The Supreme Court of South Carolina

IN THE MATTER OF ROBERT DWAINE DAY, JR., RESPONDENT

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 9, 1977, Robert Dwaine Day was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 10, 2001, Mr. Day submitted his resignation from the South Carolina Bar. We accept Mr. Day's resignation.

Mr. Day shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Day shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Robert Dwaine Day, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 13, 2001

The Supreme Court of South Carolina

In the Matter of C. Bradley Ruffin, Jr., Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to assume responsibility for Mr. Ruffin's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Ruffin may have maintained.

IT IS ORDERED that Anne E. Janes, Esquire, is hereby appointed to assume responsibility for Mr. Ruffin's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Ruffin may have maintained. Ms. Janes shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Ruffin's clients and may make disbursements from Mr. Ruffin's trust, escrow, and/or

operating account(s) as are necessary to effectuate this appointment.

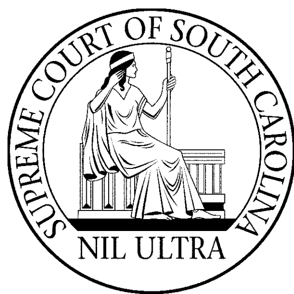
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of C. Bradley Ruffin, Jr., Esquire, shall serve as notice to the bank or other financial institution that Anne E. Janes, Esquire, has been duly appointed by this Court.

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

March 16, 2001



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

March 19, 2001

ADVANCE SHEET NO. 10

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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The State, Respondent,

v.

Bernard Laux, Appellant.

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

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Opinion No. 25262
Heard February 6, 2001 - Filed March 19, 2001

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AFFIRMED

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Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William E. Salter, III, of Columbia, and Solicitor George M. Ducworth, of Anderson, for respondent.

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JUSTICE WALLER: Appellant, Bernard Laux, was convicted of murder and sentenced to thirty years. We affirm.

FACTS

Laux was charged with the murder of his long-time friend and drinking buddy, Frank Joseph (Butch) Beylotte, III, who allegedly owed Laux $2000.00. Beylotte's body was found on John's Island in the early morning hours of March 4, 1997, having been shot in the head and shoulder, and apparently run over by an automobile.

Beylotte was last seen alive with Laux in the late evening hours of March 3, 1997, at the Golden Key Club and the Hayloft Lounge in Charleston. The following morning, police went to Laux' apartment to find him. According to the *in camera* testimony of Detective Michael Conkey, he went to Laux' apartment at 11:15 am and was met at the door by Dee Cooke, who answered the door in her night clothes, appearing to have just gotten out of bed. Cooke told Conkey she lived there with Laux and that it was her apartment.[1] Cooke consented to police searching the one-bedroom apartment, and signed a waiver to that effect. According to Conkey, he saw female clothing in the bedroom and hair spray and brushes in the bathroom. Conkey did not recall seeing a suitcase on the floor.

Dee Cooke testified *in camera* that she had been living with Laux for about one week, that she had a key to the apartment, and that she had told police she lived there and had consented to the search of the apartment. Although she was still "living out of [her] suitcase some," she testified that a number of her personal items were in the bedroom and bathroom.

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[1] Conkey also had information from Golden Key employees that Cooke lived in the apartment with Laux.

Laux moved to suppress the evidence seized,[2] contending Cooke was an overnight guest who had no authority to consent to the search. The trial court ruled there was an appropriate consent, either by a person with apparent authority, or by a person temporarily living in the house.

ISSUE

> Did Cooke, a temporary resident in Laux' apartment, have actual or apparent authority sufficient to consent to a search of the premises, such that the trial court properly denied the motion to suppress?

DISCUSSION

The test of whether a third party has sufficient status to consent to a search is whether the third party possesses common authority over or has some other sufficient relationship to the premises or effects searched. U. S. v. Matlock, 415 U.S. 164 (1974); State v. Middleton, 266 S.C. 251, 258-259, 222 S.E.2d 763, 766 (1976). Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so. Matlock, 415 U.S. at 171, note 7. Accord State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999)(noting that any person with an equal right to use or occupy property may consent to its search).

Whether an individual has actual authority to consent to a search is not, however, necessarily dispositive. In Illinois v. Rodriguez, 497 U.S. 177 (1990), the United States Supreme Court held a consent to search may be valid if based upon apparent authority. The Court stated, "determinations of consent to enter

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[2] Some .357 magnum bullets, a holster, and a few papers were found in the bedroom and kitchen as a result of the search. Laux' 357 revolver was subsequently found stuck inside some cinder blocks outside the Golden Key Club, and a spent bullet shell found at the scene was consistent with having been shot from Laux' weapon.

must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" 497 U.S. at 188. See also United States v. Whitfield, 939 F.2d 1071, 1074 (D.C.Cir.1991); State v. Williams, 655 N.E.2d 764 (Ct. App. Ohio 1995)(finding Rodriguez applicable to situations in which an officer would have had valid consent to search if the facts were as he reasonably believed them to be).[3]

Under Rodriguez, we find the officers in this case were clearly justified in their belief that Cooke had authority to consent to the search.[4] Officer Conkey was told by people at the Golden Key Club that Cooke was living with

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[3] Although this Court has not directly addressed the issue, we have implicitly upheld a search based upon officers' reasonable belief that the person authorizing the search had the authority to do so. State v. Bailey, 276 S.C. 32, 37, 274 S.E.2d 913, 916 (1981) (where defendant left his pickup truck parked in his uncle's yard, without any instructions or restrictions on its use, and vehicle was unlocked with keys inside, it was "reasonable for the officers to believe . . . the [uncle] had authority to consent to the search."). See also State v. Brockman, 329 S.C. 115, 494 S.E.2d 440 (Ct. App. 1998), *rev'd on other grounds,* 339 S.C. 57, 528 S.E.2d 661 (2000)(recognizing that suppression is not warranted if officers had an erroneous but reasonable belief of authority to consent).

