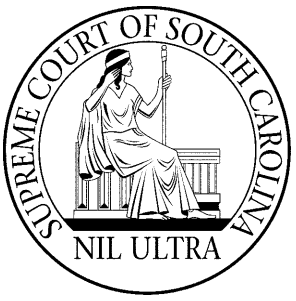

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41

December 3, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Bobby J. Long, Respondent.

ORDER

Respondent was suspended on October 22, 2007, for a period of thirty (30) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

December 3, 2007

The Supreme Court of South Carolina

In the Matter of James R. Jones, II, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension and to an attorney being appointed to protect the interests of his clients.

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

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

account(s), escrow account(s), operating account(s), and any other law office accounts 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 account(s) 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 Daniel B. Lott, Jr., 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 Daniel B. Lott, Jr., 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. Lott's office.

Mr. Lott's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Costa M. Pleicones J.

FOR THE COURT

Columbia, South Carolina

November 27, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Vernon Tumbleston, **Appellant.**

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

Opinion No. 4312
Heard November 6, 2007 – Filed November 27, 2007

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie Thames, all of Columbia; and Scarlett Anne Wilson of Charleston, for Respondent.

ANDERSON, J.: Vernon Tumbleston appeals his convictions for first-degree criminal sexual conduct with a minor and committing a lewd act on a

minor, arguing the trial court erred in denying his motion to quash the indictments. Specifically, Tumbleston maintains the indictments did not allege the specific time of each offense intended to be charged, and thus, failed to provide him with adequate notice to prepare a defense. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The present case revolves around the accusations of Tumbleston's granddaughter, B.J., who was ten years old at the time of Tumbleston's trial. In late 2004, B.J. told her mother Tumbleston had repeatedly molested her over the course of several years. The violation began when she was in kindergarten and continued throughout the second grade. B.J. alleged Tumbleston "licked [her] private," "stuck his private in [her] private," "stuck his private in [her] mouth," and "put [her] hand on his private." B.J. claimed these acts occurred more than once over the three-year period. B.J. did not tell her mother about the abuse until approximately three years after it began, when she refused to go shopping with Tumbleston. After hearing B.J.'s account of the sexual abuse, B.J.'s mother took her to a local pediatrician and the Lowcountry Children's Center for examination. Subsequently, a representative from "People Against Rape" notified the North Charleston Police Department of B.J.'s accusations. During the police investigation, Tumbleston agreed to give an oral statement regarding his alleged molestation of B.J. According to Tumbleston, "there [was] a possibility that he might have touched [B.J.] between her legs while he was asleep." Additionally, "it [was] possible [Tumbleston's] penis came out of his pants and touched [B.J.]."

Tumbleston was indicted on four counts of first-degree criminal sexual conduct with a minor and one count of committing a lewd act on a minor. The indictments alleged the charged offenses occurred between 2001 and 2004. Tumbleston moved to quash the indictments on the ground of insufficiency, asserting the indictments failed to indicate the specific time of each offense, thus depriving him of adequate notice. Despite Tumbleston's contention, the trial court found the indictments sufficient as long as the State "tie[d] in the dates of the time frame with some type of rational testimony from other people."

The jury found Tumbleston guilty on two counts of first-degree criminal sexual conduct with a minor and one count of committing a lewd act on a minor. The court directed a verdict of not guilty on one count of criminal sexual conduct, and the jury acquitted Tumbleston on another count of criminal sexual conduct. The trial court sentenced Tumbleston to concurrent terms of imprisonment totaling twenty-two years followed by five years probation.

STANDARD OF REVIEW

The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. Id.; see also State v. Douglas, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct. App. 2006) cert. granted June 7, 2007; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005). Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law. Baccus, 367 S.C. at 48, 625 S.E.2d at 220; Douglas, 367 S.C. at 506, 626 S.E.2d at 63.

LAW/ANALYSIS

I. Insufficient Indictment

Tumbleston avers the trial court erred in denying his motion to quash the indictments on the ground of insufficiency. Tumbleston contends the indictments did not allege the specific time of each offense intended to be charged, and therefore, failed to provide him with adequate notice to prepare a defense. We disagree.

A. The Indictment: A "Notice Document"

In State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 499 (2005), our supreme court "abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid [grand jury] indictment." State v. Means, 367 S.C. 374, 381, 626 S.E.2d 348, 352 (2006). Prior to Gentry, the circuit court did not have subject matter jurisdiction in a criminal case unless: (1) there was an indictment sufficiently stating an offense; (2) the defendant waived presentment of the indictment to the grand jury; or (3) the charge was a lesser-included offense of the crime charged in the indictment. Means, 367 S.C. at 381, 626 S.E.2d at 352; Evans v. State, 363 S.C. 495, 507-09, 611 S.E.2d 510, 516-18 (2005); Carter v. State, 329 S.C. 355, 362-63, 495 S.E.2d 773, 777 (1998); Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995); State v. Beachum, 288 S.C. 325, 326, 342 S.E.2d 597, 598 (1986); Summerall v. State, 278 S.C. 255, 256, 294 S.E.2d 344, 344 (1982); State v. Tabory, 262 S.C. 136, 139-40, 202 S.E.2d 852, 853 (1974). Consequently, a defective or insufficient indictment often resulted in the lack of subject matter jurisdiction, "which is a matter that may be raised at any time, including on direct appeal, in a [post-conviction relief] action or sua sponte by the trial or appellate courts." Means, 367 S.C. at 381, 626 S.E.2d at 352; see also State v. Munn, 292 S.C. 497, 499, 357 S.E.2d 461, 463 (1987) (concluding trial court lacks subject matter jurisdiction to convict defendant for an offense if there is no indictment charging him with the offense when the jury is sworn).

As our supreme court recognized in Gentry, the subject matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts. Gentry, 363 S.C. at 102 n.6, 610 S.E.2d at 499 n.6 ("[P]resentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court."). "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Gentry, 363 S.C. at 100, 610 S.E.2d at 498; Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000); Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994); see also S.C. Const. art. V, § 11 (providing circuit court "shall be a

general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law").

"However, an indictment is needed to give notice to the defendant of the charges against him." Gentry, 363 S.C. at 102 n.6, 610 S.E.2d at 499 n.6. (Emphasis added). Definitively, an indictment is a "notice document." See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed. . . ."); S.C. Code Ann. § 17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury. . . ."). Indeed,

> [t]he indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter,-when found guilty of the crime charged,-to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

Gentry, 363 S.C. at 102, 610 S.E.2d at 499-500 (quoting State v. Faile, 43 S.C. 52, 59-60, 20 S.E. 798, 801 (1895), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Pursuant to Gentry, an indictment reputed to be insufficient no longer raises a question of subject matter jurisdiction; rather, it raises a question of whether a defendant properly received notice he would be tried for a particular crime. See Evans, 363 S.C. at 507-09, 611 S.E.2d at 516-17; see

also State v. Smalls, 364 S.C. 343, 346-48, 613 S.E.2d 754, 756-57 (2005) (holding circuit court had subject matter jurisdiction to accept a guilty plea where defendant was not indicted for the charge to which he pled guilty, but signed a sentencing sheet which established defendant was notified of the charge to which he pled guilty).

B. Sufficiency of the Indictment

A challenge to the sufficiency of an indictment must be made before the jury is sworn. S.C. Code Ann. § 17-19-90 (2003). If the objection is timely made, the circuit court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003)). A ruling on a timely objection, before the jury is sworn, that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. Cutner v. State, 354 S.C. 151, 155, 580 S.E.2d 120, 122-23 (2003), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494; Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389, 390 (1994), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494.

In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. See State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006); Gentry, 363 S.C. at 103, 610 S.E.2d at 500; State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993); State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct. App. 2002) (citing State v. Adams, 277 S.C. 115, 126, 283 S.E.2d 582, 588 (1981); State v. Reddick, 348 S.C. 631, 637, 560 S.E.2d 441, 444 (Ct. App. 2002); see also Evans, 363 S.C. at 507-09, 611 S.E.2d at 516-17 (noting all the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment). Accordingly, the

sufficiency of an indictment is examined objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Means, 367 S.C. at 383, 626 S.E.2d at 353-54. Further, whether the indictment could be more definite or certain is irrelevant. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500. As repeatedly noted by our appellate courts:

> An indictment is sufficient if the offense is stated with [enough] certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

See Means, 367 S.C. at 383, 626 S.E.2d at 353-54; Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500; State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972); State v. Walker, 366 S.C. 643, 661, 623 S.E.2d 122, 131 (Ct. App. 2005); State v. Adams, 354 S.C. 361, 374, 580 S.E.2d 785, 792 (Ct. App. 2003); Guthrie, 352 S.C. at 108, 572 S.E.2d at 312.

> In South Carolina, an indictment
>
> > shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20 (2003); see also State v. Pierce, 263 S. C. 23, 27, 207 S. E. 2d 414, 416 (1974); State v. Quarles, 261 S. C. 413, 417, 200 S. E. 2d 384, 386 (1973); State v. Rutledge, 232 S.C. 223, 225, 101 S.E.2d 289, 292 (1957). Therefore, an indictment passes legal muster when it charges the

crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Reddick, 348 S.C. at 635, 560 S.E.2d at 443; State v. Ervin, 333 S.C. 351, 355, 510 S.E.2d 220, 222 (Ct. App. 1998) overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494.

1. Specific Time of Offenses Charged

While our supreme court has not created a new rule or standard for addressing this issue, this court has adopted a two-prong test for determining the sufficiency of an indictment involving a purportedly overbroad time period: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (holding an indictment alleging commission of second-degree criminal conduct during periods of June 1 through July 20, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995, was sufficient as to time); State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) (finding an indictment charging first-degree criminal sexual conduct with a minor covering a two-year period was sufficient as to time); see also State v. Thompson, 305 S.C. 496, 500-01, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first-degree criminal sexual conduct.").

Contrary to Tumbleston's contention, the indictments need not specify the precise time of each offense charged because (1) time is not a material element of each offense; and (2) the three-year time period covered by the indictments occurred prior to the return of the indictments by the grand jury. Nicholson, 366 S.C. at 574, 623 S.E.2d at 103; see also State v. Ray, 24 S.C.L. (Rice) 1, 4-5 (1838) ("If the time laid in the indictment is antecedent to the finding, in general it is not material that the [offense] should be proven to have been committed either before or after the time laid — provided it was a reasonable time before the finding of the grand jury."); 65 Am. Jur. 2d Rape § 34, at 582 (2001) ("Because time is not an essential ingredient of either forcible or statutory rape, the exact date of the commission of the offense need not be alleged unless a statute provides otherwise."); 75 C.J.S. Rape §

45, at 515-16 (1952) (stating it is proper and sufficient to prove the commission of a sexual assault on any day before the indictment and within the period of limitations and, in cases involving a victim under the age of consent, on a day when the victim was still under the statutory age).

In the case sub judice, Tumbleston was charged with four counts of first-degree criminal sexual conduct with a minor and one count of committing a lewd act on a minor. Section 16-3-655 of the South Carolina Code of Laws sets forth the statutory provision for first-degree criminal sexual conduct with a minor as follows:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
>
> (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
>
> (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

S.C. Code Ann. § 16-3-655 (Supp. 2006).

> "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

S.C. Code Ann. § 16-3-651(h) (2003).

The crime of committing or attempting to commit a lewd act on a child under sixteen is set forth in section 16-15-140 as follows:

> It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

S.C. Code Ann. § 16-15-140 (2003).

The indictments against Tumbleston claimed:

> Indictment 2005-GS-10-807: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of birth 1-23-96, to wit: fellatio. This is in violation of § 16-3-655 of the South Carolina Code of Laws (1976) as amended. [1]
>
> Indictment 2005-GS-10-808: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of birth 1-23-96, to wit: cunnilingus. This is in violation of § 16-3-655 of the South Carolina Code of Laws (1976) as amended.
>
> Indictment 2005-GS-10-809: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of birth 1-23-96, to wit: digital penetration. This is in violation of § 16-3-655 of the South Carolina Code of Laws (1976) as amended. [2]

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[1] The jury acquitted Tumbleston of Indictment 2005-GS-10-807.

[2] The court directed a verdict of not guilty on Indictment 2005-GS-10-809.

