The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who have failed to pay their license fees for 2021. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by March 26, 2021.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 26, 2021

Members Who Have Not Paid 2021 License Fees

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The Supreme Court of South Carolina

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CLERK OF COURT

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CHIEF DEPUTY CLERK

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N O T I C E

IN THE MATTER OF DAVID B. SAMPLE, PETITIONER

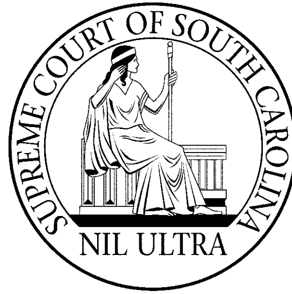
Petitioner was definitely suspended from the practice of law for nine (9) months. *In re Sample*, 415 S.C. 337, 782 S.E.2d 583 (2016). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
February 24, 2020



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
March 3, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ontavious Derenta Plumer, Appellant.

Appellate Case No. 2017-000481

Appeal From Greenwood County
Edward W. Miller, Circuit Court Judge

Opinion No. 5806
Heard February 11, 2020 – Filed March 3, 2021

AFFIRMED IN PART AND VACATED IN PART

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, Respondent.

LOCKEMY, C.J.: Ontavious Derenta Plumer appeals his convictions for attempted murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred by (1) refusing to charge the jury on the law of self-defense, (2) denying his motion to relieve trial counsel, (3) refusing to qualify a witness as an expert in gunshot residue analysis, and (4) sentencing him to an

additional five years' imprisonment in addition to his sentence of life without parole. We affirm in part and vacate in part.

FACTS

On October 11, 2015, Oshamar Wells was shot during the course of a drug transaction. Wells later identified Plumer in a photographic lineup as the person who shot him. In July 2016, Plumer was indicted for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. He proceeded to a jury trial on February 6, 2017.[1]

At trial, Wells testified that he had arranged to meet two men, who were supposed to purchase a pound of marijuana from him, around 6:00 p.m. on the evening of October 11.[2] Wells explained someone he knew setup the deal, he had never met the men before, and he did not know their names. Wells testified he planned to meet the two men at a convenience store in Greenwood and then have them follow him to his cousin's residence because the men were unfamiliar with the area. The men followed Wells in their black Mercedes and parked behind him in the driveway.[3] After they arrived at the home, they smoked marijuana so that the two men could "try the product" before proceeding with the purchase. Wells explained that after some time passed, he began to wonder when the men were going to pull out cash to pay for the marijuana. Plumer pulled out a gun instead. Wells testified that as soon he saw what Plumer was doing, he turned around and retrieved a handgun from the cabinet behind him.[4] He stated he shot at Plumer in defense of his life. Wells explained that Plumer then began firing at him and recalled he was

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[1] Prior to trial, the State served Plumer with a notice of intent to seek life imprisonment without the possibility of parole based on his previous conviction for a most serious offense. *See* S.C. Code Ann. § 17-25-45(A)(1)(a) (2015) (providing that "upon a conviction for a most serious offense . . . a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense"); S.C. Code Ann. § 17-25-45(C)(1) (2015 & Supp. 2020) (stating offenses defined as "most serious" include attempted murder and attempted armed robbery).
[2] Wells testified a pound of marijuana carried a street value of about $3,600.
[3] No one else was present at the home when the three men arrived.
[4] Wells testified the gun belonged to his mother and he saw her place the holstered gun there earlier that day.

"already getting hit when [he] reached to grab the gun out of the cabinet. And from the[n on, he] just returned fire." Wells stated that after the shooting began, the third man got up, took the marijuana, and ran. Wells did not recall seeing the third man with a gun. Wells testified that as he returned fire at Plumer, Plumer continued to fire at him while backing out of the door.

Bullets struck Wells in his back, buttocks, and legs. He testified that as soon as the men were gone, he called his mother and an ambulance. Wells was taken to the local hospital in Greenwood, where Dr. Ricky Ladd treated him for his gunshot injuries. Dr. Ladd testified Wells was admitted with potentially life-threatening injuries. He explained Wells suffered six gunshot wounds consisting of wounds to the left upper buttock, the lower back region, the left anterior thigh, the right lateral thigh, and an entrance and exit wound to the left lower leg.