[4] Accordingly, we need not decide the more difficult question of whether she had actual authority to do so. Compare People v. Lewis, 716 N.Y.S.2d 204 (N.Y. App. Div. 2000)(defendant's guest who had been living in defendant's residence for approximately one week possessed requisite degree of authority and control over premises to voluntarily consent to police officers' entry) with United States v. White, 40 M.J. 257 (C.M.A. 1994) (roommate who had shared apartment with accused for only two weeks was without actual authority to consent to entry of accused's bedroom); People v. Pickens, 655 N.E.2d 1206 (Ill. App. 1995) (overnight guest whom police found sleeping on defendant's sofa, and whom police had no information lived in defendant's residence, had no authority to consent to search of defendant's residence).

Laux. Conkey went to Laux' apartment and was met by Cooke, who answered the door in her bedclothes at 11:15 am, told him this "was her apartment," and that she "stayed there with Mr. Laux." She then orally consented to a search of the apartment, and signed a written consent search waiver of rights form in which she stated she was "the owner or person in charge of the item or premises to be searched." Moreover, Conkey observed female clothing in the bedroom and hair spray and hair brushes in the bathroom. Conkey did not recall seeing a suitcase on the floor of the apartment.[5]

Dee Cooke verified that she had told police she lived in the apartment and had given her consent to the search, and that a number of her personal effects were in the bathroom and bedroom. She also testified that she possessed a key to the apartment. However, she acknowledged that she had only been staying there for about a week, and that she was still "living out of her suitcase some."

Under these circumstances, we find it was entirely reasonable for Detective Conkey to assume Cooke had authority to consent to the search of the premises. Accord United States v. White, supra (although roommate who had shared apartment with accused for only two weeks was without actual authority to consent to entry of accused's bedroom, officers nonetheless reasonably relied on roommate's apparent authority to consent); United States v. Ramirez, 115 F.Supp.2d 401 (S.D.N.Y. 2000)(objectively reasonable for officers to conclude defendant's girlfriend had authority to consent to search of his apartment where she had property at the apartment, had been staying there for at least one week prior to the search, and she opened the door and let officers inside); State v. McCaughey, 904 P.2d 939 (Idaho 1995)(facts not known to officer at time of search not relevant to question of whether they reasonably believed defendant's wife could consent to search). See also U.S. v. Kinney, 953 F.2d 863, 866-67

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[5] We have viewed photographs of the search scene in which a closed "suitcase" is shown on the floor of the bedroom. The suitcase is small, brown, and leather and somewhat resembles a large attache case. We find nothing in its appearance which would have alerted Conkey's attention to the fact that Cooke was not a permanent resident of the premises.

(4th Cir. 1992) (joint resident's consent to search closet valid because officers had reasonable belief in apparent authority because she possessed closet key and opened closet in presence of officers); U.S. v. Thomas, 120 F.3d 564, 571 (5th Cir. 1997), cert. denied 522 U.S. 1061 (1998) (babysitter had apparent authority to consent to search of common areas of apartment, including bedrooms and areas he was permitted to use and given free access to as a babysitter).

We hold it was objectively reasonable for officers to conclude Cooke had apparent authority to consent to the search of the residence. Accordingly, the trial court's ruling denying Laux' motion to suppress is

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Belinda Sue Pearson, Respondent,

v.

Tommy L. Bridges, M.D., Petitioner.

____

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Greenville County
Frank P. McGowan, Jr., Circuit Court Judge

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Opinion No. 25263
Heard February 20, 2001 - Filed March 19, 2001

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AFFIRMED IN RESULT

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Gregory A. Morton and Ashby W. Davis, both of Donnan, Morton, Davis & Snyder, P.A., of Greenville, for petitioner.

Larry C. Brandt, P.A., of Walhalla, for respondent.

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CHIEF JUSTICE TOAL: We granted certiorari in this medical malpractice action to review the Court of Appeals' decision upholding the jury's $755,000 damage award to Belinda Sue Pearson ("Pearson").

FACTUAL/ PROCEDURAL BACKGROUND

On May 1, 1992, Dr. Tommy L. Bridges ("Dr. Bridges") examined Pearson, then a twenty-six year old, who had known problems with gallstones. Dr. Bridges recommended Pearson have her gallbladder removed. Because it was less painful and recovery time was shorter, Dr. Bridges recommended a laparoscopic surgery instead of an open procedure. During the laparoscopic gallbladder surgery on May 6, 1992, Dr. Bridges mistakenly cut the common bile duct instead of the cystic duct. After realizing the mistake, Dr. Bridges converted the surgery to an open procedure, and attempted to repair the common bile duct by inserting a stent. After the surgery, a stricture[1] formed where the bile duct had been cut, necessitating a second surgery by Dr. Bridges in early November 1992 to redo the repair and again stent the bile duct.

Pearson was referred to another doctor in 1993. On September 3, 1993, Pearson had another surgery to replace the stent in her bile duct. The stent was replaced several times because of blockage. In April 1994, Pearson appeared to be doing well, and the stent was removed. However, in May 1994, another stricture developed, and Pearson underwent surgery to insert another stent. That stent was removed in November 1995. At the time of trial in 1997, Pearson had not had any further strictures.

