury were extraordinary and unusual in comparison to the normal conditions of employment. The commissioner held that Watt suffered from angina on the date of his alleged injury and angina is not compensable because it did not cause any disability. The commissioner found Watt's claim was barred by the notice provision of section 42-15-20 of the South Carolina Code because he failed to notify Employers of a work-related accident within ninety days from the date of the alleged accident. Finally, the commissioner ruled an employer/employee relationship did not exist on the date of the alleged accident, January 31, 2001. The Appellate Panel of the Workers' Compensation Commission affirmed. The circuit court, however, reversed on all grounds. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act establishes our standard of review of decisions by the South Carolina Workers' Compensation Commission. Accordingly, this court can reverse or modify the Appellate Panel's decision only if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5) (Supp. 2008); Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. The possibility of drawing two inconsistent conclusions

does not prevent the Appellate Panel's conclusions from being supported by substantial evidence. Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

1. Injury by accident arising out of and in the course of employment

Employers argue the circuit court erred in determining Watt suffered an injury by accident arising out of and in the course of employment when Watt was not subjected to unusual and extraordinary conditions of employment. We agree.

An employee may recover workers' compensation benefits if he sustains an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2008); Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009); Section 42-1-160(C) of the South Carolina Code (Supp. 2008) provides:

> Stress, mental injuries, heart attacks, strokes, embolisms, or aneurisms arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner.

"The general rule is that a heart attack is compensable as a worker's compensation accident if it is induced by unexpected strain or overexertion in the performance of the duties of a claimant's employment or by unusual and

extraordinary conditions of employment." Jordan, 381 S.C. at 486, 674 S.E.2d at 168.

In Jordan, the employee, a truck driver, suffered a heart attack following a long haul route from Virginia to Texas. 381 S.C. at 484, 674 S.E.2d at 167. The employee contended he was entitled to workers' compensation benefits because his heart attack was proximately caused by unusual and extraordinary duties of the long haul, which included a seven hour departure delay, having to leave without the necessary permits until he could pick up faxed copies at a truck stop, and not being able to take the exit his permit required him to take and therefore having to drive through downtown Houston, barely making the extended deadline. Id. at 485, 674 S.E.2d at 167-68. Although the Appellate Panel denied the employee compensation, the circuit court reversed. The supreme court found the circuit court's decision was in error. The court noted that while the employee testified the haul was very stressful, his boss and co-worker testified that the employer did not impose deadlines and it was not unusual for employees to deviate from their routes due to construction. The employee admitted that he had left without permits on prior deliveries and then picked up faxed copies at the nearest truck stop. In addition, the employee had several risk factors for heart attacks: he smoked cigarettes, abused alcohol, suffered from high blood pressure, and had a family history of heart disease. Id. at 486-87, 674 S.E.2d at 168-69.

The supreme court held that while the record contained conflicting evidence, it was not in a position to weigh the evidence presented in a workers' compensation hearing. Id. at 487, 674 S.E.2d at 169. Thus, the supreme court ruled substantial evidence supported the Appellate Panel's finding that the employee's heart attack was not induced by unexpected strain or overexertion in the performance of the duties of his employment or by unusual and extraordinary conditions of employment. Id.

In the present case, the Appellate Panel held Watt's disability was caused by his underlying coronary artery disease and his cardiomyopathy, both of which he had for several years. Dr. Ware, Watt's cardiologist, testified that angina did not damage Watt's heart, but rather was a warning

about the insufficiency of blood supply to the heart caused by the underlying heart disease. There is no question that Watt has suffered from heart conditions during the prior decade. Watt first saw Dr. Ware in June of 1991 for unstable angina pectoris. A cardiac catheterization at that time showed a high grade obstruction of his right coronary artery. He had angioplasty as a result. In the mid-1990s, he developed congestive heart failure and poor left ventricle function. Dr. Ware felt that Watt had developed a second condition, congestive cardiomyopathy. Watt was treated medically and was instructed to follow certain dietary restrictions, lose weight, exercise more, and limit his stress at work. However, as Dr. Ware noted, Watt was unable to comply with any of these instructions. In addition to the heart conditions, Watt suffered from gastroesophageal reflux, anxiety, and depression. He has numerous risk factors for coronary artery disease including obesity, hyperlipidemia, and hypertension. Dr. Ware noted these factors were difficult to control because of Watt having difficulty with compliance with medical directions. In addition, Watt has a family history of heart disease.