The same night, Plumer received treatment at Greenville Memorial Hospital for a gunshot wound to his kneecap. A Greenville County law enforcement officer interviewed him at the hospital that evening. Plumer told the officer that as he was walking down the street after leaving a friend's apartment in Greenville, a man he did not know approached him from behind and started shooting at him. Plumer stated he ran away when the shooting started. The officer testified that, at the time, law enforcement had no reason to suspect Plumer had fired a gun that night.

Wenona Wells, Wells's mother, testified the gun in the cabinet, which she identified at trial, belonged to her. She explained that when she went to the home the night of the shooting, her young grandson was with her and he found and picked the gun up off the floor. Ms. Wells testified she took the gun from him and when they left, she placed it in the trunk of her car. However, she testified she did not know Wells had used it during the altercation. Ms. Wells stated that about three days later, she turned the gun over to law enforcement at Wells's request.

Wells acknowledged that when law enforcement first approached him, he was not forthcoming because he was afraid they would charge him with selling drugs. Investigator William Kay, of the Greenwood Police Department, testified he took a statement from Wells the day after the shooting. Investigator Kay stated that in his first statement to law enforcement, Wells said that "two random guys came in the front door and tried to rob him" while he was sitting at his kitchen table and "ended up shooting him." He testified Wells gave a second statement to law enforcement in which he explained that he met two men to sell them marijuana, that they ended

up trying to rob him, that he reached for a gun to defend himself, and that they began shooting and he returned fire. Law enforcement showed Wells a photographic lineup and he selected Plumer from the lineup as the person who shot him.

Thereafter, law enforcement arrested Plumer, and Plumer gave a statement admitting he was at the residence at the time of the incident and had also been shot. In addition, Greenwood officers determined the Mercedes parked behind Wells's car in the driveway belonged to Plumer's grandfather, who had loaned it to Plumer on the night of the shooting, and a blood sample retrieved from the sidewalk in front of the home matched Plumer's DNA profile.

Plumer did not testify at trial, but he called several defense witnesses. Shameka Hawes testified that on the evening of the shooting, she was sitting in her car when Plumer ran up to her and asked for a ride to the hospital. She stated she could see he had been shot. Hawes explained that on the way to the hospital, Plumer asked her to drop him off at his baby's mother's apartment instead. Hawes stated she did not know Plumer before this encounter and never saw him again afterwards. Plumer's cousin, Vanjarvis Martin, testified that on October 11, 2015, he picked Plumer up from his baby's mother's house and drove him to the hospital. Martin stated Plumer did not want to go to the Greenwood hospital, so he drove him to Greenville Memorial Hospital instead.

Deputy Wesley Smith, of the Greenville County Sheriff's Office, testified the sheriff's office performed a gunshot residue collection kit on and collected some evidence, including clothing, from Plumer at approximately 11:15 p.m. on October 11, 2015. He recalled that some of the evidence was covered in blood. Deputy Smith stated that between the time Plumer was admitted to the hospital at 10:55 p.m. and when he was released, there was a period of up to twenty-five minutes during which no one from law enforcement was with him. Deputy Smith explained the sheriff's office never completed an examination of the evidence and ultimately transferred it to Detective McClinton a few months later. The defense recalled Detective McClinton, who confirmed he received this evidence but it was never sent to the South Carolina Law Enforcement Division for analysis.

Joseph Best, a private detective hired by the defense, testified he collected the evidence from the Greenwood Police Department on January 6, 2017, and transferred it to Dr. Robert Bennett on January 10, 2017. Best testified the

evidence included a gunshot residue kit that was collected from Plumer's hands, a tennis shoe, jeans, and a tee shirt.

The defense then called Dr. Robert Bennett, who testified he was a forensic scientist and held a pharmacy degree and a doctorate in drug sciences with a focus in toxicology. He stated he had "a number of training certifications from the Department of Justice, [including] a couple in the are[a] of firearms." Dr. Bennett explained that the firearms training included "looking at a variety of subjects such as different types of ballistics, which include[d] gunshot residue analysis" and that he was "familiar" with gunshot residue and had "learned to test gunshot residue." Dr. Bennett explained that he worked with a lab that performed gunshot residue analysis as one of their "basic core service provisions." He admitted he had never personally performed a gunshot residue test and was instead interpreting the results of the test the lab performed. The State objected to Dr. Bennett's qualification, and the court refused to qualify him as an expert witness. Plumer did not attempt to proffer Dr. Bennett's testimony.

At the close of the defense's case, Plumer renewed his motion for a directed verdict, which the trial court denied. Plumer requested a jury charge on the law of self-defense, which the trial court denied, finding there was "insufficient evidence from which a reasonable inference could be drawn" that Plumer acted in self-defense.