Pearson filed a medical malpractice action against Dr. Bridges in April 1995. In March 1997, the case was tried before a jury. The jury ultimately returned a verdict in favor of Pearson and awarded her $755,000 in damages.

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[1]A stricture is a narrowing of the duct caused by the build up of scar tissue.

Dr. Bridges appealed the damages award.[2] The Court of Appeals, with Judge Anderson dissenting, affirmed. *Pearson v. Bridges*, 337 S.C. 524, 524 S.E.2d 108 (Ct. App. 1992).

Dr. Bridges then filed a petition for certiorari, and the sole issue before this Court is:

> I. Did the Court of Appeals, in determining whether the trial judge erred in admitting the evidence of future medical damages in this case, improperly utilize the standard of proof the jury uses to determine whether future medical expenses have been proven?

LAW/ ANALYSIS

Dr. Bridges argues the Court of Appeals erred in utilizing the jury's standard of proof, instead of the trial judge's standard of admissibility, when determining whether the trial judge erred in admitting the evidence of future medical damages. We agree. The Court of Appeals' opinion confuses and intertwines the standard of proof with the standard of admissibility. However, even under the correct standard, the trial judge did not err in admitting the testimony concerning future damages.

Pearson's medical expert testified there were four scenarios whereby Pearson could incur future medical expenses:

> Scenario One: Continual monitoring of Pearson's condition to discover any more strictures and complications.
> Projected Cost: $9,473.78
>
> Scenario Two: If the duct restrictured, another

[2]Dr. Bridges did not appeal the finding of liability.

cholangioplasty would need to be performed.
Projected Cost: $20,107.56

Scenario Three: If scenario two failed and surgery was required.
Projected Cost: $38,683.62

Scenario Four: If scenarios two and three failed, a possible liver transplant.
Projected Cost: $237,128.39

Dr. Bridges did not object to Pearson's presentation of testimony and evidence on scenario number one. He did object to the presentation of the expert's testimony concerning scenarios two, three, and four.[3]

Pearson's expert testified there was a twenty-five to thirty percent chance scenario number two would occur. The expert then testified scenario number three would occur only if the number two stent procedure failed. He further testified if number two and three occurred and failed, Pearson might need a liver transplant. Pearson's other medical expert testified, "to a reasonable degree of medical certainty, Ms. Pearson will not need a liver transplant -- that is greater than 51 [percent]."

Dr. Bridges argued at trial, and now argues on appeal, the testimony was inadmissible because Pearson was required to prove the future expenses would "most probably" occur. The trial judge overruled Dr. Bridges' objections, and admitted the testimony.

The majority of the Court of Appeals agreed with the trial court that the

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[3]There is no dispute that if Pearson incurs these future medical expenses, they would be the proximate result of Dr. Bridges' negligence. The dispute in this case is over the *probability* that these damages will arise in the future.

evidence was admissible, holding, "the most probable standard required to prove causation is not the standard to be applied in determining the admissibility of evidence of future damages. Rather, the evidence must be beyond speculation or conjecture and reasonably certain to occur." *Pearson*, 337 S.C. at 533, 524 S.E.2d at 113. The Court of Appeals was correct in finding the "most probable" standard is not the standard of admissibility in South Carolina.[4] However, whether future medical expenses are "reasonably certain" to occur is also the incorrect standard to use in determining admissibility. Whether future damages are "reasonably certain" to occur is the *standard of proof* for future damages, not the *standard of admissibility*. *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972) (to recover future damages in a negligence case, the plaintiff must prove the damages are reasonably certain to occur).[5]

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[4]The "most probable" standard is the standard required to prove proximate cause. *See Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976) ("when the opinions of medical experts are relied upon to establish causal connection of negligence to injury, the proper test to be applied is that the expert must, with reasonable certainty, state that in his professional opinion the injuries complained of *most probably* resulted from the alleged negligence of the defendant"). We reaffirm the requirement that plaintiff must prove defendant's negligence, in probability, proximately caused plaintiff's injuries.

[5]The trial judge properly charged the jury on the standard of proof. His charge, in relevant part, stated: "your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future. . . I further instruct you that the existence or amount of damages may not be left to conjecture, speculation or guess." The issue of whether the jury's verdict was supported by the evidence is not before this Court. However, we note the jury returned a general verdict in this case in the amount of $755,000. Dr. Pearson never requested a special verdict form separating the elements of damage, and, therefore, there is no way of knowing whether any allowance was made for future medical expenses. The uncontested actual medical expenses in this case were $197,508.43. The remaining damage award could have been awarded for pain and suffering, future pain and suffering, mental anguish, loss of enjoyment of life, impairment of ability to work, etc. There is simply no way

The question in this case is whether the evidence was properly admitted, *not* whether the evidence was sufficient to support a verdict including future damages. The Court of Appeals decision confuses these two standards.[6]

Under current South Carolina law, the standard of admissibility for evidence of future damages is "any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent." *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-282 (1969). "The fact that future medical expenses might conceivably be small and are difficult to estimate would not deprive the plaintiff of the right to have the jury determine whether any award for future medical be made, and if so, what amount." *Kelly v. Brazell*, 253 S.C. 564, 567-568, 172 S.E.2d 304, 306 (1970). In *Kelly*, the trial judge charged the jury an award could not be based on speculation and that damages must be proven by the preponderance of the evidence. This charge created a jury question as to whether the need for future treatment had been proven. *See Haltiwanger, supra* (it is the duty of the jury to estimate, as best it can, the future damages which are reasonably certain to be accrued by the plaintiff).