> Indictment 2005-GS-10-810: That [appellant] did in Charleston County on or between 2001 and June 2004 engage in sexual battery upon [B.J.], date of birth 1-23-96, to wit: sexual intercourse. This is in violation of § 16-3-655 of the South Carolina Code of Laws (1976) as amended.
>
> Indictment 2005-GS-10-811: That [appellant] did in Charleston County on or between 2001 and June 2004 willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body of one [B.J.], a child under the age of sixteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of himself or such child. This is in violation of § 16-15-140 of the South Carolina Code of Laws (1976) as amended.

The indictments clearly identify the elements of each offense charged, substantially tracking the statutory language so plainly that the nature of the offense charged can be easily understood. Each indictment establishes an offense of sexual battery as defined in section 16-3-651 or lewd act on a minor as defined in section 16-15-140. The victim's date of birth substantiates that she was under the age of eleven when the offenses occurred. The conduct charged occurred "on or between 2001 and June 2004." Furthermore, the indictments indicate the offenses occurred prior to the February 15, 2005 grand jury indictment.

Time is not a material element of either first-degree criminal sexual conduct with a minor or committing a lewd act on a minor. See S.C. Code Ann. §§ 16-3-655, 16-15-140 (2003 and Supp. 2006). The State is not required to denote the precise day, or even year, of the accused conduct in an indictment charging criminal sexual conduct. Thompson, 305 S.C. at 501, 409 S.E.2d at 423. Indeed, indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame. Nicholson, 366 S.C. at 574, 623 S.E.2d at 103; see also State v. Alexander, 140 S.C. 325, 138 S.E. 835, 839 (1927) (noting "surplusage will not vitiate an indictment which,

without regard to the surplusage, is sufficient to charge the offense for which the defendant is being indicted").

The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse. B.J. verified the abuse began while she was in kindergarten, and she ensured the end of the abuse when she disclosed the offenses to her mother.

We reject the notion that a specified time period prevented Tumbleston from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise Tumbleston that he must be prepared to address his conduct toward B.J. between 2001 and June 2004.

Tumbleston proceeded with the defense of denial, and the jury simply rejected this defense. His contention regarding the sufficiency of the indictments is without merit and we discern no abuse of discretion in the trial court's ruling.

II. Motion for Directed Verdict

Tumbleston maintains the trial court erred in denying his motion for a directed verdict. However, Tumbleston failed to argue or identify supporting authority on this issue in his brief on appeal. Consequently, we deem this issue abandoned. See First Sav. Bank v. McLean, 314 S.C. 361, 363 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the appellant fails to provide argument or supporting authority); see also Fassett v. Evans, 364 S.C. 42, 45, 610 S.E.2d 841, 844 (Ct. App. 2005); Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 77, 557 S.E.2d 689, 690 (Ct. App. 2001).

CONCLUSION

Based on a jurisprudential evaluation, we place our imprimatur and approbation upon the challenged indictments in regard to factual and legal

sufficiency. Because we hold that the specific date and time is not an element of the offenses of first-degree criminal sexual conduct with a minor and lewd act on a minor, the indictments in this case meet the test of "notice documents."

Accordingly, Tumbleston's convictions and sentences are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John D. Peake, **Appellant,**

v.

South Carolina Department of Motor Vehicles, **Respondent.**

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 4313
Heard November 6, 2007 – Filed November 27, 2007

REVERSED

Timothy Clay Kulp, of Charleston, for Appellant.

Frank L. Valenta, Jr., of Blythewood, and Philip S. Porter, of Columbia, for Respondent.

ANDERSON, J.: Following a single car accident, John D. Peake (Peake) was arrested at the hospital for driving under the influence. He refused to consent to a blood alcohol test and, as a result, the South Carolina Department of Motor Vehicles (the Department)

suspended his driver's license. The suspension was affirmed at an administrative hearing and on appeal to the circuit court. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

On February 5, 2005, Trooper J.T. Manley of the South Carolina Highway Patrol responded to a one car accident on I-26 in Charleston County. He found Peake, the sole occupant of the wrecked car, buckled into the driver's seat. As Trooper Manley spoke with Peake, he observed a strong smell of alcohol on Peake's breath and noted his slurred speech. EMS arrived shortly after Trooper Manley and transported Peake to Trident Regional Medical Center. At the hospital, Trooper Manley placed Peake under arrest for driving under the influence. Peake was read the Miranda rights and the Advisement of Implied Consent Rights. Trooper Manley then requested Peake provide a blood sample believing Peake's condition precluded a breath test. Peake stated he understood his implied consent rights and refused to submit a blood sample. Trooper Manley then issued Peake a Notice of Suspension which Peake refused to sign.

After receiving the Notice of Suspension, the Department suspended Peake's license for ninety days. Peake requested an administrative hearing pursuant to South Carolina Code section 56-5-2951(B)(2) (2006). At the April 26, 2005, hearing, Trooper Manley appeared and testified on behalf of the Department. He said he requested the blood sample because Peake was "not able to give a breath sample due to his condition." The record contains no explanation of Peake's condition. Peake did not appear though he was represented by counsel. Peake's counsel did not cross-examine Trooper Manley but asserted the mandatory suspension should be rescinded because the Department did not show medical personnel deemed Peake unable to give a breath sample in accordance with South Carolina Code section 56-5-2950(a). The hearing officer's order sustained the suspension reasoning "[Peake] verbally refused to give a blood or urine sample, as he was unable to give a breath sample."

Peake next appealed to the Court of Common Pleas in Charleston County where he complained Trooper Manley's testimony did not justify the request for a blood sample. Peake contended section 56-5-2950(a) requires law enforcement to seek the opinion of a medical professional that a person is incapable of providing a breath test. The Department argued Peake was improperly shifting the burden of proof, the Department's actions were presumably correct pursuant to the Administrative Procedures Act, and the record's substantial evidence supported the hearing officer's findings.

In its written order, the circuit court interpreted section 56-5-2950(a) to "require the opinion of a medical professional if the subject is unable to give a breath sample for some reason outside those enumerated by the statute (e.g. injured mouth, unconscious, dead)." However, the judge then affirmed the suspension concluding "under these facts, the officer was not required to seek the opinion of a medical professional as to Petitioner's ability to give a breath sample."

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act, S.C. Code Ann. section 1-23-310, et seq., (2005), establishes the "substantial evidence" rule as the standard for judicial review of a decision of an administrative agency. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Summersell v. South Carolina Dep't of Public Safety, 334 S.C. 357, 513 S.E.2d 619 (Ct. App. 1999), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999). Section 1-23-380(A)(5) of the South Carolina Code (Supp. 2006) provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995); South Carolina Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (Ct. App. 2005); Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). "A court cannot substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable probative and substantial evidence on the whole record." Summersell, 334 S.C. at 363, 513 S.E.2d at 622; see also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Nelson, 364 S.C. at 519, 613 S.E.2d at 547; see also Palmetto Alliance, Inc. v. South Carolina Public Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) (declaring

substantial evidence is something less than weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence). The circuit court essentially sits as an appellate court in reviewing an administrative agency's final decision for alleged errors. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995); Nelson, 364 S.C. at 519, 613 S.E.2d at 547.

LAW / ANALYSIS

The issue in this case is whether the circuit court erred in finding Trooper Manley properly requested a blood test despite the absence of any opinion by licensed medical personnel that Peake was unable to provide a breath sample as required by the implied consent statute. We find no substantial evidence establishing Trooper Manley's compliance with the procedure mandated in section 56-5-2950(a).

I. The Implied Consent Statute

Being licensed to operate a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. State v. Collins, 253 S.C. 358, 170 S.E.2d 667 (1969); Summersell v. South Carolina Dep't of Public Safety, 334 S.C. 357, 366, 513 S.E.2d 619, 624 (Ct. App. 1999), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999). The privilege may be revoked or suspended for any cause relating to public safety, but it cannot be revoked arbitrarily or capriciously. Taylor v. South Carolina Dep't of Motor, 368 S.C. 33, 36, 627 S.E.2d 751, 753 (Ct. App. 2006) cert. granted; Sponar v. South Carolina Dep't of Pub. Safety, 361 S.C. 35, 39, 603 S.E.2d 412, 415 (Ct. App. 2004). "As part of this privilege, individuals operating motor vehicles implicitly consent to chemical tests of their breath, blood, or urine to determine whether they are under the influence of drugs or alcohol." Taylor, 368 S.C. at 36-37, 627 S.E.2d at 753. S.C. Code Ann. § 56-5-2950 (2006).

Section 56-5-2950(a) states in pertinent part:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. **At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.**
>
> …
>
> No test may be administered or samples obtained unless the person has been informed in writing that:
>
> (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court;
>
> (2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;

(3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;

(4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and

(5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

(emphasis added).

Under section 56-5-2951(A), the Department of Motor Vehicles must suspend the license of anyone who drives a motor vehicle and refuses to submit to a test provided for in section 56-5-2950 or who takes the test and registers an alcohol concentration of at least fifteen percent. A person issued a notice of suspension may request an administrative hearing within thirty days. S.C. Code Ann. § 56-5-2951(B)(2) (2006).

Section 56-5-2951(F) mandates "the scope of the administrative hearing must be limited to whether the person: (1) was lawfully arrested or detained; (2) was advised in writing of the rights enumerated in Section 56-5-2950; [or] (3) refused to submit to a test pursuant to Section 56-5-2950…." "The gravamen of the administrative hearing is a determination of the efficacy and applicability of the implied consent law. The query is: did the person violate the implied consent law." South Carolina Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 525, 613 S.E.2d 544, 550 (Ct. App. 2005).

II. Rules of Statutory Construction

The primary rule of statutory construction is to ascertain and give effect to the intent of legislature. Joiner v. Rivas, 342 S.C. 102, 108,

536 S.E.2d 372, 375 (2000); Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006); City of Camden v. Brassel, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997). The first inquiry is whether the statute's meaning is clear on its face. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); Eagle Container Co., L.L.C. v. County of Newberry, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct. App. 2005). With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); State v. Frey, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, ___, 642 S.E.2d 751, 754 (2007); Vaughan v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Mun. Ass'n of South Carolina v. AT&T Commc'n of Southern States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); see also Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning.").

The legislature's intent should be derived primarily from the plain language of the statute. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005) (citing State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004)). The text of a statute is considered the best evidence of the legislative intent or will. Jones, 364 S.C. at 231, 612 S.E.2d at 724 (citing Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001)). The language must be read to harmonize with its subject matter and in accord with its general purpose. Jones, 364 S.C. at 230, 612 S.E.2d at 723 (citing Hitachi Data Sys. v. Leatherman, 309 S.C.

174, 178, 420 S.E.2d 843, 846 (1992)). The court's primary function in interpreting a statue is to determine the intent of the General Assembly. Smith v. South Carolina Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

If the language of an act creates doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. State v. Morgan, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." Collins Music Co., Inc. v. IGT, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). Courts will reject statutory interpretations that lead to results so plainly absurd they could not have been intended by the legislature or that defeat the plain legislative intention. Jones, 364 S.C. at 232, 612 S.E.2d at 724 (citing Unisun Ins. Co. v Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law. Hinton v. South Carolina Dep't of Prob., Parole, and Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004); Doe v. Roe, 353 S.C. 576, 580, 578 S.E.2d 733, 735-36 (Ct. App. 2003).

III. Compliance with Section 56-5-2950(a)

The plain language of section 56-5-2950(a) permits an arresting officer to request a blood sample but unambiguously limits this to situations where a person is physically unable to provide a breath sample due to an injured mouth, unconsciousness or death, or for any other reason considered acceptable by the licensed medical personnel. In the case at bar, the Department has not asserted Peake had an injured

mouth or was unconscious. Therefore, the Department was required under the implied consent statute to show Peake was physically unable to give an acceptable breath sample for a reason found acceptable by licensed medical personnel.

In State v. Stacy, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993) this court held the state complied with the licensed medical personnel determination requirement of section 56-5-2950(a). Stacy led police on a high speed chase that ended in a crash killing one person and injuring several others. He appealed his convictions for two felony DUI counts and failure to stop for a police vehicle arguing his blood sample should have been suppressed because the State had not complied with section 56-5-2950(a).

Reading the statute as a whole, this court held "the statute requires a licensed physician, licensed registered nurse, or other medical personnel trained to take blood samples … to determine whether an acceptable reason exists for finding that a person is unable to provide an acceptable breath sample." Id. at 107, 431 S.E.2d at 641; (citing State v. Baker, 310 S.C. 510, 427 S.E.2d 670 (1993)). The trained medical person who drew the blood testified Stacy was unable to provide a breath sample because he had not yet been treated and could not be transported to the law enforcement center. Because the evidence established the medical person considered this an acceptable reason, we found the statute permitted the taking of a blood sample without first offering a breath test. Id.