The jury acquitted Plumer of armed robbery but found him guilty of attempted murder and possession of a weapon during the commission of a violent crime. Plumer moved for a new trial, arguing the jury returned an inconsistent verdict. The trial court denied the motion and sentenced Plumer to life imprisonment without parole for attempted murder and five years' imprisonment for the weapon offense. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ANALYSIS

I. Self-Defense Instruction

Plumer argues the trial court erred by refusing to instruct the jury on the law of self-defense. He contends the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder. We disagree.

"A self-defense charge is not required unless it is supported by the evidence." *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious

> bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Id. at 69-70, 644 S.E.2d at 52; *see also State v. Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (holding when the defendant testified he shot the victim after the victim "took out a gun and began shooting at him," the trial court erred by refusing to charge the law of self-defense because the defendant's testimony "constituted sufficient evidence from which the jury could infer that [he] acted in self-defense"); *State v. Smith*, 406 S.C. 547, 555, 752 S.E.2d 795, 798 (Ct. App. 2013) (stating that "going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty"); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) (stating "one cannot through his own fault bring on a difficulty and then claim the right of self-defense").

In *Slater*, our supreme court found there was no evidence to show the defendant was "without fault in bringing on the difficulty" and he was therefore not entitled to a self-defense instruction. 373 S.C. at 71, 644 S.E.2d at 53. There, the court concluded the defendant's actions of carrying a "cocked weapon, in open view, into an already violent attack in which he had no prior involvement . . . . proximately caused the exchange of gunfire, and ultimately the death of the victim." *Id.*

We conclude the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty. *See Light*, 378 S.C. at 649, 664 S.E.2d at 469 ("A self-defense charge is not required unless it is supported by the evidence."); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) ("The law to be charged to the jury is determined by the evidence presented at trial."); *Light*, 378 S.C. at 649, 664 S.E.2d at 469 (providing self-defense requires the defendant to "be without fault in bringing on the difficulty"). Of the three individuals present when the shooting occurred, only Wells testified at trial. Although it is undisputed Wells fired a gun during the encounter, he consistently testified Plumer was the first to draw and fire a gun. The record contains no evidence to contradict Wells's testimony that he stored a holstered handgun in a cabinet prior to the meeting and did not retrieve it until after Plumer pulled out a gun. Further, the record contains no evidence Wells was visibly armed or that Plumer knew Wells had a gun nearby when Plumer pulled out his own gun. Wells stated he shot at Plumer because Plumer was shooting at him and that if Plumer had not pulled out his gun first, he would not have retrieved the gun from the cabinet. Even though Wells's treating physician

agreed the gunshot injury to his hip would likely have caused him to fall immediately, he testified it was impossible to determine which of Wells's gunshot injuries occurred first or otherwise discern the timing of those injuries. In addition, Wells testified that bullets were already striking him when he turned to retrieve the gun from the cabinet. As to Investigator Kay's testimony, he testified only that Wells initially told law enforcement that two random men came into his home, tried to rob him, and ended up shooting him. This testimony does nothing to suggest Wells, rather than Plumer, was at fault for bringing on the difficulty. As to Plumer's contention that Wells and Ms. Wells conspired to hide the gun, Wells admitted he initially withheld the truth from law enforcement because he was afraid he would get in trouble for dealing marijuana, and he admitted to shooting a gun that night. Further, Ms. Wells explained she took possession of the gun the night of the shooting because it belonged to her; she was concerned for the safety of her young grandson, who had just picked the gun up off of the floor; she did not know it was involved in the shooting; and she was most concerned with Wells's condition at the time. In addition, Ms. Wells testified she turned the gun over to law enforcement within days of the incident. Regardless, the suggestion that Wells conspired to hide the gun made it no more or less likely that Wells was the first to present a gun or that Plumer was without fault in bringing on the difficulty.

Next, as to Plumer's contention he retreated from the violence, the evidence shows he only did so after firing his gun multiple times. Moreover, such facts pertain to whether he had a means of avoiding the danger rather than whether he was at fault for bringing on the difficulty. Finally, we find Plumer's argument regarding his acquittal for the charge of armed robbery is without merit. The lack of motive to commit murder is not an element of self-defense, nor does it negate Wells's testimony that Plumer drew a gun without any prior act of provocation or aggression on Wells's part.