In *Martin, supra*, the doctor testified that his opinion as to the extent of the plaintiff's permanent disability was, "[t]hese patients have a general disability in the neighborhood of ten or fifteen percent disability following this type of surgery." This Court found no error in the admissibility of the testimony since, "[t]he fact that the doctor had not had opportunity to consider whether the

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to determine if the jury allocated any money for future medical expenses.

[6]The Court of Appeals indicates that *Martin v. Mobley*, 253 S.C. 103, 169 S.E.2d 278 (1969), changed the standard for admissibility of future medical expenses. The question in that case, as in this one, was whether the evidence of future damages was admissible. The earlier cases cited by the Court of Appeals referred to the requirement that future damages must be established with "reasonable certainty" involved the standard of proof. Therefore, the Court of Appeals erred in finding that *Martin* changed the standard of admissibility.

plaintiff's permanent disability was more or less than that which generally followed such a condition and operation affected . . . only the weight and not the admissibility of the proffered evidence." *Id.* at 109, 169 S.E.2d at 281.

The evidence of the medical expenses of scenarios two, three, and four was admissible. These scenarios tended to establish the extent of Pearson's injuries. *Id.* The fact that Pearson's experts testified that the possibilities of scenarios two, three, and four occurring were 30 percent or less went to the weight of the evidence not its admissibility. *Id.* Whether Pearson proved the expenses were "reasonably certain" to occur so she would be entitled to an award of future damages was a question for the jury to determine. *Haltiwanger*, *supra*.[7]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the Court of Appeals in **RESULT**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[7]We note that even if the future damages testimony was inadmissible, Dr. Bridges has failed to prove any prejudice since the jury returned a general verdict. *See* Footnote 4.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

Minyard Lee Woody,

Appellant.

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Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

____

Opinion No. 3314
Heard February 8, 2001 - Filed March 5, 2001

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VACATED IN PART AND REMANDED

____

Assistant Appellate Defender Aileen P. Clare, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Holman C. Gossett, of Spartanburg, for respondent.

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HOWARD, J.: Minyard Lee Woody was convicted of second degree burglary and sentenced to life in prison without the possibility of parole, pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2000).[1] Woody appeals his burglary sentence, arguing the trial court erred by refusing to apply S.C. Code Ann. § 17-25-50 (1985) so as to treat his two prior convictions as one for purposes of sentencing. We vacate Woody's life sentence and remand for re-sentencing on the burglary conviction.

FACTS

Woody was convicted of second degree burglary in July, 1999. At sentencing, the State asserted this was Woody's third serious offense as defined in section 17-25-45[2] because Woody had previously been convicted of two armed robberies. In support of its contention, the State presented two indictments to which Woody pleaded guilty on January 21, 1981, alleging that on April 24, 1980, Woody committed two armed robberies; one of a convenience store, and one of the convenience store's clerk.[3]

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[1] Woody was also convicted of Petit Larceny and received a consecutive ten year sentence. There is no appeal from that conviction or sentence.

[2] Section 17-25-45 is a part of the Omnibus Crime Act, and provides in part that a person convicted of a "serious offense" as defined within the statute must be sentenced to life in prison without the possibility of parole if that person has two or more prior convictions for "serious" or "most serious" offenses.

[3] For the first time on appeal, and in contrast to the written brief, the State asserted in oral argument that the record does not establish with certainty that the two prior armed robberies occurred as one incident. We reject this argument, because the convictions were presented to the sentencing judge by both the State and the defense as occurring as one incident, at one location, and at one time. Two charges were brought because different victims were involved. The trial judge considered them as such, and no factual basis was proffered by the State to the contrary.

DISCUSSION

Woody argues that the two prior convictions should be treated as one, pursuant to section 17-25-50. That section reads as follows:

> [i]n determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

S.C. Code Ann. § 17-25-50 (1985).

The trial court rejected this argument, concluding section 17-25-45(F) contained language defining prior offenses differently for purposes of that section only, and therefore, section 17-25-50 did not apply. Section 17-25-45(F) reads in applicable part as follows:

> [f]or the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

S.C. Code Ann. § 17-25-45(F) (Supp. 2000). Finding that both prior convictions occurred on a separate, prior occasion from the burglary conviction, the trial court considered them as two prior "most serious" offenses, thereby mandating a sentence of life without parole on the burglary conviction.

We disagree with the trial court's interpretation and conclude that sections 17-25-45(F) and 17-25-50 may easily be reconciled so that both apply in the present circumstances. Contrary to the State's argument, we find nothing to suggest section 17-25-45(F) somehow abrogates section 17-25-50.

> Criminal statutes must be strictly construed against the State and in favor of the defendant. The elementary and cardinal rule of

> statutory construction is that the court must ascertain and effectuate the intent of the legislature. Therefore, in interpreting a statute, the words must be given their plain and ordinary meaning without resorting to a subtle or forced construction that limits or expands the statute's operation. Statutes, as a whole, must receive "practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers."

State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999) (citations omitted) (quoting Whiteside v. Cherokee County Sch. Dist. No. 1, 311 S.C. 335, 340, 428 S.E.2d 886, 888 (1993)).

The court should not consider the particular clause in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. Prince, 335 S.C. at 472, 517 S.E.2d at 232. Statutory provisions should be read so as to be consistent with the purpose of the statute. Id. Furthermore, statutes that are part of the same act must be read together and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable. Id.