This court considered compliance with section 56-5-2950(a) and suppression of blood test results in City of Columbia v. Moore, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995). Moore was involved in a car accident, placed under arrest at the scene, and transported to the hospital in full spinal precautions. The arresting officer testified he ordered the blood sample after being informed Moore could be in the hospital all night. Finding the City failed to present any evidence of compliance with the procedure set forth in section 56-5-2950(a), this court noted "it is undisputed Moore did not have an injury to the mouth and was conscious at all times. Therefore, the City was required to

present evidence Moore was physically unable to give an acceptable breath sample for a reason found acceptable by licensed medical personnel." Id. at 295, 457 S.E.2d at 347.

The City alleged the arresting officer's belief Moore would remain at the hospital a long time, coupled with the circumstances of his transport, provided a sufficient basis to conclude Moore was physically unable to give a breath sample. This court answered "[h]owever reasonable these conclusions may be under the circumstances, they are legally insufficient." Id. We explicated:

> To allow the arresting officer to make the determination that a person is physically unable to give an acceptable breath sample, absent an injured mouth, unconsciousness, or death, is a relaxation of the plain requirement of the statute, and would allow the substitution of the officer's judgment for that of licensed medical personnel.

Id. at 295, 457 S.E.2d at 348. The City further averred Moore consented to the taking of a blood sample, but we elucidated:

> [A driver's implied] consent is only to chemical tests under the procedure plainly set forth in the statute. The penalty for refusal to submit to testing is the administrative loss of license for ninety (90) days. …. In view of this statute, it would be pure legal fiction to infer Moore's 'consent' at the hospital was a voluntary relinquishment of his right to require compliance with the statute as written.

Id.

Although this court acknowledged the inability to leave a medical facility **could** provide a legally sufficient basis to conclude a person was physically incapable of providing a breath sample, we required "the evidence **must** establish the reason a blood test was ordered in lieu

of a breath sample is for a reason found acceptable by licensed medical personnel." Id. (emphasis added).

In State v. Kimbrell, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997), this court again found noncompliance with section 56-5-2950. Kimbrell was involved in a one car accident and taken to the hospital. As she was leaving the hospital, the responding officer asked her to submit to a blood test. The defendant's husband testified she had no injury to her mouth which prevented giving a breath sample. The officer told the court she had a small amount of blood in her teeth. Kimbrell consented to the blood test. The officer did not offer or discuss a breath test with Kimbrell, ask about the condition of her mouth, or attempt to determine the extent of any injury. Accordingly, the test results were suppressed because the record lacked sufficient evidence to support the officer's decision not to offer a breath test. We inculcated:

> Unlike a breath test, the blood test is physically invasive. By enacting the implied consent statute, the legislature clearly intended to protect against this invasion where it is used simply as a convenience to the arresting officer, absent the agreement of the accused. There can be no valid agreement where the accused is not advised of his or her right to a breath test instead of a blood test.

Id., 326 S.C. at 348, 481 S.E.2d at 458-59; see also Taylor v. State, 368 S.C. 33, 627 S.E.2d 751 (Ct. App. 2006) cert. granted (explaining implied consent laws attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from arbitrary or overbearing state action). Relying heavily on the precedent of Moore, we determined "the plain meaning of the statute requires the arresting officer to offer a breath test, absent a valid determination that the defendant is physically unable to give an acceptable breath sample." Id. at 348, 481 S.E.2d at 459.

In State v. Long, 363 S.C. 360, 610 S.E.2d 809 (2005), our supreme court highlighted the requirements of section 56-5-2950 in order to distinguish section 56-5-2946. When the implied consent laws were rewritten by 1998 Act No. 434, section 7, section 56-5-2946, entitled "Submission to testing for alcohol or drugs," was created and applies only to persons believed to have committed Felony DUI. The court found section 56-5-2946 removed the general requirements that an officer must first offer a breath test or get a medical opinion a breath test is not possible before ordering a blood test. While hospitalized following a single car accident which killed a passenger, a blood sample was drawn from Long at the request of an officer. Long objected to the introduction of the test results at trial because he had not been offered a breath test and no licensed medical personnel determined he was unable to provide a breath sample. A study of the language of section 56-2-2946 led the court to conclude:

> [The first] two paragraphs essentially alter the procedural prerequisites which must be met under § 56-5-2950 before an officer may order a blood test for a Felony DUI suspect. Under § 56-5-2946, the officer need no longer offer a breath test as the first option, nor must he obtain a medical opinion that such a test is not feasible before ordering a test or sample.

Id. at 363, 610 S.E.2d at 811. See also State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005) (finding under section 56-5-2950(a), unlike section 56-5-2946, arresting officer must first offer breath test).

In the case sub judice, Peake was not suspected of felony DUI and the parties concede no breath test was first offered. Apodictically, under section 56-5-2950(a), Trooper Manley could only have requested a blood sample if Peake was physically unable to provide a breath sample due to an injured mouth, unconsciousness, death, or for any other reason considered acceptable by the licensed medical personnel. The record contains no substantial evidence supporting any of these exceptions. Indeed, the uncontested facts show the administrative

hearing officer and the circuit court relied only on an unsubstantiated reason considered acceptable by Trooper Manley.

The Department asserts "a reasonable mind could conclude…that [Peake] was 'unable to give a breath sample.'" In Moore, we established this conclusion, "however reasonable," was legally insufficient because section 56-5-2950(a) plainly establishes the determination of the licensed medical personnel is the standard.

The Department additionally contends that because a person cannot be transported from a medical facility to the locale of a DataMaster until released by licensed medical personnel, the statutory requirement of a medical opinion is necessarily satisfied "every single time a motorist is taken to a medical facility for treatment and is not soon thereafter discharged." The Department limits application of this notion to administrative hearings. We are unaware of any statutory or jurisprudential basis for this proposition. Although this court in Moore held the inability to leave a medical facility could form a legally sufficient basis for ordering a blood test, we expounded the record must show this determination is based on the opinion of licensed medical personnel.

Section 56-5-2950(a) clearly articulates the statutory structure for chemical testing to which drivers impliedly consent. The record is absolutely devoid of any evidence showing Trooper Manley met the statutory requirements before requesting a blood test, therefore we find the decisions of the administrative hearing officer and the circuit court are clearly erroneous.

CONCLUSION

Although the administrative hearing officer correctly concluded Peake was lawfully arrested, advised of his section 56-5-2950 rights, and refused to submit to a test, no substantial evidence shows the Department honored these rights in accordance with statutory provisions. Therefore, the findings of the administrative hearing officer and the circuit court judge are

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jamar William McGriff,
Employee, Respondent,

v.

Worsley Companies, Inc. d/b/a
Scotchman Stores, Employer,
and Crum & Forrester
Insurance, Inc., Carrier, Appellants.

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

Opinion No. 4314
Heard October 11, 2007 – Filed November 27, 2007

AFFIRMED

Stephen L. Brown, Wallace G. Holland, and Russell G. Hines, all of Charleston, for Appellants.

Anthony E. Forsberg and Mark A. Mason, both of Mt. Pleasant for Respondent.

STILWELL, J.: Worsley Companies, Inc. appeals the circuit court order affirming the order of the appellate panel of the Worker's

Compensation Commission finding Jamar W. McGriff's injury compensable. We affirm.

FACTS

On September 5, 2001, McGriff applied for a job with Worsley Companies, doing business as Scotchman Stores, at store #98 on the corner of Remount Road and North Rhett Avenue in Charleston. In the interim between the submission of his application and his eventual hiring at Scotchman, McGriff met David W. Chennault, a neighbor of McGriff's friend. At the time of their acquaintance, both McGriff and Chennault were seeking employment and went "job hunting" together by submitting applications to various stores located on Remount Road. On December 19, 2001, Chennault submitted an application at store #98. After submitting his application to Scotchman, Chennault was hired as a salesman for Country Fed Meats in Hanahan, South Carolina. Subsequently, Chennault assisted McGriff in securing employment with the same company. However, according to Chennault's testimony, McGriff worked at Country Fed Meats for only a short time.

I. McGriff's Employment and Related Responsibilities

In early February 2002, McGriff accepted a position at store #98 as a third-shift sales clerk. According to the Scotchman Standard Duty List, third-shift clerks are required to complete numerous duties outside the physical confines of the store. In particular, McGriff was expected to excel in his efforts to maintain the cleanliness of the outside premises as part of Scotchman's "Pride Ride" program. In addition, Scotchman's "New Beginning Training Manual" required sales clerks to "[a]lways keep applications on the [sales counter] and offer them to people you feel would be beneficial to Scotchman Stores."

II. McGriff's Accident

On February 9, 2002, at around 5:00 a.m., Chennault stopped his company truck at the intersection in front of the store, and saw McGriff

outside cleaning the parking lot.[1] Having recently worked at Country Fed Meats, McGriff apparently noticed the company truck stopped at the intersection and recognized Chennault as the driver. Given the "non-existent" traffic at the time, McGriff crossed the store's parking lot and entered the intersection to speak with Chennault. McGriff stood at Chennault's truck window approximately 12 to 15 feet from the curb of the Scotchman parking lot.

According to Chennault, McGriff entered the intersection to inform Chennault that he had been hired by Scotchman. Chennault asked McGriff whether McGriff would follow up on Chennault's application. In response, McGriff indicated he would speak with the store manager on Chennault's behalf. As he turned to go back to the store, McGriff was struck by an oncoming car.

III. The Appellate Panel and Circuit Court Findings

Before the single commissioner, the parties stipulated to a bifurcation of the claim so that compensability alone was the subject of the initial hearing. The single commissioner found McGriff had sustained a compensable injury as his actions were not a substantial deviation from his employment and because he was acting in the interest of his employer when he left the store's premises.

The appellate panel affirmed the decision, stating:

> Claimant had not abandoned his job. He was not violating any company policy . . . . There was no written prohibition against the Claimant leaving the store to clean the parking lot. Further, there was the affirmative written expectation that the Claimant would assist his employer in finding applicants he felt would be beneficial to the company.

[1] According to the testimony of Leslie Flowers, McGriff was not scheduled to work that shift but was called in due to the store being understaffed.

The circuit court affirmed the appellate panel's order that found "both the reason the claimant was outside and the reason he stepped into the intersection were specifically authorized and expected by his employer; even if the location was not."

STANDARD OF REVIEW

Generally, a reviewing court will not overturn a decision by the appellate panel unless the determination is unsupported by substantial evidence or is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 365 S.C. 612, 619, 611 S.E.2d 297, 299 (Ct. App. 2005). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact. Gibson v. Spartanburg County Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000). Where facts are disputed, the findings of the appellate panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 454-55, 562 S.E.2d 679, 681 (Ct. App. 2002). However, where the facts are undisputed, the question of whether an accident is compensable under workers' compensation law is a question of law. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). While the appellate courts are required to be deferential to the appellate panel regarding questions of fact, such deference does not prevent the courts from overturning the Panel's decision when it is legally incorrect. Id. at 202, 641 S.E.2d at 872.

LAW/ANALYSIS

I. Injury Arising out of Employment

Scotchman argues the appellate panel and circuit court erred in finding McGriff's injury compensable, because McGriff's injury did not arise out of

his employment or occur during the course and scope of his employment. We disagree.

In order to be entitled to compensation for an injury under the South Carolina Workers' Compensation Act, a claimant must show he suffered an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 2006). However, "[t]he two parts of the phrase 'arising out of and in the course of employment' are not synonymous." Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). Rather, "[b]oth parts must exist simultaneously before any court will allow recovery." Id. According to this court in Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 161, 584 S.E.2d 390, 394 (Ct. App. 2003) (internal citations omitted):

> The term "arising out of" refers to the origin of the cause of the accident. An accidental injury is considered to arise out of one's employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury occurs within the course of employment when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while fulfilling those duties or engaged in something incidental thereto.

While an injury must both "arise out of" and occur "in the course of" employment to recover for the injury, "[t]here are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable. These circumstances have been applied to: (1) acts benefiting co-employees; (2) acts benefiting customers or strangers; (3) acts benefiting the claimant; and (4) acts benefiting the employer privately." Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007). Furthermore, an act outside an employee's regular duties that is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment. Id. at 202, 641 S.E.2d at 872.

Thus, in determining whether an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances. Lanford v. Clinton Cotton Mills, 204 S.C. 423, 425, 30 S.E.2d 36, 38 (1944). Moreover, the general policy in South Carolina "is to construe the Workers' Compensation Act in favor of coverage rather than exclusion." Baggot v. So. Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998).