Based on the foregoing, we find the only evidence presented at trial suggested that Plumer was at fault for bringing on the difficulty. Therefore, the record contained no evidence from which a jury could have inferred Plumer acted in self-defense, and we find the trial court did not err by refusing to give a self-defense instruction.[5]

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[5] We note Plumer asserts the trial court inappropriately involved itself in plea negotiations. Because Plumer raised no exception on this basis at trial, this argument is unpreserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142,

II. Motion to Relieve Trial Counsel

Plumer argues the trial court should have treated his insistence to relieve his trial counsel as a motion to represent himself and the court denied him his Sixth Amendment right to represent himself by permitting counsel to continue representing him. We disagree.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, "[a]n accused may waive the right to counsel and proceed *pro se*." *State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010); *see also Faretta v. California*, 422 U.S. 806 (1975) (holding a criminal defendant has the right to waive his right to counsel and proceed pro se when he chooses to do so voluntarily and intelligently). "The request to proceed pro se must be clearly asserted by the defendant prior to trial." *Winkler*, 388 S.C. at 586, 698 S.E.2d at 602 (quoting *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)); *see also Barnes*, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*.").

Here, Plumer informed the court on the morning of the third day of trial that he wished to relieve his trial counsel and presented a written motion to relieve counsel or, in the alternative, for a competency evaluation. After the court confirmed Plumer had no competency issues, Plumer stated he wished to relieve counsel and find another lawyer. He alleged his trial counsel failed to relay a plea offer of seven years' imprisonment and he was unaware he faced a mandatory sentence of life without parole. Plumer's counsel denied this, and the trial court refused to suspend the trial to allow Plumer to hire new counsel.

We find Plumer did not clearly assert his right to self-representation. Plumer's written motion was styled as a "motion declining or terminating representation," and he told the trial court he wanted another lawyer. We acknowledge Plumer argued he had "a constitutional right to relieve [his] lawyer when [he] want[ed] to relieve him"; however, he never stated he wished to represent himself for the

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587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

remainder of the trial. Rather, he repeatedly stated he wanted to hire a different lawyer. Because we conclude Plumer failed to clearly assert his right to proceed without counsel, *Faretta* warnings were not required, and the trial court did not deprive Plumer of his right to self-representation.

III. Expert Witness

Plumer argues the trial court erred by refusing to allow Dr. Bennett to testify as an expert in gunshot residue. He contends the record established Dr. Bennett had the necessary education, training, and experience to testify as an expert and the exclusion of this expert testimony denied Plumer his constitutional right to a complete defense. We find Plumer failed to preserve this issue for appellate review.

"The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* "For an error to warrant reversal, however, the error must result in prejudice to the appellant." *State v. Santiago*, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App. 2006).

We find this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett's testimony at trial. *See id.* at 163, 634 S.E.2d at 29 ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."); *see also State v. King*, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005) ("The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice.").

IV. Sentencing

Plumer argues the trial court erred by sentencing him to an additional five years' imprisonment for the weapons charge pursuant to section 16-23-490. We agree.

> If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

S.C. Code Ann. § 16-23-490(A) (2015) (emphasis added); *see also* S.C. Code Ann. § 16-1-60 (2015 & Supp. 2020) (defining attempted murder as a violent crime).

"[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999), *disapproved of by State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). In *Johnston*, our supreme court vacated an illegal sentence notwithstanding preservation rules. *See id.* at 463-64, 510 S.E.2d at 425. There, the court found there were exceptional circumstances in that the State conceded "the trial court committed error by imposing an excessive sentence," and there was a "real threat" that the defendant would "remain incarcerated beyond the legal sentence due to the additional time it w[ould] take to pursue [post-conviction relief]." *Id.*

In *Vick*, this court acknowledged the holding in *Johnston*, but addressed the sentencing issue even though there was no "threat" that the appellant would "remain incarcerated beyond the legal sentence." *Vick*, 384 S.C. at 202-03, 682 S.E.2d at 281-82. The court reasoned, "[O]ur courts have, in the past, 'summarily vacated' sentences for kidnapping whe[n] such sentences were precluded by [statute] because the defendant received a concurrent sentence under the murder statute." *Id.* at 202, 682 S.E.2d at 282. The court also noted that "our courts have at times considered an issue in the interest of judicial economy." *Id.* In *Vick*, we held:

> [B]ecause the State concede[d] the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper

> sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

Id. at 203, 682 S.E.2d at 282.

In *Bonner*, we vacated a defendant's sentence notwithstanding preservation rules when both parties fully briefed the issue, and we stated, "[T]his case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence." *See State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012).