Section 17-25-50 requires the trial court to combine prior offenses "arising out of simultaneous acts committed in the course of a single incident." State v. Boyd, 288 S.C. 206, 209, 341 S.E.2d 144, 146 (Ct. App. 1986) (holding that under section 17-25-50, two prior violations of the Controlled Substances Act occurring in the same incident should be treated as one offense, and noting that if multiple prior convictions are obtained for violations of the Controlled Substance Act unrelated to one another and not arising out of a single incident, there is no prohibition against counting each conviction separately for sentencing purposes). In State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972), our supreme court recognized that this section is a recidivist statute. See Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1999).

In contrast, section 17-25-45(F) limits prior convictions which may trigger the life without parole provision contained in section 17-25-45 to those convictions which are separate from and prior to the present adjudication.

Consequently, these two statutes can properly be read together and applied to Woody. The two prior armed robberies were closely connected offenses within one incident. Therefore, in determining the number of prior offenses, they must be treated as one conviction under section 17-25-50 for sentencing purposes. As one incident, the armed robbery constituted a single "most serious offense." See S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2000) (defining the term "most serious offense"). Applying section 17-25-45(F), this conviction is considered a prior "most serious offense" because it occurred on a separate occasion from the present adjudication on the second degree burglary charge.

Woody's conviction for second degree burglary is categorized as a "serious offense." See S.C. Code Ann. § 17-25-45(C)(2) (Supp. 2000) (defining the term "serious offense"). Therefore, his prior "most serious offense" of armed robbery does not invoke the life without parole provision of section 17-25-45(B), which requires two or more such prior convictions as a trigger. S.C. Code Ann. § 17-25-45(B) (Supp. 2000).

CONCLUSION

For the foregoing reasons, we vacate Woody's sentence of life in prison without possibility of parole for the burglary conviction and remand for re-sentencing on that charge in accordance with this opinion.

VACATED IN PART, AND REMANDED.

CONNOR, and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

Ronald L. Woodruff,

Appellant.

____

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

____

Opinion No. 3315
Heard January 9, 2001 - Filed March 12, 2001

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REVERSED

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Assistant Appellate Defender Robert M. Pachak, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Charles H.

Richardson, all of Columbia; and Solicitor George M. Ducworth, of Anderson, for Respondent.

ANDERSON, J.: Ronald L. Woodruff appeals his conviction for trafficking in crack cocaine. Woodruff contends the trial court erred in denying his motion to suppress evidence pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). We reverse.

FACTS/PROCEDURAL BACKGROUND

At the suppression hearing, the trial court viewed two police video tape recordings which depicted a June 4, 1998 traffic stop and thirty minute detention. One of the video tapes came from Officer Matthew Durham's patrol car. The second video tape was obtained from Officer James Littleton's patrol car. Both officers testified at trial regarding the detention. The tapes, together with the testimony, reveal the following.

At approximately 10:22 a.m. on June 4, 1998, Officer Matthew Durham, with the Anderson County Sheriff's Department, stopped a vehicle for speeding. The driver of the automobile was Alex Graham. One of the vehicle's windows was broken. Shortly after Officer Durham stopped the vehicle, Officer James Littleton arrived on the scene. Woodruff was a passenger in the vehicle. Officer Durham asked to see Graham's driver's license or identification, but Graham was unable to produce either. Graham told Officer Durham his last name was "Harriston" and provided an address and date of birth. Graham informed Officer Durham that he and Woodruff had been to Atlanta to "see some girls" and the vehicle belonged to Woodruff. Officer Durham called in the information Graham provided for verification, along with the automobile's tag number. Officer Durham testified the resulting report indicated the car belonged to Robert Moore, who had been reported missing.

According to Officer Durham, Woodruff, when questioned, declared he owned the automobile, but he was unable to produce a registration for the car. Upon further questioning, Woodruff indicated he and Graham had taken Graham's girlfriend to Atlanta to "drop her off." Officer Durham stated Woodruff provided several different names during the stop.

About 10:34 a.m., Officer Durham issued Graham a warning ticket for speeding and asked him for permission to search the car. Graham consented to the search.

At approximately 10:35 a.m., prior to the vehicle search, Woodruff got out of the car. Officer Durham conducted a pat-down on both Graham and Woodruff. Neither search revealed weapons. The vehicle search, which lasted approximately ten minutes, produced a small set of scales and a number of identification cards, none of which depicted either Graham or Woodruff. Officer Durham stated Woodruff claimed to be one of the persons pictured on one of the identification cards, but the claim proved to be false.

After the vehicle search, Officer Durham searched Woodruff a second time. On direct examination, Officer Durham gave the following account of the second search:

> A. At that time after all the names and anything was adding up--kept finding different IDs, the inconsistencies with their stories, the busted window,--at that time I did a more thorough search on the passenger using my hands and went down through his groin area and at that time I felt a bulge in his groin area.
>
> Q. And what did you do when you felt that bulge?
>
> A. Asked the subject what was in his pants.
>
> Q. And what did he tell you?

A. He pulled his britches out and at that time I could visually see the cocaine in his pants.

Q. Did you remove it?

A. No, ma'am.

Q. Who removed it?

A. I asked the subject to remove it for me.

On cross-examination, Officer Durham testified as follows regarding the second search:

A. At that time we started finding more IDs. I think he produced the ID and we got to finding IDs in the car. The stories that they were giving weren't adding up as to where they said they were going and where they were coming from and the window being busted out of the car. Supposedly now he's a missing person out of North Carolina, and then he goes from there to that he's not even the owner of the car--At that time I decided I may have missed something, so, I searched him again.