In Grant v. Grant Textiles, 372 S.C. 196, 198-99, 641 S.E.2d 869, 870 (2007), the claimant, vice-president of sales for a family-owned textile company, was traveling to a meeting with clients when he stopped to remove debris from along the highway near the entrance to the site of the meeting. Claimant was struck by a passing vehicle, and the court found his injury compensable. Id., 372 S.C. at 198-200, 641 S.E.2d at 870-72. According to the court, "the full commission [of the Worker's Compensation Commission] erred by finding that the accident did not have a causal connection with [Grant's] employment. The accident would not have happened but for [his] business trip . . . to meet his employer's customers." Id. at 201-202, 641 S.E.2d at 872.

In the present case, the record contains ample evidence substantiating the causal connection between the conditions under which McGriff's work was required to be performed and his resulting injury. As evidenced by the record: (1) at the time McGriff entered the road to engage in conversation with Chennault, McGriff was allowed and expected to be outside; (2) McGriff was allowed and expected to solicit new employees; (3) McGriff was allowed and expected to communicate inquiries to the store manager regarding employee prospects; and (4) McGriff was acting in good faith in the interest of his employer when he entered the road to discuss employment with Chennault. There is substantial evidence in the record to support the determination that but for his employment with Scotchman, McGriff would not have entered the highway. McGriff knew the store was understaffed and knew Chennault was desirous of employment there. According to Chennault's testimony, the only thing the two discussed during their brief conversation was employment at Scotchman store #98. Because there is substantial evidence in the record to support the findings, we cannot conclude

that the appellate panel or circuit court erred in finding McGriff's injury arose out of his employment.

II. Injury Occurring in the Course of Employment

Scotchman also contends the appellate panel and circuit court erred in finding McGriff's injury compensable because McGriff's departure from the store's premises constitutes a substantial deviation outside the course of his employment. We disagree.

Generally, an employee need not be in the actual performance of the duties for which he was expressly employed in order for his injury to be in the course of employment. See Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (noting "[i]t is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment."). As our supreme court noted in Gray v. Club Group, Ltd., 339 S.C. 173, 190, 528 S.E.2d 435, 444 (2000), "[s]ince South Carolina does not look to fault, [the employee's violation of a rule of conduct] must be a substantial deviation to remove his actions from the course of his employment, and disallow recovery of benefits." Accordingly,

> [W]hen an employee is in the performance of the duties of the employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instruction or rules of the employer does not make the injury one incurred outside the scope of employment.

Id. at 190-191, 528 S.E.2d at 444 (citing Arthur Larson & Lex K. Larson, Workers' Compensation Law § 37.02 (1999)).

The record does not support Scotchman's contention that McGriff abandoned his employment. Although he technically left the boundaries of Scotchman's premises, the fact that McGriff was outside of the store does not in and of itself violate any company rule. Furthermore, according to Chennault's testimony, McGriff was constantly glancing back toward the

store during their conversation. The situs of the conversation was approximately 12-15 feet from the Scotchman parking lot, and the conversation was as brief as the time of one cycle of the traffic signal at the intersection. Thus, while McGriff may have deviated slightly from the general location of his job responsibilities, the record supports that such deviation was not so substantial as to remove him from the course and scope of his employment. Accordingly, we hold neither the appellate panel nor the circuit court erred in finding McGriff's injury compensable.

III. Chennault's Testimony

Additionally, Scotchman argues the appellate panel erred in relying on a hand-written affidavit from Chennault that was previously excluded by the single commissioner as inadmissible hearsay. We disagree.

The record shows Chennault gave a statement to investigating officers the day of McGriff's accident generally indicating that he and McGriff were talking about their new jobs at the time of the accident. He apparently provided a hand-written affidavit approximately four days later. However, as the circuit court noted, "there is no mention in the [Appellate Panel's] Decision and Order of reliance upon the excluded statement, only an acknowledgment that it existed." Rather, the appellate panel only details the single commissioner's findings as to the first statement Chennault gave to police. Because the record reflects no reference to the appellate panel's reliance upon Chennault's second hand-written statement in making any determination of fact or conclusion of law, we hold the appellate panel did not err in relying on Chennault's testimony.[2]

[2] Sligh v. Newberry Elec. Coop., Inc., 216 S.C. 401, 411, 58 S.E.2d 675, 684 (1950), suggests that if an erroneously admitted document does not constitute the basis for an award, then it is harmless error. If the appellate panel's mere acknowledgment of Chennault's second statement was indeed erroneous, we find it was harmless error.

IV. Witness Credibility

Finally, Scotchman maintains the appellate panel erred in finding Chennault was a credible witness while two of their witnesses were not. We disagree.

As noted by our supreme court in Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000), the final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. Accordingly, the findings of the appellate panel are presumed correct and will be set aside only if unsupported by substantial evidence. Frame v. Resort Serv., Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (2004). Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the appellate panel's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

Cross-examination of Chennault revealed he had exaggerated positive information on his employment application as well as lied about being fired from his previous job. In addition, Chennault did not reveal any prior arrests on his application although he had bee previously arrested. Nevertheless, the record shows Chennault and McGriff had a history of trying to assist one another with employment opportunities, and Chennault's initial statement to police following the accident is consistent with his more detailed deposition testimony.

Scotchman's witness, Joseph Turner, observed the accident from a nearby Food Lion parking lot. Turner indicated multiple times during his testimony that he was not "pay[ing] attention" to the specifics of the incident. Leslie Flowers, the Scotchman store manager, gave testimony regarding the company's policies and her own instructions to her employees about leaving the store that was arguably inconsistent. Based on the record, we cannot conclude the appellate panel erred in making its findings on the credibility of these witnesses.

CONCLUSION

Based on the foregoing, we hold neither the appellate panel nor the circuit court erred in finding McGriff's injury compensable under South Carolina's Workers' Compensation Act. The decision of the appellate panel and the circuit court is accordingly

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Irene Todd, Appellant,

v.

Barbara C. Joyner, Respondent.

Appeal From Georgetown County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4315
Submitted October 1, 2007 – Filed November 27, 2007

AFFIRMED

Gene M. Connell, Jr., of Surfside Beach, for Appellant.

Linda Weeks Gangi, of Conway, for Respondent.

STILWELL, J.: Frances Irene Todd appeals several evidentiary rulings of the trial court as well as the trial court's denial of her motion for a new trial nisi additur. We affirm.[1]

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

FACTS

On September 4, 2002, Todd and Barbara C. Joyner were involved in an automobile accident in Georgetown, South Carolina. As a result of injuries sustained in the accident, Todd brought this action. Joyner stipulated to her negligence in the case.[2]

On February 27, 2006, Joyner made Dr. Richard J. Friedman available for deposition as an expert in the field of orthopedic surgery. Friedman was not available to testify live at the trial, and a redacted version of his deposition was read into evidence. During the deposition, Todd questioned Friedman extensively about his private practice, the amount of his practice Friedman devoted to testifying as an expert witness, and the percentage of his income that came from testifying as an expert in an average year.

Friedman could not recall specifics in his responses at the time of the deposition, and Todd subsequently subpoenaed records from State Farm Insurance Company regarding payments made to Friedman. The records showed payments of between $50,000 and $60,000 to Friedman for the calendar years 2003 through 2005. The trial court denied their admission into evidence because of the prejudicial impact of injecting insurance into the proceeding.

Additionally, Todd objected to Friedman's use of Todd's medical records as the foundation of his testimony as well as Friedman's occasional reference to those records in his deposition. The trial court overruled this objection. Finally, Todd attempted to introduce, through cross-examination, a covenant not to execute entered into by Todd and State Farm. The trial court denied the covenant's introduction. The jury awarded Todd $37,191.11, the exact amount of her medical bills. Todd made a timely motion for a new trial nisi additur. The trial court denied the motion, and this appeal followed.

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[2] Although the terms liability and negligence appear to have been used somewhat interchangeably during the trial, it is clear that Joyner only stipulated to negligence as opposed to liability.

LAW/ANALYSIS

I. Admission of Evidence of Expert's Connection to State Farm

Todd maintains the court improperly excluded evidence of the prior payments State Farm made to Friedman, which would be evidence of bias in favor of the defendant.[3] We disagree.

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id.

Historically, South Carolina restricted the admission into evidence of defendants' insurance against potential liability in an action for damages before a jury. Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 45, 426 S.E.2d 756, 757 (1993). The reasoning behind this rule was to avoid prejudice in the verdict, which might result from the jury's knowledge that insurance, and not the defendant, would be responsible for paying any resulting award of damages. Id. at 45, 426 S.E.2d at 757-58. However, "Rule 411 modified this rule by providing that the admissibility of evidence of insurance depends upon the purpose for which such evidence is introduced." Yoho v. Thompson, 345 S.C. 361, 365, 548 S.E.2d 584, 585 (2001). Rule 411 of the South Carolina Rules of Evidence provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

[3] This section addresses the arguments in Todd's brief labeled Arguments I and III.

Because Joyner stipulated to negligence, the records were not being offered to show that she was at fault. Rather Todd sought to use them to discredit the defense expert's testimony.

In Yoho v. Thompson, 345 S.C. 361, 365-66, 548 S.E.2d 584, 586 (2001) the court explained if Rule 411 does not require the exclusion of the insurance evidence, and we find in this case it does not, the court must then consider whether the probative value of the evidence substantially outweighs its prejudicial effect and any potential confusion for the jury under Rule 403. In order to accomplish this analysis, South Carolina has adopted the "substantial connection" test to determine whether an expert's connection to a defendant's insurer is sufficiently probative to outweigh the prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance. Id. at 366, 548 S.E.2d at 586 (citing Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000); Mills v. Grotheer, 957 P.2d 540 (Okla. 1998)). The substantial connection test has been adopted by a majority of the jurisdictions that have addressed this issue and is based upon the degree of connection between the expert and the insurance company. Id.

The court in Yoho did not articulate a defined test, but instead described the characteristics present in the case that led it to the conclusion a substantial connection existed, and ultimately that the evidence of bias should come in. These characteristics included: (1) the expert maintained an employment relationship with insurance companies; (2) the expert consulted for the insurance company in question in other cases and gave lectures to its agents and adjusters; (3) ten to twenty percent of the expert's practice consisted of reviewing records for insurance companies; and (4) the expert's yearly salary was based in part on his insurance consulting work. Id. Further, the Yoho court specifically found the expert "was not merely being paid an expert's fee in this matter." Id.

The trial court distinguished Yoho from this case in several important aspects. First, the court found it significant the expert in Yoho was present for live testimony during the trial. This allowed the expert to be confronted about his connection to the insurance industry, instead of merely submitting an itemized list of payments into evidence. As described above, Friedman was not available for cross-examination at trial. Friedman could have been cross-examined with the records at his deposition, but Todd had not acquired

the records at that point in time. We also note Friedman's relationship with State Farm was presented for the jury's consideration since his deposition testimony was read into the record. This recitation included the extensive cross-examination by Todd bringing out the issue of potential bias. As a result, the actual record of payments became less probative.

Next, the circuit court did not feel Friedman's relationship with State Farm rose to the level described in Yoho because the only available evidence of his connection to State Farm was an itemized list of payments totaling between fifty and sixty thousand dollars over the course of three years. The court found significant that no witnesses, including the two State Farm employees Todd called, could explain why these payments to Friedman were made. The combination of these factors led the circuit court to conclude "the prejudicial effect of injecting this insurance information into this case greatly outweighs the probative value because . . . there's no opportunity to really do anything probative with this information; and it's really open to great latitude for abuse." We find the circuit court did not abuse its discretion in so holding.

II. Covenant Not to Execute

Todd next contends the circuit court erred in refusing to admit into evidence the covenant between Todd and State Farm. We disagree.

Todd relies upon the lone South Carolina decision addressing the admissibility of a covenant not to execute, Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987). In Poston, the plaintiff was injured when another driver struck a school van in which the plaintiff was a passenger. The plaintiff, driver defendant, and the defendant's insurance company entered into a covenant not to execute. Id. at 263, 363 S.E.2d at 889. This covenant limited the defendant driver's liability for damages, while requiring her to remain a co-defendant, along with the school district, outwardly still subject to joint and several liability. Id. at 265, 363 S.E.2d at 890. The court found the covenant was a facade, and the failure to disclose it to the jury tainted the judicial process. Id.