Plumer was convicted of attempted murder, a violent crime under section 16-1-60. The trial court sentenced him to life without parole for attempted murder and an additional five years' imprisonment for possession of a weapon during the commission of a violent crime. *See* § 16-23-490(A) (providing the five-year sentence required for possessing a firearm during the commission of a violent crime does not apply when the trial court imposes a sentence of life imprisonment without parole for the violent offense). Although the State argues the issue is unpreserved because Plumer failed to object at trial, it concedes the trial court erred by imposing the five-year sentence and acknowledges that under certain circumstances, our appellate courts have decided such issues on the merits notwithstanding preservation rules. The State argues, however, that the appropriate procedure for raising the issue is in post-conviction relief. Although there is no "real threat" Plumer will remain incarcerated beyond the length of his legal sentence, because the State concedes error, we believe it is appropriate under these circumstances and as a matter of criminal equity to vacate the sentence pursuant to our holdings in *Bonner* and *Vick*. *See Bonner*, 400 S.C. at 567, 735 S.E.2d at 528 (opining a "case present[ed] an exceptional circumstance because the State concede[d] in its brief that the trial court committed error by imposing an improper sentence"). We therefore vacate the five-year sentence Plumer received for the weapons charge.

CONCLUSION

For the foregoing reasons, we affirm Plumer's convictions but vacate the trial court's imposition of the five-year sentence for the weapons charge.

AFFIRMED IN PART AND VACATED IN PART.

GEATHERS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Road, LLC and Pinckney Point, LLC, Plaintiffs,

of which Road, LLC is the Appellant,

v.

Beaufort County, a political subdivision of the State of South Carolina, Respondent.

Appellate Case No. 2017-001736

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5807
Heard June 16, 2020 – Filed March 3, 2021

AFFIRMED

John Phillips Linton, Jr. and George Trenholm Walker, both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Appellants.

C. Mitchell Brown, Allen Mattison Bogan, and Nicholas Andrew Charles, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Mary Bass Lohr and Robert W. Achurch, III, both of Howell Gibson & Hughes, PA, of Beaufort, for Respondent.

LOCKEMY, C.J.: In this breach of contract action, Road, LLC and Pinckney Point, LLC (Pinckney) (collectively, Developers) appeal the trial court's order granting Beaufort County's (the County's) motion for judgment notwithstanding the verdict (JNOV). Road, LLC argues the trial court erred by finding that (1) there was no evidence to support the jury's finding of breach of contract, (2) the $5 million in damages were speculative, and (3) the contract was a nullity. We affirm.

FACTS/PROCEDURAL HISTORY

This case involves two adjacent tracts of land: the first is a northern 229-acre tract (the Point Tract), and the second is a .85-acre isthmus (the Road Parcel), which connects the Point Tract to Bluffton. The only way to access the Point Tract was by Pinckney Colony Road (Colony Road), which crosses over the Road Parcel. Pinckney bought the Point Tract on March 31, 2006, with $5.7 million cash and financed another $5 million through BB&T. Pinckney intended to build a residential development on the land. When Pinckney purchased the Point Tract, the seller was in the midst of litigation with the County over whether Colony Road was a public or private road (the Road Action). Pinckney applied for a variance to shift Colony Road within the river bluff, the County denied the application, and Pinckney appealed (Variance Action).

In 2010, BB&T sold Pinckney's note and mortgage to Equity Resource Partners (ERP). In December 2011, Pinckney deeded the Point Tract to ERP in lieu of foreclosure and paid ERP $125,000 for an option to buy back the Point Tract for $6.5 million. This option was set to expire on August 31, 2012. Pinckney extended the option until February 28, 2013, for an additional $375,000.

During development of the Point Tract, the County required Pinckney to acquire a separate variance for the water line. This required Pinckney to acquire permission from Dorothy Gnann and Agnes Pinckney (Agnes), owners of the Road Parcel, to add utility lines along Colony Road. In order to facilitate that permission, Pinckney wanted to buy the Road Parcel, but could not afford the $1.3 million needed to acquire it. Subsequently, John Kunkel, a manager for Pinckney, and Bruce Bunner established Road, LLC, through which they purchased the Road Parcel.