Q. Okay, when you patted him down the first time, you didn't find any weapons?

A. No, sir.

Q. You didn't expect to find any weapons when you patted him down again, did you?

A. At that time I wasn't looking for weapons.

Q. Well, what were you looking for?

A. I was looking to see if there was any more IDs or anything else on him that made me believe that he isn't who he says he is.

Q. And the second time you searched him this was a more extensive search, wasn't it?

A. Yes, it was.

. . . .

Q. But,–you felt a bulge in his pants.

A. That's correct.

Q. Okay, did that bulge feel like a knife?

A. A knife?

Q. Yeah.

A. No.

Q. Did it feel like a gun?

A. No.

Q. Did it feel like brass knuckles?

A. No.

Q. Did it feel like any type of weapon?

A. No.

Q. What did it feel like?

A. At the time I wasn't sure; that's why I asked him what he had in his pants and at that time he pulled his waistband out and when he did that I looked down in his pants and you could visually see the cocaine in the bag.

Approximately thirty minutes elapsed between the time Officer Durham made the traffic stop and the time he conducted the second search of Woodruff. The material seized from Woodruff was determined to be 30.34 grams of crack cocaine.

LAW/ANALYSIS

Woodruff argues the trial court erred in refusing to suppress the crack cocaine because it was seized pursuant to an unlawful and unreasonable thirty minute Terry search. We agree.

I. Law

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734, 737 (1891). It has, however, long been recognized that not all personal encounters between policemen and citizens involve "seizures" of persons thereby bringing the Fourth Amendment into play. State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v.

Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509 (1980)(quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081-82, 49 L.Ed.2d 1116, 1126 (1976)).

A person has been "seized" within the meaning of the Fourth Amendment "whenever a police officer accosts [the] individual and restrains his freedom to walk away." Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889, 903 (1968). See also Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)("An individual is 'seized' when an officer restrains his freedom, even if the detention is brief and falls short of an arrest."). That is, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry, 392 U.S. at 19 n.16, 88 S.Ct. at 1879 n.16, 20 L.Ed.2d at 905 n.16.

In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, thereby implicating Fourth Amendment protection, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave. Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509. So long as the person approached and questioned remains free to disregard the officer's questions and walk away, there has been no intrusion upon that person's liberty or privacy and, therefore, no constitutional justification for the encounter is necessary. Id. See also Foster, 269 S.C. at 379, 237 S.E.2d at 591 (person has not been seized where he is neither detained nor frisked and remains free to refuse to cooperate with enforcement officers).

The Supreme Court has often observed that searches and seizures "'conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.'" Thompson v. Louisiana, 469 U.S. 17, 20, 105 S.Ct. 409, 410, 83 L.Ed.2d 246, 250

(1984)(per curiam)(quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967)(footnotes omitted)). See also Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)(Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside judicial process, without prior approval by magistrate or judge, are per se unreasonable, subject only to specifically established exceptions). The Court recognized one such exception in Terry v. Ohio, wherein the Court held "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. Terry, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911.

A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911; State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); Blassingame, 338 S.C. at 248, 525 S.E.2d at 539. See also State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977)("It is recognized that the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity.").

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997). In determining whether reasonable suspicion exists, the whole picture must be considered. United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); Blassingame, 338 S.C. at 248, 525 S.E.2d at 539. If the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances. Blassingame, 338 S.C. at 248, 525 S.E.2d at 539; State v. Kirkpatrick, 320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995).

Generally, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). See also Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985)(officer may stop automobile and briefly detain occupants, even without probable cause to arrest, if he has reasonable suspicion occupants are involved in criminal activity).

Expressly recognizing the risk involved when a police officer approaches a person seated in an automobile, the United States Supreme Court articulated: "[O]nce a motor vehicle has been lawfully detai[n]ed for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6, 98 S.Ct. 330, 333 n.6, 54 L.Ed.2d 331, 337 n.6 (1977). Applying its decision in Terry, the Supreme Court in Mimms ruled that, subsequent to a valid Terry stop for a traffic violation, a police officer may search the individual for weapons where the officer has reason to believe the person is armed and dangerous. Mimms, 434 U.S. at 111-12, 98 S.Ct. at 334, 54 L.Ed.2d at 337. See also Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)(under Terry doctrine, law enforcement officer, for his own protection and safety, may conduct patdown to find weapons he reasonably believes or suspects are in possession of person he has stopped). Further, reasoning that the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car," the Supreme Court concluded the Mimms rule applies to passengers as well as drivers. Maryland v. Wilson, 519 U.S. 408, 414, 117 S.Ct. 882, 887, 137 L.Ed.2d 41, 48 (1997).

In assessing whether a suspect is armed and dangerous, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. See also

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)(officer must be able to specify particular facts on which he based his belief suspect was armed and dangerous; officer is not entitled to seize and search every person on the street; mere knowledge of suspect being known narcotics dealer who put his or her hand into a pocket as police approached does not provide justification). Cf. United States v. Moore, 817 F.2d 1105 (4th Cir. 1987)(justification found where suspect was only person observed in vicinity of building late at night, shortly after alarm sounded, and street was dark, officer was alone, and suspected crime was burglary); State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996)(in order to support his decision to "frisk" defendant subsequent to valid Terry stop, officer must be able to specify particular facts on which he based his belief suspect was armed and dangerous; reasonable person in officer's position must believe frisk was necessary to preserve officer's safety).