> [T]he jury was denied information to which it was entitled as to the sources of remuneration available to

> the plaintiff and by whom such remuneration would be paid. The fact that the agreement was not disclosed to the jury in this instance facilitates inequity and injustice in the judicial process. . . . Under the circumstances of this case, the agreement should have been allowed into evidence to insure that an equitable verdict was reached. Id.

We find this case readily distinguishable from Poston. Todd and Joyner were both insured by State Farm. Todd entered into a covenant not to execute whereby she agreed not to execute against Joyner's personal assets and to take her recovery from Joyner's $25,000 liability policy, which was tendered, and Todd's own underinsured coverage. So, at trial, Todd was essentially proceeding against her own insurance company. Since naming the insurer is impermissible in this type of action, Joyner was the sole remaining party who could serve as the named defendant. The primary circumstance that compelled the admission of the covenant into evidence in Poston, i.e., the possibility of jury confusion due to multiple parties defendant, is simply not present here.

Todd's position is based in part upon her contention that during the opening statement, Joyner's counsel alluded to Joyner's responsibility to pay the entire amount of the damages award. We find this contention is misplaced and taken out of context, as the crux of Joyner's opening statement did not focus on Joyner's personal responsibility for the damages. Rather, Joyner questioned the reasonableness of the medical costs Todd claimed were necessitated by the automobile accident. Because we find no evidence of an abuse of discretion amounting to an error in law in the record, we affirm the circuit court's decision to exclude the covenant.

III. New Trial Nisi Additur

Todd next asserts the circuit court erred in not granting additur to the jury's damages award, which only reimbursed Todd for her medical expenses. We disagree.

A trial court may grant a new trial nisi additur whenever it finds the amount of the verdict to be merely inadequate. Green v. Fritz, 356 S.C. 566,

570, 590 S.E.2d 39, 41 (Ct. App. 2003). "While the granting of such a motion rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages." Id. To this end, the trial court must offer compelling reasons for invading the jury's province by granting a motion for additur. Id. An appellate court will only reverse if the trial court abused its discretion in deciding a motion for new trial nisi additur to the extent that an error of law results. Id. The denial of a motion for a new trial nisi additur is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). "The consideration of a motion for a new trial nisi additur requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). A trial court does not abuse its discretion in denying a motion for new trial nisi additur where evidence in the record supports the jury's verdict. See Steele v. Dillard, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict).

The jury awarded Todd $37,191.11, her exact medical costs. In the jury instructions, the circuit court provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed Todd was entitled. This included a full explanation of actual damages, including: "past and future medical charges related to the injury, pharmacy charges, related expenses, pain and suffering, loss of enjoyment of life, as well as mental anguish and impairment of health or physical condition." We find evidence in the record to support the jury's verdict. Joyner argued that all of Todd's claimed damages were not proximately caused by the accident and that all of the medical treatment was not reasonably necessary. Joyner cited the relatively low impact of the collision along with Todd's apparently limited injury immediately following the accident in support of her position. Because there was evidence in the record to support the jury's verdict, we find no error in the circuit court's denial of Todd's motion for new trial nisi additur.

IV. Expert's Reliance on Medical Records During Deposition

Finally, Todd contends the circuit court erred in allowing an expert to read medical records to the jury during his testimony. We disagree.

The admission or rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

Experts may testify regarding facts or data, not as substantive proof of the facts so stated, but rather as information upon which they have relied in reaching their professional opinions. Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 324, 154 S.E.2d 112, 117 (1967). Rule 703, of the South Carolina Rules of Evidence provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Even if an expert's testimony is admissible under Rule 703, the determination of whether an expert may testify to the facts underlying an opinion must be analyzed under Rule 403. State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (Ct. App. 1999). Because any evidence of Todd's medical history would have a minuscule prejudicial effect, if any, as opposed to the high probative value it lends as the basis of Friedman's opinion, we agree with the circuit court's determination.

Finding no error of law, we conclude the circuit court did not abuse its discretion in allowing Friedman to opine as to the evidence contained within Todd's medical records.

CONCLUSION

Based on the foregoing, we hold the circuit court did not err in failing to: (1) allow evidence to prove the bias of Joyner's expert; (2) admit the covenant not to execute between Todd and State Farm; and (3) grant Todd's new trial nisi additur motion. Further, the circuit court did not err in allowing Joyner's expert to testify as to the contents of Todd's medical records. The decision of the circuit court is accordingly

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Luba Lynch, Respondent/Appellant,

v.

Toys "R" Us-Delaware, Inc., Appellant/Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4316
Heard March 7, 2007 – Filed November 27, 2007

AFFIRMED IN PART and REVERSED IN PART

Joel Collins, Jr. and Christian Stegmaier, both of Columbia, for Appellant/Respondent.

Brooks Roberts Fudenberg, of Charleston and Geoffrey H. Waggoner, of Mt. Pleasant, for Respondent/Appellant.

HEARN, C.J.: In this cross appeal, Toys "R" Us and Luba Lynch appeal various issues arising from a jury verdict in favor of Lynch. Toys "R" Us argues the circuit court erred by: (1) granting a directed verdict to Lynch rather than to Toys "R" Us on the false imprisonment cause of action; (2) denying its directed verdict/judgment notwithstanding the verdict (JNOV) motion on the causes of action for malicious prosecution, slander, and outrage; (3) denying its motion for a new trial absolute based on juror misconduct and the thirteenth juror doctrine; and (4) denying its motion for a new trial nisi remittitur. Lynch argues the circuit court erred in requiring her to elect a remedy. We affirm in part and reverse in part.

FACTS

On February 1, 2003, Lynch brought her mother, Tatiana Kotova, to a Babies "R" Us store in North Charleston. Kotova, a Russian National, was vacationing in the United States and this was her first visit to the baby superstore. While shopping, Lynch decided to go to the restroom and handed some baby cookies she had selected to Kotova, who put them in a black canvas tote bag.

A customer witnessed Kotova placing the items in the bag and reported the incident to a store employee. The employee went to the aisle and saw Kotova position a box into her bag, move around some other items, pull out what appeared to be a child's coat from the bag, and then push the coat down on top of the items. The employee called the store manager, Nrurka Galarraga, to inform her that a customer saw "an older lady" putting merchandise inside a bag.[1]

The manager contacted the North Charleston Police Department and then approached Kotova. Noticing a piece of black garment covering some of the merchandise in the tote bag, the manager asked Kotova if she could search it. Although Kotova did not speak English and could not understand

[1] The manager testified that the customer described the suspect as "an older lady;" however, the employee testified the customer reported that "some ladies" were putting merchandise in a bag.

the manager's request, she permitted a search of the bag, wherein the manager discovered the boxes of cookies.

Lynch returned from the ladies' restroom to find Kotova in this encounter with the manager. The manager asked Lynch about the cookies in the tote bag, and Lynch responded that she and Kotova were "going to buy [them]." The manager then provided Lynch and Kotova a shopping basket, in which Lynch placed the cookies, and gave them permission to continue shopping. Lynch and Kotova later arrived at the checkout counter and purchased the cookies plus three additional items, for a total of $10.10.

Meanwhile, officers from the North Charleston Police Department had entered the store and were talking to the manager. The officers approached Lynch and Kotova as they were leaving the store, requested that they open their bag, and asked the manager, "where can we talk?" The manager then escorted Lynch, Kotova, and the officers into a nearby office for investigation. In the office, the manager told the officers that Lynch and Kotova had persisted in their efforts to conceal merchandise, even after being provided with a shopping basket. At trial, however, the manager testified that after giving the women a shopping basket they merely continued shopping and did nothing illegal or suspicious. The manager also told the officers that she had confronted Lynch and Kotova twice for concealing items. At trial, however, she recounted only one confrontation.

After the officers spoke with the parties, they gave the manager three options: (1) to put Lynch and Kotova on trespass notice; (2) to sign an affidavit and pursue a warrant for shoplifting; or (3) to press charges and effectuate an immediate arrest. The manager elected the third option. The officers handcuffed Lynch and Kotova, escorted them through the busy store to the police car parked in front of the store, and transported them to jail.

When the women arrived at the jail, they were patted down, stripped of their belongings, and escorted to their cells. Lynch and Kotova spent ten hours in jail before being transported in handcuffs and shackles to a bond hearing. Two hours after the bond hearing, they were released. Lynch claimed she and Kotova could not sleep that night, and the next morning,

Lynch went to church to seek comfort from her priest. Lynch also testified to experiencing nightmares since the arrest.

Lynch brought four causes of action against Toys "R" Us, alleging false imprisonment, malicious prosecution, slander, and outrage.[2] The case was tried before a jury, and at the close of the evidence, both Lynch and Toys "R" Us moved for directed verdicts. The circuit court denied all of Toys "R" Us's motions, but granted Lynch's motion for a directed verdict on false imprisonment. The circuit court submitted the remaining causes of action to the jury. The jury returned verdicts in favor of Lynch on all causes of action, and awarded $50,000 in actual damages and $250,000 in punitive damages on each.

Toys "R" Us filed post-trial motions for JNOV, new trial pursuant to the thirteenth juror doctrine, new trial absolute, new trial nisi remittitur, and new trial based on juror misconduct. The circuit court denied these motions. However, the circuit court required Lynch to elect one of the four awards as the basis for her recovery. Lynch elected to recover based on her malicious prosecution cause of action, and thus received $50,000 in actual damages and $250,000 in punitive damages for a combined total of $300,000. These cross-appeals followed.

LAW/ANALYSIS

I. Toys "R" Us's Appeal

A. Directed Verdict on False Imprisonment

Toys "R" Us contends the circuit court erred by granting a directed verdict to Lynch on her false imprisonment cause of action and by denying Toys "R" Us's motion for a directed verdict on the same issue. We believe the issue of false imprisonment was for the jury to decide.

[2] Kotova returned to Russia after this incident and was not a party to this action.

When ruling on a directed verdict motion, the circuit court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The appellate court must follow the same standard. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965).

The essence of the tort of false imprisonment consists of depriving a person of his or her liberty without lawful justification. Law v. S.C. Dep't of Corr., 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006). To establish false imprisonment under South Carolina law, the plaintiff must show that the defendant restrained the plaintiff; the restraint was intentional; and the restraint was unlawful. Id.; see also Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 618, 521 S.E.2d 163, 167 (Ct. App. 1999).

Toys "R" Us raises the Merchant's Defense in regard to its actions. Section 16-13-140 of the South Carolina Code (2003) protects merchants and their employees who restrain or delay customers suspected of shoplifting if the customer was delayed in a reasonable manner and for a reasonable time to permit such investigation, and reasonable cause existed to believe that the customer delayed had committed the crime of shoplifting. As set out in the statute, "reasonable cause" is synonymous with "probable cause." S.C. Code § 16-13-140 (2003). Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). The determination of whether probable cause exists is ordinarily a jury question; however, it may be decided as a matter of law when the evidence yields but one conclusion. Law, 368 S.C. at 441, 629 S.E.2d at 651.

Lynch acknowledged at trial that the Merchant's Defense would apply to the initial confrontation between the manager and her. However, once the

manager investigated the situation and resolved it by providing the women with a shopping basket and allowing them to continue to shop, Lynch argues the store had no right to again detain her once the police arrived. The circuit court judge agreed and found as a matter of law that Lynch was falsely imprisoned when she was restrained in the office.

After a thorough review of the record, we find there is evidence from which the jury could have determined Toys "R" Us continued to have probable cause to detain Lynch even after the initial confrontation. According to the manager's testimony, Lynch and her mother continued to act "very nervous" and went to different areas of the store "kind of hiding between fixtures." From this evidence, the jury could have found probable cause existed to restrain the women once the police arrived to determine whether additional merchandise had been concealed after the initial confrontation. On the other hand, it was also in the jury's province to find that Toys "R" Us no longer had probable cause once the women were allowed to continue shopping and ultimately paid for their merchandise. Accordingly, the determination of whether Lynch was falsely imprisoned should have been submitted to the jury.

B. Directed Verdict/JNOV Motions on the Remaining Causes of Action

Toys "R" Us next contends the circuit court erred by denying its directed verdict motions on the remaining causes of action or, alternatively, by denying its motions for JNOV. In ruling on a motion for JNOV, as in ruling on a motion for directed verdict, the circuit court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The motion should be denied when either the evidence yields more than one inference or its inference is in doubt. Id. The circuit court's denial of such motions can only be reversed when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Id.