Watt asserts the unusual stress and strain and/or extraordinary conditions in his workplace aggravated his prior existing coronary artery disease, which resulted in total disability. Dr. Ware opined that stress contributed to a progression of Watt's coronary artery disease, along with other factors. Watt testified that Piedmont Honda's implementation of the Net Profit system in January of 2000 placed extraordinary stress on him. He claimed the system redesigned the whole service process resulting in double the paper work and much longer hours for him. He stated he went to work before daylight and would work until 8:00 or 9:00 at night. He related that the new system angered the customers and he would have to handle their complaints. He also had to call the customers at night and would sometimes take the list of customers home with him to complete his calls. During the year of Net Profit's implementation, Watt had more chest pains and felt tired. He was depressed because the new system was not working well, upsetting the technicians as well as the customers and he had to handle their complaints. Watt stated he was told he would be fired if he did not implement the new system. Sean Parkhurst, a former employee of Piedmont Honda, similarly testified that the implementation of the Net Profit system

doubled Watt's work. He stated Watt always appeared tired and worked late every night.

In contrast, Gary Billy Vinson, the shop foreman and assistant service manager at Piedmont Honda, testified the Net Profit system merely changed the way customers were greeted and the way repair orders were written. He stated it did not change the amount of work needed or cause Watt to work extra hours, other than a 45 minute meeting once a week. Vinson, who handled customer complaints when Watt was not there, testified the system did not upset the customers. He stated that while not all of the employees liked the new system, some did.

Similarly, Jeff Searcy, the general manager of Piedmont Automotive, testified the Net Profit system did not change anything other than the way customers were greeted and the way repair orders were written. He stated the implementation of Net Profit would not have necessitated Watt having to stay and work until 9:00 at night. He denied threatening to fire Watt if he did not implement the new system. William Dial, Piedmont Honda's Chief Financial Officer, testified that his office looked directly into Watt's office. He stated he usually left the office between 7:00 and 8:00 at night and rarely saw Watt still in his office when he left. He claimed the implementation of Net Profit would not have necessitated Watt's having to stay late at night. He denied that it created problems or made customers unhappy.

Although, as in Jordan, the record contains conflicting evidence, this court may not weigh the evidence. 381 S.C. at 487, 674 S.E.2d at 169 (holding "that the final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel], and it is not the task of an appellate court to weigh the evidence as found by the [Appellate Panel]"). There is substantial evidence in the record that Watt was accustomed to working 55 and 60 hour weeks in the years preceding the implementation. In addition, there is substantial evidence to support the Appellate Panel's conclusion that the implementation of Net Profit did not result in unusual or extraordinary conditions of employment for Watt or that Watt was subject to unusual or extraordinary conditions of employment in

comparison to the normal conditions of his employment. Accordingly, the circuit court erred in reversing the order of the Appellate Panel.

2. Notice

Employers assert the circuit court erred in reversing the Appellate Panel's determination that Watt failed to provide adequate and timely notice. We agree.

Section 42-15-20(A) of the South Carolina Code (Supp. 2008) requires an injured employee to immediately "on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident." Generally, the injury is not compensable unless notice is given within ninety days. S.C. Code Ann. § 42-15-20(B) (Supp. 2008).

In ruling Watt had satisfied the notice requirement, the circuit court found Piedmont Honda had been aware of Watt's heart condition during his years there. In addition, it held Piedmont Honda was provided notice in February 2001 when Watt's wife informed Dial, one of Watt's supervisors, that Watt was in the hospital and was going to have open heart surgery.

While several Piedmont employees testified that they knew of Watt's heart condition, they did not testify that they knew he believed his heart condition to be work-related. At the hearing, Watt's wife testified that before Watt was transferred to Greenville Hospital she went to Piedmont Honda and spoke with Dial. She told him that Watt was in the hospital and would have open heart surgery because of the stress he had been under. Sean Parkhurt, a former employee of Piedmont Honda testified that a few days after Watt was fired, he saw Watt's wife visit the dealership and speak to Dial. Dial, however, denied having this conversation with Mrs. Watt. He stated he did not learn that Watt was making a workers' compensation claim until December of 2001. Dial's testimony provides substantial evidence for the Appellate Panel's ruling that Watt failed to provide the required notice. It is the Appellate Panel, rather than the circuit court or this court, that determines the credibility of witnesses and resolves disputes between witnesses. See

Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) ("Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the [Appellate Panel] are conclusive."). Accordingly, the circuit court erred in reversing the Appellate Panel on this issue.

CONCLUSION

For the above stated reasons, the decision of the circuit court is

REVERSED.[1]

WILLIAMS and KONDUROS, JJ., concur.

[1] At oral argument, Employers conceded the issue regarding the employment relationship at the time of the injury.