The scope of a search authorized by Terry is limited. In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), a police officer stopped a suspect and conducted a patdown search. Although the search did not reveal any weapons, the officer conducting the search felt a small lump in the suspect's nylon jacket. The officer testified: "'[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.'" Id. at 369, 113 S.Ct. at 2133, 124 L.Ed.2d at 341. The officer then reached into the suspect's pocket and retrieved a small plastic bag containing one-fifth of one gram of crack cocaine.

On appeal, the Supreme Court held that police officers may seize nonthreatening contraband detected through the sense of touch during a protective patdown search permitted by Terry, but only if the officers' search stays within the bounds marked by Terry. Id. at 373, 113 S.Ct. at 2135-36, 124 L.Ed.2d at 344. Specifically, the Court explained:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for

> weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Dickerson, 508 U.S. at 375-76, 113 S.Ct. at 2137, 124 L.Ed.2d at 346. Further, the Dickerson Court instructed:

> "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." Adams [v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972)]. Rather, a protective search--permitted without a warrant and on the basis of reasonable suspicion less than probable cause--must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Terry, supra, at 26, 88 S.Ct. at 1882, 20 L.Ed.2d 889; see also Michigan v. Long, 463 U.S. 1032, 1049, and 1052, n.16, 103 S.Ct. 3469, 3480-81, and 3482, n.16, 77 L.Ed.2d 1201 (1983); Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343-44, 62 L.Ed.2d 238 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed. Sibron v. New York, 392 U.S. 40, 65-66, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968).

Dickerson, 508 U.S. at 373, 113 S.Ct at 2138, 124 L.Ed.2d at 344.

The courts of this state have recognized and applied the principle that law enforcement officers are not granted, under the purview of Terry, a general warrant to rummage and seize at will,[1] and that any evidence stemming from an

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[1]See Texas v. Brown, 460 U.S. 730, 748, 103 S.Ct. 1535, 1546-47, 75 L.Ed.2d 502, 518 (1983) (Stevens, J., concurring in judgment)(Supreme Court "has been sensitive to the danger . . . that officers will enlarge a specific

unlawful detention must be excluded as "fruit of the poisonous tree." The case of Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), involved a traffic stop which resulted in a twenty minute detention during which Sikes, the passenger of a vehicle, was searched twice before being placed in a police car. When Sikes got out of the police car, an officer found a bag of crack cocaine on the back seat. Our Supreme Court determined:

> When an officer stops a vehicle for a traffic violation, he may briefly detain the vehicle and its occupants while he examines the vehicle registration and the driver's license. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (emphasis added). Although Sikes does not challenge the officers' initial stop of the automobile, Sikes claims that the officers improperly seized him to run a warrant check with no reasonable cause. An individual is "seized" when an officer restrains his freedom, even if the detention is brief and falls short of arrest. The scope and duration of seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In South Carolina, we have gone a little further by holding that an officer may stop a car and briefly detain the occupants if he has a reasonable suspicion that the occupants are involved in criminal activity. Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985) (emphasis added).
>
> . . . .
>
> Here the officers' "reasonable suspicion" was that the car was either stolen or that the driver was uninsured. Under Knight, supra, neither of these reasons gave the officers the right to seize or question the car's passenger. Moreover, even assuming arguendo that this stop was reasonable, certainly a twenty minute detention

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authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.").

> while the officers "went fishing" for evidence of some crime was not brief within the definition announced in Prouse, supra, or in Knight, supra. See also State v. Damm, 246 Kan. 220, 787 P.2d 1185 (1990)(seizure of occupants of the vehicle while routine records checks were made of the occupants was unreasonable); State v. Johnson, 805 P.2d 761 (Utah 1991)(the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the rational inference from specific and articulable facts and degenerated into an attempt to support an as yet unparticularized suspicion or hunch).
>
> The detention and arrest of the Petitioner was unlawful; therefore, the evidence of the Petitioner's possession of crack cocaine would have been inadmissible as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981).

Sikes, 323 S.C. at 31-32, 448 S.E.2d at 562-63 (emphasis added).

The reasonableness of an "on-the-scene" warrantless seizure depends on the balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. See State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977)(citing United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)). The applicable balancing test employs judicial review of all of the circumstances including but not limited to: (1) the seriousness of the offense; (2) the degree of likelihood that the person detained may have witnessed or been involved in the offense; (3) the proximity in time and space from the scene of the crime; (4) the urgency of the occasion; (5) the nature of the detention and its extent; (6) the means and procedures employed by the officer; and (7) the presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant. United States v. Holland, 510 F.2d 453 (9th Cir. 1975); State v. Rodriquez, 323 S.C. 484, 476 S.E.2d 161 (Ct. App. 1996).

Given the intrusive nature of a seizure and considering the fact that on occasion a person may be wrongfully stopped, the United States Supreme Court has held, as has the Supreme Court of this State, that the scope and duration of a Terry detention "must be strictly tied to and justified by the circumstances which rendered its initiation proper." Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983); Sikes, 323 S.C. at 30, 448 S.E.2d at 562. The burden falls upon the State to "demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Royer, 460 U.S. at 500, 103 S.Ct. at 1326, 75 L.Ed.2d at 238.

In State v. Rodriquez, this Court considered the scope of a thirty minute detention. The Court discussed the background of a train trip by Rodriquez resulting in his detention and explicated:

> Even assuming an investigative detention was proper at that point, we find a thirty minute detention while the officers attempted to elicit incriminating evidence from Rodriquez is the type of fishing expedition denounced by our Supreme Court in Sikes, 448 S.E.2d at 563 (assuming arguendo, that stop of motor vehicle passengers was reasonable, twenty minute detention while officers "went fishing" for some evidence of crime was not brief). In light of the foregoing, we hold the intrusion of the officers in this case was not reasonable.