1. Malicious Prosecution

As to its directed verdict and JNOV motions on the malicious prosecution cause of action, Toys "R" Us contends the circuit court should have found the store had probable cause as a matter of law to prosecute Lynch. We disagree.

In order to recover in an action for malicious prosecution, the plaintiff must show (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) termination of such proceeding in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Ruff v. Eckerds Drugs, Inc., 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause. Law v. South Carolina Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006).

Probable cause, which is a defense to an action for malicious prosecution, has been defined as "the existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." Eckerds Drugs, 265 S.C. at 568, 220 S.E.2d at 652. Thus, for probable cause, the facts must be regarded from the point of view of the prosecuting party; the question is not what the actual facts were, but what the prosecuting party honestly believed them to be. Law, 368 S.C. at 436, 629 S.E.2d at 649. Although the question of whether probable cause exists is ordinarily a jury question, in an action for malicious prosecution, it may be decided as a matter of law when the evidence yields but one conclusion. Id.

In this case, evidence was presented to support Lynch's claim that Toys "R" Us lacked probable cause to believe she had committed shoplifting, and malice may be inferred from a lack of probable cause to institute the prosecution action. Id., 368 S.C. at 437, 629 S.E.2d at 649. Further, there

was evidence to show the charge was pursued by Toys "R" Us, it was terminated in Lynch's favor, and Lynch suffered damages as a result. Therefore, the circuit court properly submitted the issue of malicious prosecution to the jury.

2. Slander/Defamation

Toys "R" Us next contends the circuit court erred in denying its motions for directed verdict and JNOV on the slander cause of action. Specifically, Toys "R" Us argues the evidence reflected a reasonable inference that Lynch intended to deprive the store of merchandise; it was justified in calling the police; there was no testimony of publication to a third party; and the report of Lynch's activities to the officers was subject to a qualified privilege. We disagree.

Initially, we note that Toys "R" Us's assertion of a qualified privilege as a defense to defamation is not preserved for our review. Because qualified privilege was not raised to the circuit court, we refuse to consider it on appeal. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding that for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the circuit court).

The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998). Although slander is generally a spoken defamation, the supreme court has established that a defamatory insinuation may not only be made by word, but also by actions or conduct. Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980).

Here, the record indicates that there was sufficient evidence from which a jury could have found that Toys "R" Us's words and conduct were defamatory. Evidence supports a claim that: (1) the manager and employee

distorted the facts of Lynch's actions in telling the officers that Lynch and Kotova continued to steal items after confronted; (2) as a result of these statements, and at the direction of the manager and employee, the officers handcuffed Lynch and Mother and escorted them out of the store; (3) the officers put Lynch and Kotova into the backseat of their marked patrol car, which was parked in front of the store; and (4) Lynch suffered damage to her reputation.[3] Lynch testified that while handcuffed and walking out of the store, "everybody was looking at us." In addition, this conduct occurred at a time in which Toys "R" Us admits the store was "very busy."

Because a jury could have found that Toys "R" Us's statements concerning Lynch's behavior and its insistence on an immediate handcuffed arrest was a communication to both the officers and customers in the store that Lynch committed shoplifting, a jury question existed as to whether Toys "R" Us slandered Lynch.

3. Outrage

Toys "R" Us contends that the circuit court erred by finding, as a matter of law, that outrage existed in this case. We agree.

To establish an action for outrage, the plaintiff must show that: (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his or her conduct; (2) the conduct was so extreme and atrocious as to exceed all possible bounds of decency and must be regarded as outrageous and utterly intolerable in civilized society; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Initially, the court determines whether the defendant's conduct may

[3] Slander involving the accusation that the plaintiff committed a crime of moral turpitude is actionable per se, which carries a presumption of general damages. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998).

reasonably be regarded as so extreme and outrageous as to permit recovery, and only if reasonable persons might differ should the question be one for the jury. Id.

Here, evidence indicates that Toys "R" Us's employees never specifically saw Lynch do anything illegal, that Lynch and her mother were arrested after having paid for the merchandise, and that the manager distorted the facts to the officers. We find these facts fall short of conduct "so atrocious that it exceeds all possible bounds of decency," as contemplated by the outrage cause of action. Cf. Shipman v. Glenn, 314 S.C. 327, 329, 443 S.E.2d 921, 922 (Ct. App. 1994) (holding that supervisor's conduct in ridiculing speech of employee with cerebral palsy and threatening to fire her was *not* sufficiently outrageous to support claim of outrage). Further, there is a lack of evidence indicating Toys "R" Us's actions were outrageous to the extent they might be regarded as utterly intolerable in a civilized society. But cf. McSwain v. Shei, 304 S.C. 25, 29, 402 S.E.2d 890, 892 (1991) (holding that jury could find outrageous and intolerable conduct of an employer who forced employee to perform exercises in public which exposed her inability to control her bladder). Therefore, the circuit court erred in denying Toys "R" Us's motions for directed verdict and JNOV on the outrage cause of action.

C. New Trial Based on Juror Misconduct

Toys "R" Us contends the circuit court erred by denying its motion for a new trial absolute based on juror misconduct. Toys "R" Us specifically contends that because a member of the jury lacked complete candor while responding under oath to voir dire and engaged in out-of-court investigation, its motion for a new trial should have been granted. We disagree.

1. Juror's Conduct During Voir Dire

Toys "R" Us contends that because a member of the jury did not reveal his alleged prior false arrest to the circuit court during voir dire the juror should have been disqualified from serving on the jury, and the court erred in

denying its motion for a new trial absolute based on this juror misconduct. We disagree.

The granting of a new trial based on a juror's failure to honestly respond to the court's voir dire remains within the sound discretion of the circuit court. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000). The appellate court will not reverse a circuit court's decision to deny a new trial absolute motion absent an abuse of discretion. Id. Further, when allegations arise concerning a juror's failure to reveal information in response to voir dire questions, courts look to whether the concealment was intentional and consider the nature of the information concealed. State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004). A new trial is warranted if the court finds that the juror intentionally concealed the information and the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Id. However, a determination that a juror did not intentionally conceal the information ends the court's inquiry. Id.

In addition, as a policy matter, this court has refused to allow testimonies of jurors to impeach verdicts. Barsh v. Chrysler Corp., 262 S.C. 129, 134, 203 S.E.2d 107, 109 (1974). Thus, upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any other juror's mind as influencing the juror to assent or dissent from the verdict. State v. Zeigler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005). A juror may only testify on the question of extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Id.

Here, the circuit court directed a verdict in favor of Lynch on the false imprisonment cause of action, and there is no evidence that the juror's silence regarding his alleged false arrest would have affected the jury's deliberation on the remaining issues. Furthermore, there is no evidence the juror intentionally concealed his history of false arrest or that the juror's revelation

had any influence on the other jurors' decisions. Accordingly, we find the circuit court did not abuse its discretion by denying Toys "R" Us's motion for a new trial absolute based on juror misconduct.

2. Out-of-Court Investigation

Toys "R" Us also contends that because the same member of the jury went to Lynch's place of employment during a lunch break and thereafter reported to the remaining jurors that "Lynch must be trustworthy to work in a store that sells such expensive items," the juror's out-of-court investigation was extrajudicial and prejudicial to the verdict. We disagree.

The determination of whether any person has a coercive effect on a jury for any reason is a matter addressed to the sound discretion of the trial judge. Parker v. Evening Post Pub. Co., 317 S.C. 236, 247, 452 S.E.2d 640, 647 (Ct. App. 1994). The test is whether there is reason to believe outside influences affected the jury's verdict. Id. In such a determination, the court will look to relevant factors such as: (1) the number of jurors exposed; (2) the weight of the evidence properly before the jury; and (3) the likelihood that curative measures were effective in reducing the prejudice. State v. Covington, 343 S.C. 157, 164, 539 S.E.2d 67, 70 (Ct. App. 2000).

To constitute reversible error, the casual viewing of a public place must have been calculated to influence, and most likely must have influenced, the verdict. 75B Am. Jur. 2d Trial § 1550 (2006). However, even purposeful, unauthorized views of the premises made by a juror, in which the juror did nothing more than look at or examine the premises, is not automatically prejudicial. Id.

Here, Toys "R" Us again relied on the juror affidavits, which suggested that during a lunch break, one of the jurors visited Lynch's place of employment and reported to the remaining jurors that based on the upscale nature of the establishment, Lynch must be trustworthy. There was no evidence that this influenced the verdict. Moreover, evidence had already been presented informing the jury that Lynch's place of employment was an upscale retail establishment. Thus, the juror's visit to the store did not

provide the jury with any information that was not already before it. Accordingly, we find no abuse of discretion in the circuit court's denial of Toys "R" Us's motion for a new trial absolute based on juror misconduct.

D. Thirteenth Juror Doctrine

Toys "R" Us contends that because Lynch failed to prove the elements necessary to recover under all four causes of actions for false imprisonment, slander, malicious prosecution, and outrage, the jury's verdict was not supported by evidence, and the circuit court erred by denying its motion for a new trial absolute based on the thirteenth juror doctrine. We disagree.

South Carolina's thirteenth juror doctrine allows the circuit court to grant a new trial absolute when the court finds the evidence does not justify the verdict. Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004). The appellate court will not disturb a circuit court's order granting or denying a new trial upon the facts unless its decision is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law. Id.

As explained previously, we find sufficient evidence existed to support submission of the false imprisonment, malicious prosecution, and slander causes of action to the jury. We have also addressed the circuit court's failure to direct a verdict on outrage above. Thus, we find the circuit court did not err in denying Toys "R" Us's motion for a new trial absolute based on the thirteenth juror doctrine.

E. New Trial and Jury's Excessive Award

Toys "R" Us argues the circuit court erred by denying its motions for a new trial absolute or nisi remittitur based on the jury's excessive award of $50,000 in actual damages and $250,000 in punitive damages for each cause of action. Toys "R" Us specifically contends that because there was no testimony of Lynch's actual damages, and the reasonable conduct of its employees preclude any award of punitive damages, it was error for the court to deny its motions for a new trial absolute or nisi remittitur. We disagree.

The grant or denial of a new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). The circuit court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive. Id. If the amount of the verdict is grossly excessive or inadequate so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence, the circuit court must grant a new trial absolute. Id. When the denial of a motion for a new trial nisi is appealed, this court will reverse when the verdict is grossly inadequate or excessive, requiring the granting of a new trial absolute. However, compelling reasons must be given to justify invading the jury's province by granting a new trial. Id. at 320, 628 S.E.2d at 518.

Here, evidence demonstrates Lynch suffered damages for each specific cause of action. Lynch testified that she was arrested without justification; she was handcuffed and escorted to a police car in full view of customers; and she was jailed for ten hours, the combination of which also injured her reputation and led to her humiliation, sleeplessness, and emotional pain. We find this constitutes evidence of actual damages.

Further, in South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). They serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." Harris v. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973).

Evidence was presented to show that Toys "R" Us wantonly, willfully, and maliciously fabricated and distorted the facts of Lynch's actions to the officers and rejected the officers' alternatives to the immediate arrest of Lynch and her mother, all without ever observing any illegal action by

Lynch. Such evidence was sufficient for the jury to award punitive damages.[4]

For the foregoing reasons, and because Toys "R" Us has not provided any compelling reasons to justify invading the jury's province by granting a new trial, we find the circuit court did not err in denying its motions for a new trial absolute or nisi remittitur based on the jury's award of damages.

II. Lynch's Appeal: Election of Remedies

Lynch contends the circuit court erred in requiring her to elect one of four causes of action for which the jury awarded damages, when those causes of action were based on different facts. Because we have found the false imprisonment cause of action should have gone to the jury and the circuit court should have directed a verdict in favor of Toys "R" Us on the outrage cause of action, we need only decide whether Lynch should have had to elect between the remaining malicious prosecution and slander verdicts. We hold that she should not.

The doctrine of election of remedies requires a plaintiff to choose between different remedies allowed by law upon the same set of facts. Jones v. Winn Dixie, 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995). Within this context, the facts refer to the defendant's wrongs or actions, so that when a plaintiff asserts only one primary wrong committed by the defendant, the plaintiff is entitled to only one recovery under the doctrine. Id. Therefore, the doctrine has no application when two separate causes of action exist based on different facts. Id. Application of the doctrine should be confined to cases in which double compensation to the plaintiff is threatened. Tomlinson, 367 S.C. at 470-471, 626 S.E.2d at 44-45.

[4] Toys "R" Us does not challenge the award of punitive damages under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 354 (1991). Toys "R" Us only argues its conduct did not rise to the level to support an award of punitive damages.