Road, LLC and Pinckney then entered into an agreement (the Road Agreement), which provided Road, LLC would sell the Road Parcel to Pinckney for $5 million on November 30, 2013. Road, LLC and Pinckney also recorded an easement granting Pinckney a twenty foot right-of-way across the Road Parcel. The easement stated it was for the benefit of the "Grantee and for the benefit of any and all other occupants of Grantee's Property, and for its respective subtenants, licensees, customers, agents, employees, invitees, mortgages, successors and assigns."

In January 2011, the County; the County's zoning board; Pinckney; Road, LLC; Agnes; and Gnann entered into a settlement agreement (the Agreement), which settled both the Road Action and the Variance Action. Specifically, the Agreement stated the "Road Parcel is and shall be a private road for the use and benefit of those parties described in the Right of Way and Easement Agreement." The Agreement further provided that Road, LLC would convey the Road Parcel to Pinckney in accordance with the Road Agreement. Further, the County agreed the Road Parcel provided sufficient access for the development of the Point Tract in accordance with the Beaufort County Zoning and Development Standards Ordinance. The Agreement also granted Pinckney the variance to relocate Colony Road.

In November 2012, the Beaufort County Land Trust (Land Trust) was contacted by a broker for ERP regarding the Point Tract and the Land Trust determined the property should be conserved.

ERP extended Pinckney's option until March 11, 2013; however, Pinckney failed to secure an investor to fund the repurchase, and the option expired. On March 14, 2013, the County's Rural and Critical Lands Board received and approved an offer to purchase of the Point Tract from ERP for $6,950,000. The County council approved the purchase of the Point Tract on April 8, 2013, and signed the contract for the purchase the Point Tract on April 24, 2013. On May 21, 2013, Developers (Pinckney, LLC and Road, LLC) filed their first complaint seeking declaratory and injunctive relief prohibiting the sale of the Point Tract to the County based on the Agreement. The County closed on the Point Tract on May 28, 2013. Following the closing, Developers sought declaratory and injunctive relief prohibiting the County from using Colony Road for public access, an order of specific performance that the Road Parcel and Point Tract only be used for a residential community, and damages for breach of the Agreement.

At the August 25, 2016 trial, the trial court found there was a latent ambiguity in the Agreement, which required the admission of extrinsic background evidence. Taylor Bush, the manager for Pinckney, testified to the following on direct examination:

> Q: How many cases were there at this point?
> A: There was the dock case.[1] There was the [Variance Action]. There was the [R]oad [Action].
> Q: What was the [Agreement] to do?
> A: It was to resolve everything necessary for us to develop the property.

The County objected based on the parol evidence rule, and the trial court overruled the objection. Bush testified the County required Pinckney to change the development plan from sewer to septic, collect individual soil samples, and acquire septic permits for each lot, which were not required by ordinance. Bush testified that the request for individual lot permits caused a nine-month delay and obtaining individual permits was unrealistic. He explained these septic delays caused Pinckney to default on the loan. He stated Pinckney completed all permitting with the County in February 2012.

Bush stated Pinckney wanted to repurchase the Point Tract, but was unable to complete the entitlements necessary to acquire an investor. He testified that if Pinckney had been granted another 120-day option from ERP, it could have acquired the remaining approvals needed for the Point Tract. Bush testified the County granted the variance as required by the Agreement.

John Kunkel stated Pinckney could not acquire investment to buy back the loan from ERP because they did not have the permits and approvals in place. Kunkel explained that if Pinckney had 120 more days, they would have acquired an investor because they were 95% complete. Kunkel stated Pinckney lost between $5.7 million and $8.5 million in profit. He explained that after the County purchased the Point Tract, Colony Road was kept open and the road was in a better condition than it was before the purchase. Kunkel testified that on March 5, 2013,

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[1] The County and Pinckney had a third action over the number of docks Pinckney was granted on the Point Tract. The dock action was not part of the Agreement.

Silver Point, LLC was interested in investing, but Pinckney rejected Silver Point, LLC's terms. He admitted ERP could sell the Point Tract to whomever they wanted.

Walter Nester, Pinckney's attorney, stated the County required Pinckney to use septic tanks on the Point Tract. He testified Pinckney acquired a permit for a development-wide septic system; however, during development, the South Carolina Department of Health and Environmental Control (DHEC) regulations changed, requiring individual permits for each lot. Nester stated DHEC agreed Pinckney's development-wide permit remained valid; however, the County required Pinckney to obtain individual permits for final review. Nester stated that because there was no conditional approval for the septic system, Pinckney's engineering efforts were delayed. Nester stated that on February 23, 2012, the County approved the use of their development-wide permit. He agreed Pinckney faced unusual hurdles during development but admitted the septic issue was the only issue Pinckney had with the County regarding approvals.

Thomas Hartnett, an expert in land appraisals, testified the Road Parcel was worth $5 million at its highest and best use, which was as an access point to a residential development. He agreed that the Road Parcel was still worth $5 million after the County purchased the Point Tract and explained that any party wishing to develop the Point Tract would have to pay $5 million for the Road Parcel.

Gary Kubic, the County Administrator, testified the County had been interested in purchasing the Point Tract since 2003. He stated he approved the Agreement on behalf of the County and admitted he knew Pinckney wanted to build a residential development on the Point Tract. Kubic stated that, to his knowledge, the County had done nothing to restrict access to the Point Tract following the County's acquisition and any taxpayer could access the Point Tract via Colony Road. He testified the County wanted to prevent the development of the Point Tract.

The County moved for a directed verdict. The trial court denied the motion, finding there was evidence from which the "jury could determine that there was a breach of contract."

John H. Irby, one of the owners of ERP, testified via deposition that ERP was not interested in another option with Pinckney; however, if Pinckney had been able to close, they would have sold them the Point Tract.

At the close of the County's case, it again moved for a directed verdict, arguing there was no evidence of a breach of contract, and Pinckney suffered no damages because Hartnett testified the Road Parcel was still worth $5 million. The trial court denied the County's motion, reasoning "there [we]re facts that were testified to [from which] this jury could conclude there was a breach of contract."

In their closing argument, Developers asserted: "[T]he settlement agreement clearly required that the road was private. Everybody agreed it was private; no dedication; no public use. Judge Dukes entered a court order; we looked at it two times; this road is private. And the County has not treated it as private." They further argued:

> As to Road, LLC, what is the breach there? Well, it's that the County is treating it like it's a public road, and the private property is public property, they're contending. They haven't gated it. Their testimony was they had not gated it. The testimony was there were no signs saying you cannot come here. The testimony was that they treat it like a public road.

The jury found the County did not breach its contract with Pinckney; however, it found the County breached its contract with Road, LLC and awarded $5 million in damages.

The County filed a motion for JNOV as to Road's breach of contract claim. The County argued the Agreement only obligated it to do two things—(1) grant the road variance and (2) agree the road was private—and it had already fulfilled those requirements. The County argued there was no latent ambiguity in the Agreement, no evidence Pinckney was treated differently than any other developer, and no evidence the County delayed permitting for the Point Tract. Further, the County asserted the jury verdict as to Pinckney supported the finding there was no evidence the County breached as to good faith and fair dealing against Road, LLC because their claims were interconnected. The County argued it did not breach the implied covenant of good faith and fair dealing because when Pinckney's option ended, Pinckney could no longer meet its obligation under the Agreement; thus, the Agreement became a nullity. The County asserted the only testimony about the value of the Point Tract was that it was still worth $5 million, and any damages

were speculative because there was no certainty Pinckney would acquire the funds needed to turn the tract into a residential community. The County also argued if it used the right-of-way as a public road, the appropriate remedy was an injunction or rule to show cause, and that Road, LLC did not show it caused $5 million in damages by violating the private road clause of the Agreement.

The trial court granted the County's motion for JNOV and entered judgment for the County. The trial court found there was no evidence to support a finding that the County breached the express terms of the Agreement. Specifically, it found the County complied with its obligation to (1) grant the road variance for Pinckney and (2) agree the road was private. The trial court altered its previous ruling and held there was no latent ambiguity in the Agreement and the plain reading of the Agreement did not bind the Point Tract to be used forever as a residential development. It also found the right-of-way was not converted into a public road by the County's purchase of the Point Tract because there was no evidence the County invited the public to use the property or evidence the public used the road. Further, the court found a private road purchased by a government agency does not de facto become a public road.

The trial court found Pinckney had an easement over the Road Parcel, which runs with the land. The trial court also found there was no evidence the County breached the implied covenant of good faith and fair dealing. The trial court found the evidence does not support the assertion the County held up Pinckney's permitting and found Pinckney was treated like any other developer.

The trial court found there were no issues between the County and Pinckney as of February 2012 and Pinckney had over a year to submit for final approval but failed to do so. The trial court held: "There is no evidence that Pinckney . . . was treated in any way differently than any other developer. There is evidence in the record that the County's actions did not cause Pinckney . . . to fail to meet their obligations under the settlement agreement, but rather, Pinckney['s] . . . own actions did." The trial court further held that by the time the County purchased the Point Tract, the Agreement was a nullity because Pinckney could no longer meet its obligations under the contract.