In Jones v. Winn-Dixie, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995), this court reversed the trial judge's reformation of the jury's verdict to require an election of remedies between a false imprisonment verdict and assault and battery verdict. In Winn-Dixie, Jones was suspected by a store manager of stealing shoe inserts from the store. Id. at 173, 456 S.E.2d at 431. The jury returned identical verdicts for each cause of action, including $25,000 in actual damages and $50,000 in punitive damages for each. In finding election improperly applied, this court reasoned that the plaintiff's action for false imprisonment was not based upon the same elements as his action for assault and battery, and that the plaintiff's injuries occurred at different times and resulted from separate and distinct actions on Winn-Dixie's part. Id.

As in Winn-Dixie, Lynch's causes of action were based upon different elements. The essence of a claim of for malicious prosecution is the lawful prosecution of an unwarranted criminal or civil proceeding against the plaintiff for malicious reasons, whereas slander consists of a false, defamatory statement communicated to a third party which results in injury to reputation. See, e.g., Law v. S.C. Dep't of Corr., 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006); Williams v. Lancaster Co. School Dist., 369 S.C. 293, 302, 631 S.E.2d 286, 291-92 (Ct. App. 2006).

Also, Lynch suffered distinct injuries specific to each alleged wrong committed by Toys "R" Us. Lynch spent ten hours in jail, needed to hire an attorney, and suffered nightmares as a result of the malicious prosecution. Lynch suffered injury to her reputation as a result of the slander. The malicious prosecution injury began when Lynch was arrested at the insistence of Toys "R" Us, and the slander occurred when Lynch was escorted, while handcuffed, out of the store and into the police car in full view of the public. Thus, the circuit court erred by requiring Lynch to elect between her remedies for malicious prosecution and slander.

CONCLUSION

Accordingly, we find the circuit court erred by granting a directed verdict to Lynch on the false imprisonment cause of action. The circuit court

did not err by denying Toys "R" Us's motions for directed verdict and JNOV on the malicious prosecution and slander causes of action. Nor do we find the court erred in refusing to grant a new trial. However, the circuit court erred by denying Toys "R" Us's motion for directed verdict and JNOV on the outrage cause of action and in requiring Lynch to elect a remedy. Accordingly, the circuit court's decision is

AFFIRMED IN PART and REVERSED IN PART.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jacob Lynch, Appellant.

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

Opinion No. 4317
Submitted November 1, 2007 – Filed November 27, 2007

AFFIRMED

Appellate Defender Kathrine H. Hudgins, 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, Office of the Attorney General, of

Columbia; and Solicitor C. Kelly Jackson, of Sumter, for Respondent.

WILLIAMS, J.: In this criminal case, we affirm the trial court's holding that an inmate was not entitled to be advised of his Miranda[1] rights when he spoke to a television reporter.

FACTS

Prisoners rioted at the Lee Correctional Institution located in Bishopville, South Carolina. Correctional Officers Marcus Cotton (Cotton) and Kenneth Dozier (Dozier) were working in the Chesterfield Housing Unit at the time of the riot. Prior to the incident, Cotton was providing meals to inmates located in the south side of the Chesterfield Unit, while Dozier provided meals to inmates located in the north side of the Chesterfield Unit.

Cotton opened inmate Jacob Lynch's (Lynch) cell door to furnish Lynch a meal. While the door of his cell was open, Lynch escaped. Cotton ordered Lynch to return to his cell, but Lynch refused. Rather than attempting to force Lynch back into his cell, Cotton continued with the feeding duties.[2] Cotton then opened inmate Tyrone Singletary's (Singletary) cell to provide him with a meal. Singletary absconded from his cell and refused to return.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Cotton's explanation for why he continued with his duties instead of attempting to return Lynch to his cell is that correctional officers are trained not to engage in a combative situation by themselves. Rather, officers are required to obtain assistance from other prison officers.

Lynch and Singletary released other prisoners in the Chesterfield Unit and took Cotton hostage. Cotton testified that during the struggle to capture him, Lynch and Singletary stabbed him with a shank.[3]

Shortly after Cotton's capture, Dozier, who was delivering meals to the inmates on the north side, noticed Lynch and Singletary. Lynch and Singletary attempted to capture Dozier, but Dozier managed to barricade himself in a room. Lynch and Singletary sought to seize Dozier by breaking the door. Lynch and Singletary threatened to kill Dozier and tried to stab Dozier. However, neither apprehended Dozier.

Cotton described Lynch as the leader of the riot. During the subsequent hours of negotiations with law enforcement, Lynch controlled Cotton. During the confrontation with law enforcement officials, Lynch would repeatedly come to the door of the Chesterfield Unit with Cotton handcuffed to him and demand access to the media. Lynch and Singletary threatened to kill Cotton and Dozier if their demands were not met.

Craig Melvin[4] (Melvin), along with other members of the media, covered the riot at Lee Correctional Institution. The media requested an interview with the head of the Corrections Department, John Ozmint (Ozmint). In response, Ozmint obtained the names and cell phone numbers of the members of the media who were present at the riot. Ozmint called Melvin, and as a result of that call, Melvin entered the prison.

Shortly before being interviewed by Melvin, Lynch released Cotton and surrendered. Lynch was charged with two counts of taking a hostage, rioting, assaulting a correctional officer, carrying a weapon by an inmate, and inciting a riot. The jury convicted Lynch on each count. Consequently, Lynch was sentenced to life without the possibility of parole for the hostage counts, ten years for rioting, five years for assaulting a correctional officer,

[3] A shank is a homemade knife, most often time used by prisoners.

[4] Melvin is a reporter with the Columbia television station WIS.

ten years for carrying a weapon by an inmate, and ten years for inciting a riot. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Therefore, the trial court's determination of whether a defendant was deprived of his Miranda rights will be upheld unless unsupported by the record. State v. Navy, 370 S.C. 398, 405, 635 S.E.2d 549, 553 (Ct. App. 2006) ("Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record."); see State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct. App. 1996) (Appellate review on issue of whether defendant was in custody triggering Miranda warnings is limited to determination of whether the ruling by the trial court is supported by testimony.).

LAW/ANALYSIS

Lynch puts forth two arguments on appeal. Shortly after Lynch released Cotton, Melvin interviewed Lynch. During this interview, Lynch made several incriminating statements. Lynch asked the trial court to suppress these statements, arguing Melvin became an agent of the State at the time of the interview. Lynch contended statements made to Melvin were obtained through custodial interrogation initiated by law enforcement officials without Miranda warnings. The trial court denied this motion.

Lynch also objected to the introduction of videos obtained by the Department of Corrections. The videos were taken during and subsequent to the riot. They show, among other things, the negotiations between the inmates and law enforcement officials and the condition of the Chesterfield Unit after the riot. Lynch argued the videos would inflame the passion of the jury and their prejudicial effect outweighed their probative value. The trial court overruled this objection. We address each argument in turn.

A. The trial court correctly held that Miranda warnings were not required.

The Fifth Amendment provides, "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards . . . ." Miranda, 384 U.S. at 444. Miranda rights[5] attach only if the suspect is subject to custodial interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996).

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Specifically, interrogation is either express questioning or its functional equivalent. Kennedy, 325 S.C. at 303, 479 S.E.2d at 842. The functional equivalent of an interrogation includes words or action on the part of the police, other than those that normally follow an arrest or custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. State v. Binney, 362 S.C. 353, 359, 608 S.E.2d 418, 421 (2005).

In the present case, Lynch was not subject to custodial interrogation when he spoke with Melvin. Law enforcement officials at the site of the riot did not question Lynch. Rather Lynch demanded, as a condition to release Cotton and as a condition of surrender, access to the media. Melvin was provided to accommodate Lynch's demands. During the interview, Melvin

[5] The well-known Miranda rights are that the accused must be informed of: the right to remain silent; any statement made may be used as evidence against him or her; and the right to the presence of an attorney. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996).

was acting as a private citizen, namely a reporter, and not as an agent of the State. Melvin's testimony supports this conclusion.

> Q: [A]s your **duties as a news reporter**, anchor, did you have an opportunity to come to Lee County . . . to cover a story at the Lee Correctional Institute?
>
> A: Yes.
>
> Q: What was that story?
>
> . . .
>
> A: I was told . . . that there were some inmates who had taken some guards hostage and that they were requesting [a] member of the media to speak with.
>
> Q: And you became that member of the media?
>
> A: Yes.
>
> . . .
>
> Q: [W]hen the situation ended, when the crisis was over, did you interview a specific inmate named Jacob Lynch?
>
> A: Yes.
>
> Q: And how did that occur?
>
> A: At the . . . end of this . . . situation . . . they brought Mr. Lynch over and I proceeded to . . . ask him some questions.
>
> Q: And you asked him about the . . . situation that took place inside [the Chesterfield Unit]?

A: I believe I asked him about that, you know, what happened in there and also asked him generally speaking, you know, his grievances.

(emphasis added).

Melvin's testimony demonstrates he was at Lee Correctional Instuttion covering the riot as a news reporter and not as an agent of the police. Thus, Lynch's statements to Melvin were not the result of a custodial interrogation.

Even if we assumed Melvin acted as an agent of the State at the time he interviewed Lynch, the Miranda warnings would be inapplicable. The Miranda decision is meant to preserve the privilege against self-incrimination during interrogation of a suspect in a police dominated atmosphere. Illinois v. Perkins, 496 U.S. 292, 296 (1990). The police dominated atmosphere generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. (internal quotations omitted). When an individual speaks to an undercover law enforcement official, Miranda warnings are not required. Id.

Assuming Melvin acted as an agent of the police, Lynch would not have known this. ("Coercion is determined from the perspective of the suspect."). Id. Rather, Lynch would have perceived Melvin as a reporter covering the prison riot. During Lynch's interview, Melvin's questions were of the same nature that any reasonable reporter covering a riot would ask. For example, Melvin asked Lynch what occurred inside the Chesterfield Unit, why the riot occurred, and what Lynch's grievances were. If Melvin was operating as a government agent during the interview, he was doing so in an undercover capacity, thus making the Miranda warnings inapplicable. Id.

If we assumed Melvin acted as an agent of the State and Lynch was aware of this, the trial court did not err in refusing to suppress Lynch's statements. The failure to suppress evidence for possible Miranda violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt. State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621

(1997). The record contains the testimony of numerous eyewitnesses that prove Lynch's guilt beyond a reasonable doubt.

According to Cotton's testimony, Lynch stabbed and threatened to kill Cotton on at least three separate occasions. Cotton described Lynch as the leader of the riot. Although Cotton's testimony may be deemed as bias, other evidence supports Cotton's version.

Numerous correctional officers testified Lynch stabbed and threatened to kill Cotton. Sergeant Wanda Scarborough testified Lynch told her Cotton was being held as a hostage. Lieutenant Robert Johnson testified Lynch threatened to kill Cotton with a homemade shank. Sergeant Cedrick June testified he observed Lynch with a shank, witnessed Cotton handcuffed to Lynch, and saw Lynch stab Cotton in the shoulder twice. Captain Arenda Thomas saw Cotton handcuffed to Lynch and witnessed Lynch stab Cotton. Dozier testified Lynch threatened to kill Cotton. Officer Yvonne Blandshaw testified she observed Cotton handcuffed to Lynch and saw Lynch stab Cotton twice. Officer Cynthia York testified she saw Lynch stab Cotton twice. Major John Ferraro, an expert in hostage negotiation, testified Lynch slapped, punched, and stabbed Cotton. Major Ferraro also testified Lynch threatened to kill Cotton. The overwhelming evidence of Lynch's guilt renders any possible Miranda violation harmless.

B. The trial court did not error by admitting the video tapes.

As noted above, Lynch objected to the introduction of videos obtained by the Department of Corrections. These videos were taken during and subsequent to the riot. They depict the state of the Chesterfield Unit after the riot, the negotiations between the inmates and law enforcement officials, and the condition of Lynch's cell.

During the hours of negotiations, Cotton was held in Lynch's cell. The videos portray a bloody rag in Lynch's cell. Lynch argued the videos would inflame the passion of the jury and their prejudicial effect out weighed their probative value. The trial court overruled this objection.

The admission of evidence is within the sound discretion of the trial court. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007). To constitute an abuse of discretion, the conclusions of the trial judge must lack evidentiary support or be controlled by an error of law. Id.

Even if the trial court improperly admitted the videos, we find any error in their admission harmless because the videos were cumulative to other evidence which was properly admitted. State v. Wyatt, 317 S.C. 370, 372-73, 453 S.E.2d 890, 891 (1995). As explained above, numerous correctional officers testified Lynch stabbed and threatened to kill Cotton. Thus, the trial court did not commit reversible error in admitting the videos.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.[6]

STILWELL and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Swafford, Appellant.

Appeal From Pickens County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4318
Heard October 11, 2007 – Filed November 30, 2007

AFFIRMED

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondents.

STILWELL, J.: David Swafford appeals his convictions for felony driving under the influence resulting in death and leaving the scene of an accident resulting in death. We affirm.

FACTS

In January of 2003, Karen Reid died at the scene of a car accident. Officers from the South Carolina Highway Patrol and the Pickens County Sheriff's Department found her van on the side of the road at the intersection of Highway 135 and Banks Road in Pickens County. The van appeared to have rolled at least once. Reid was thrown from and crushed under the van. According to Officer Dale Marshall, the highway patrol received a call about the accident at approximately 3:35 p.m.

At the scene, officers received information that a truck had spun out in someone's yard. The officers located Swafford's truck, which appeared to have been involved in the accident. The officers found Swafford a short distance from the truck. Swafford allegedly smelled of alcohol, acted intoxicated, and told them he had been alone in the truck. According to breathalyzer test results, Swafford's blood alcohol level was .14 percent. At the police station, Swafford made a statement indicating he found out that day that his daughter had been raped, he drank for the first time in eight years, and all he remembers is waking up in the woods after the accident.

Anthony Smith, a cable television contractor, testified he was working nearby at the time of the accident and witnessed the truck "smoking like crazy on the front end." Several hours later at the police station, Smith identified Swafford as the driver. Charles Patterson testified he was at his home at the time of the accident. He heard squealing tires and looked out his window to see the truck spinning through the neighbor's yard. He recognized Swafford, whom he knew as the driver. Patterson testified he drove to the accident scene. On the way, he saw his neighbor, Jerry Gillespie, walking in the area and picked him up. Carol Balent witnessed the accident and identified the driver of the truck as having "long stringy, like dirty blonde hair."

At trial, Swafford attempted to introduce third-party guilt evidence indicating Gillespie was driving the truck at the time of the accident. Carol Johnson testified in camera that she is a school bus driver for Pickens County. Johnson alleges she knows Swafford and saw him about 12:30 p.m. the day of the accident in the passenger side of the truck at a stop sign. She described the driver as "a person . . . that had long dirty blonde hair." She identified Gillespie in court as the driver. Brian Bobo also testified in camera alleging Gillespie was his best friend and told him the evening of the accident that he had been driving Swafford's truck and had been involved in a bad accident. Gillespie allegedly drove the truck away from the scene and then fled on foot. Robert Nealy, an investigator with the solicitor's office, testified in camera that a third witness, Greg Townsend, also claimed Gillespie admitted driving the truck at the time of the accident. Townsend later told Nealy he was not sure who told him Gillespie was driving. Townsend failed to appear in court the day of trial.

Gillespie testified in camera, denying involvement in the accident. He claimed he was at home when he heard a loud crash. He rode with Patterson to the scene of the accident. He denied telling Bobo or Townsend he had been driving the truck at the time of the accident.

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

LAW/ANALYSIS

Swafford argues the trial court erred in excluding Gillespie's proffered evidence of Gillespie's guilt. We disagree.[1]

South Carolina adopted the widely accepted rule regarding the admissibility of third-party guilt evidence in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). The rule states:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted).

In State v. Gay[2] and State v. Holmes,[3] the South Carolina Supreme Court altered the rule in Gregory by considering the strength of the prosecution's case in determining whether to admit evidence of third-party

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[1] Contrary to the State's argument, we find the issue preserved for appellate review.

[2] 343 S.C. 543, 541 S.E.2d 541 (2001), abrogated by Holmes v. South Carolina, 126 S. Ct. 1727 (2006).

[3] 361 S.C. 333, 605 S.E.2d 19 (2004), vacated and remanded, Holmes v. South Carolina, 126 S. Ct. 1727 (2006).

guilt. See Holmes v. South Carolina, 126 S. Ct. 1727, 1733-34 (2006) (discussing these South Carolina cases). The United States Supreme Court vacated and remanded State v. Holmes and abrogated State v. Gay, explaining that weighing the strength of the prosecution's case is arbitrary and does not rationally serve the end that the Gregory rule was designed to promote. Id. In comparison, the Gregory rule requires the trial judge to consider the probative value or the potential adverse effects of admitting proffered third-party guilt evidence. Id.

This trial was conducted prior to the issuance of the United States Supreme Court's opinion in Holmes. Swafford argues the trial judge improperly excluded the third-party guilt evidence and improperly relied on State v. Gay and State v. Holmes. Swafford also argues the trial court erred in excluding the proffered testimony of hearsay statements made by Gillespie as they were exceptions to hearsay. We disagree.

The trial judge mentioned State v. Gay and State v. Holmes while considering the proffered testimony. He properly concluded, however, that "all these started with State v. Gregory . . . that imposed strict limitations on the admissibility of third-party guilt." The trial judge compared the facts of this case to those in State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). In Cooper, the defendant attempted to introduce testimony of a witness who allegedly overheard a third party telling a listener that she and two others murdered the victim. Cooper, 334 S.C. at 547, 514 S.E.2d at 588. The alleged listener denied the statement. Id. The third party also denied the statement. Id. Relying on Gregory, the supreme court affirmed the trial court's exclusion of the evidence of third-party guilt. Id. at 549-50, 514 S.E.2d at 589.

After a careful review of the proffered testimony and the judge's ruling, we find no unconstitutional reliance on State v. Gay or State v. Holmes. Johnson's testimony that she witnessed Swafford in the truck as a passenger several hours prior to the accident neither offers proof that he was a passenger at the time of the accident nor that Gillespie was the driver at either point in time. At best, Johnson's testimony raises the mere suspicion that Gillespie may have been driving an hour prior to the accident, but offers no

reliable proof that he was driving at the time of the accident. In like vein, Townsend's alleged statements to Nealy were so inconsistent they raised merely a bare suspicion of Gillespie's guilt.

Finally, we find no error by the trial court in excluding Bobo's testimony. Bobo alleged Gillespie confessed to involvement in a bad accident in a telephone conversation with Bobo the night of this incident. Bobo could produce no support for his bare assertion that he telephoned Gillespie the night of the accident. He claimed he initiated the telephone call from the cellular telephone belonging to a "girl named Jade." Bobo knew neither her last name nor her telephone number.

The trial judge in this case considered Cooper, reiterated the rule in Gregory, and considered the weakness of the proffered evidence rather than improperly focusing on the strength of the State's case. We recognize this is a close case. However, based on our limited standard of review, we find no reversible error by the trial judge in excluding the proffered evidence.[4]

CONCLUSION

For the foregoing reasons, Swafford's convictions are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur

[4] We decline to address the hearsay issue as we find the trial court ultimately excluded the evidence based solely upon whether it met Gregory. See Litchfield Co. of S.C., Inc. v. Sur-Tech, Inc., 289 S.C. 247, 251, 345 S.E.2d 765, 767 (Ct. App. 1986) (finding it unnecessary to determine whether trial judge erred in excluding evidence on one ground where trial judge did not err in excluding the evidence on another ground).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Anthony Woods, Appellant.

Appeal From Clarendon County
J. Derham Cole, Circuit Court Judge

Opinion No. 4319
Submitted October 1, 2007 – Filed November 30, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, 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, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

WILLIAMS, J.: A jury found Anthony Woods (Woods) guilty of first-degree burglary and two counts of assault and battery of a high and aggravated nature. Woods argues the trial court erred in denying his motion to suppress hair, blood, and saliva samples as the products of an unlawful search and seizure and requests a new trial. We affirm.

FACTS

On June 4, 2003, Woods broke into the Taylor residence at approximately 11 p.m. Linda Taylor (Linda) testified that on the night of the break-in, she was watching television in the den, which is near the back door. Her mother, Elizabeth Taylor, was getting ready for bed in the bathroom. Linda heard a noise outside, and when she looked through the blinds, she saw the motion sensor lights turn on and noticed Woods standing outside facing her through the window. Linda testified Woods was "bathed in the flood lights," and she could "see him very well."

Woods punched his fist through the window pane of the door, causing his hand and arm to bleed. Although Linda attempted to block the door with her body, Woods eventually pushed his way into the house and pushed Linda onto a chair in the den. Woods then hit Linda in the face. Linda found her mother lying on the floor after Woods escaped. Thereafter, Linda noticed Woods had stolen the keys to the house and car, pocketbooks, tote bags, and a Bible.

Shortly after the incident, Officer Surette was dispatched to the Taylor residence. As Officer Surette approached the house, he noticed a suspicious person walking away from the Taylor residence. Although Officer Surette could not positively identify Woods at that time, Woods was apprehended in the same area after State Law Enforcement Division (SLED) brought in a bloodhound unit, which picked up Woods' trail. Woods was eventually captured that night and positively identified. Police took Woods to the hospital where he was treated for arm and hand injuries.

On June 6, 2003, SLED Officer Creech approached Judge Cooper in chambers for a court order to obtain samples of Woods' hair, saliva, and blood, which Judge Cooper granted. While Judge Cooper found probable cause existed to issue the order, the State did not establish that Officer Creech submitted a sworn affidavit or made a statement under oath to support the order.

During his trial, several police officers testified for the State, and Linda identified Woods as the man who broke into her residence. After the trial, the jury convicted Woods of first-degree burglary and two counts of aggravated assault and battery. The trial court sentenced Woods to life imprisonment for first-degree burglary and a concurrent ten years imprisonment on each count of aggravated assault and battery. Woods appeals.

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). Further, we are bound by the trial court's factual findings unless they are clearly erroneous. Id., 577 S.E.2d at 500-01. Appellate review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006); see also State v. Baccus, 367 S.C. 41, 48-49, 625 S.E.2d 216, 220 (2006) ("The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error.").

LAW/ANALYSIS

Woods argues the trial court should have suppressed his hair, blood, and saliva samples as the products of an unlawful search and seizure. He contends state officers failed to follow section 17-13-140 of the South Carolina Code (Supp. 2006) in obtaining the court order. We agree.

Section 17-13-140 provides:

> A warrant issued hereunder shall be issued only upon affidavit sworn to before the . . . judge of a court of record establishing the grounds for the warrant. If the . . . judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Accordingly, a court order issued pursuant to this section, which stands in place of a search warrant, must be supported by a sworn oath or affirmation to be admissible at trial. Baccus, 367 S.C. at 54-55, 625 S.E.2d at 223 ("Following these constitutional requirements, § 17-13-140 requires a sworn affidavit for a search warrant [or a court order] to be issued." (citing U.S. Const. amend. IV; S.C. Const. art. I, § 10)). Furthermore, the affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S. 154, 165 (1978).

On June 6, 2003, Officer Creech approached Judge Cooper in chambers for an order to take samples of Woods' hair, blood, and saliva. Two other judges were present in chambers when Officer Creech requested the order. Although Judge Cooper found probable cause to issue the order based on his conversation with Officer Creech, there was no affidavit from Officer Creech to support the court order, and Officer Creech failed to make a statement under oath as required by section 17-13-140. The State conceded the order was defective on its face. We find the court order failed to comply with statutory guidelines. Consequently, the hair, blood, and saliva samples should have been suppressed.

Despite this error, we affirm Woods' conviction in light of the overwhelming evidence of his guilt. See, e.g., Baccus, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence,

such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result.").

Here, the State presented evidence from several different sources. Linda Taylor identified Woods as the assailant and testified in detail about the incident. Woods' fingerprints were found inside the door where he gained entry into the Taylor residence, and his hand injuries were consistent with having broken the glass window. Officer Surette also testified he observed a suspicious person exiting the driveway of the Taylor residence who fled into the same area that officers secured after the break-in. Bloodhounds then tracked Woods down within this secured area. Finally, the police found several items stolen from the Taylor's residence along the trail where officers tracked Woods. Therefore, we find the hair, blood, and saliva samples cumulative, and their admission is not grounds for reversal of Woods' conviction.

CONCLUSION

Although the trial court erred in denying Woods' motion to suppress pursuant to section 17-13-140, such error was harmless in light of the overwhelming evidence establishing his guilt. Accordingly, the trial court's decision is

AFFIRMED.[1]

STILWELL and SHORT, JJ., concur.

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