The trial court also held that even if there was evidence to support a breach of contract claim, Developers failed to present any evidence of $5 million in damages. The court found the only evidence as to the current value of the Road

Parcel was from Hartnett, who stated the value of the tract was still $5 million; thus, there was no evidence the Road Parcel lost any value. Additionally, the trial court held the loss of profit was too speculative because Road, LLC's profit was dependent on Pinckney acquiring an investor to repurchase the Point Tract. The trial court stated Developers did not offer evidence that any investor would have invested; they only posited they would have found one if the County had not interfered. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by holding there was insufficient evidence to sustain the jury's verdict that the County breached the Agreement?

2. Did the trial court err by holding there was insufficient evidence to sustain the jury's award of $5 million in damages?

3. Did the trial court err by overturning the jury's damages verdict as "too speculative" because the damages amount was reasonably certain?

4. Did the trial court err by overturning the jury's verdict on the alternate ground that the contract at issue was a "nullity"?

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* at 332, 732 S.E.2d at 171. "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.* "In considering a JNOV, the trial [court] is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Boddie-Noell Props., Inc. v.*

42 Magnolia P'ship, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), *aff'd as modified*, 352 S.C. 437, 574 S.E.2d 726 (2002).

LAW/ANALYSIS

Road, LLC argues the trial court erred in holding there was no evidence of $5 million in damages. Road, LLC asserts the trial court erred by relying solely on Developers' expert witness's testimony that the Road Parcel was still worth $5 million, instead of determining if there was any evidence to support $5 million in damages. Road, LLC further argues the trial court erred in finding the damages were speculative and depended upon an investor. We disagree.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *Id.* (quoting *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990)). "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach." *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). "[P]rofits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach." *Id.* at 122, 113 S.E.2d at 335–36.

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* (quoting *Whisenant*, 277 S.C. at 13, 281 S.E.2d at 796).

We must determine whether evidence was presented to the jury that Road, LLC suffered $5 million in damages as a "proximate result" of a breach of the Agreement. *See Branche Builders, Inc.*, 386 S.C. at 48, 686 S.E.2d at 202 ("The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a *proximate result* of such breach." (emphasis added) (quoting *Fuller,* 240 S.C. at 89, 124 S.E.2d at 610)). First, the jury was presented with no evidence Road, LLC was damaged by the County treating Colony Road as public. A potential breach of the private road clause did not render Developers unable to develop the Point Tract, which Road, LLC asserted caused the $5 million in damages. Thus, there was no evidence Road, LLC suffered $5 million in damages due to the County's breach of the private road clause.

Second, the evidence presented at trial showed Road, LLC did not suffer $5 million in damages because Road, LLC's expert testified that the property was still worth $5 million after the County purchased the Point Tract. Thus, the evidence presented at trial indicated the value of the property did not change. Although we agree with Road, LLC's assertion that the jury can accept or reject Hartnett's testimony regarding the value of the property, without Hartnett's testimony, there was no evidence presented to the jury regarding the value of the Road Parcel. *See Smith v. Safeco Life Ins. Co.*, 303 S.C. 131, 136, 399 S.E.2d 427, 429 (Ct. App. 1990) (order on rehearing) ("The jury is . . . free to accept a portion of a witness's testimony and reject a portion."). Thus, even if the jury ignored Hartnett's testimony about the Road Parcel's current value, there was no other evidence presented regarding the value of the Road Parcel after the County had purchased the Point Tract. Therefore, the jury would have been left to speculate as to what damages Road, LLC suffered. *See Austin*, 387 S.C. at 43, 691 S.E.2d at 146 (providing that "neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation"). Based on the foregoing, we find Road, LLC failed to present evidence it suffered $5 million in damages due to the County's breach of the private road clause.

Because we affirm the trial court's order granting the County's motion for JNOV based on damages, whether the County breached is inconsequential for the disposition of this case. Every element of a breach of contract must be proved, and our holding that Road, LLC failed to prove an element of the claim is dispositive; thus, analysis of the remaining issues is unnecessary. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) ("[A]n appellate

court need not address remaining issues when disposition of a prior issue is dispositive[.]"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

CONCLUSION

For the foregoing reasons, the trial court's order granting the County's motion for JNOV is

AFFIRMED.

GEATHERS and HEWITT, JJ., concur.