Rodriquez, 323 S.C. at 494, 476 S.E2d at 166-67. See also United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605, 615 (1985)("In assessing whether a detention is too long in duration to be justified as an investigative stop, [it is] appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.").

II. Analysis

In the instant case, Woodruff moved to suppress the crack cocaine Officer Durham found in Woodruff's pants as poisonous fruit of an improper frisk. After viewing police video tapes of the incident, the trial court ruled the cocaine admissible, concluding that although the second search was questionable, the officers acted reasonably in light of the developing scenario. We hold the evidence was improperly admitted.

Because Officer Durham observed Graham speeding, he was justified in conducting a traffic stop. Once Graham was lawfully detained for speeding, Officer Durham could ask Woodruff to step out of the vehicle. Graham consented to a search of the vehicle. There has been no challenge as to the propriety of Officer Durham's initial patdown of Woodruff in order to search for weapons. Thus, the dispositive issue before us is whether Officer Durham discovered the contraband on Woodruff's person while acting within the lawful parameters of Terry.

Officer Durham's second search of Woodruff was, without question, unrelated to any reasonable apprehension Woodruff was armed with a weapon. Officer Durham had already searched Woodruff for weapons and admitted he was not looking for weapons during the second search. Rather, because he feared he may have "missed something" the first time he searched Woodruff, Officer Durham decided to conduct a second, more thorough search for evidence of a crime. In so doing, Officer Durham acted outside the "strictly circumscribed" search for weapons authorized in Terry. See Terry, 392 U.S. at 26, 88 S.Ct. at 1882, 20 L.Ed.2d at 908. In our view, this behavior constitutes the very type of evidentiary search, or "fishing expedition," Terry expressly refused to authorize and which has been condemned time and again by the United States Supreme Court, as well as the courts of this State.

CONCLUSION

We hold the second search of Woodruff was constitutionally violative. Therefore, evidence of his possession of crack cocaine was inadmissible as fruit

of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). Accordingly, Woodruff's conviction for trafficking in crack cocaine is

REVERSED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

Joseph Myers,

Appellant.

____

Appeal From Orangeburg County
Diane S. Goodstein, Circuit Court Judge

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Opinion No. 3316
Heard February 5, 2001 - Filed March 12, 2001

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AFFIRMED

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Chief Attorney Daniel T. Stacey, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorney

General Toyya Brawley Gray; and Solicitor Walter M. Bailey, of Summerville, for respondent.

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HEARN, CJ.: Joseph Myers appeals his convictions for assault and battery with intent to kill (ABIK) and assault and battery of a high and aggravated nature (ABHAN). He argues the trial court erred in admitting character evidence and in submitting a confusing verdict form to the jury. We affirm.

Myers attended a cookout in February 1998. When Robert Thomas arrived, the two began to argue and were asked to take their argument outside the house. Once outside, the confrontation turned physical, and Myers stabbed Thomas in the neck and abdomen. Mary Young also suffered a cut as she tried to persuade them to leave.

The Orangeburg County Grand Jury indicted Myers on charges of ABIK for assaulting Thomas and ABHAN for assaulting Young. At trial, Thomas testified over defense objection that he picked up a board as he left the house because "I kn[e]w [Myers] was dangerous and I kn[e]w that he carried a knife." Thomas said he dropped the board when Young asked them to leave. As he walked away, Myers's girlfriend blocked his way, asking him if he wanted to fight. Myers then reached around his girlfriend and began stabbing Thomas.

Myers testified in his own defense. He admitted stabbing Thomas, but claimed he only did so because Thomas threatened him with the board. He feared Thomas would hit him with the board if he turned to leave. Myers testified Thomas did not drop the board until after the stabbing.

At the close of the case, the court held a hearing to discuss the jury charges and verdict form. The court decided to submit two lesser included offenses under the ABIK indictment and one lesser included offense under the

ABHAN charge. The court drafted a special verdict form with five interrogatories consisting of a statement followed by a choice of YES or NO and an instruction.[1] The court used the interrogatories because the charges

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[1] The jury form stated:

> Please circle the appropriate answers below and follow the accompanying instructions carefully.
>
> 1. We the jury unanimously find beyond a reasonable doubt that Joseph Myers, III did in Orangeburg County on or about February 17, 1998, commit an ASSAULT AND BATTERY WITH INTENT TO KILL upon Robert Thomas. **YES** **NO**
>
> **If your answer is yes, go to question 4, if your answer is no then proceed to question 2.**
>
> 2. We the jury unanimously find beyond a reasonable doubt that Joseph Myers, III did in Orangeburg County on or about February 17, 1998, commit an ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE upon Robert Thomas. **YES** **NO**
>
> **If your answer if yes, go to question 4, if your answer is no then proceed to question 3.**
>
> 3. We the jury unanimously find beyond a reasonable doubt that Joseph Myers, III did in Orangeburg County on or about February 17, 1998, commit a SIMPLE ASSAULT AND BATTERY upon Robert Thomas. **YES** **NO**
>
> **Proceed to question 4.**

against Myers involved two separate victims and each charge had at least one lesser included offense. Myers objected to the court's interrogatory verdict form, arguing it would confuse the jury.

After the court issued its instructions to the jury, Myers renewed his objection. By circling YES on two of the five interrogatories, the jury convicted Myers of ABIK and ABHAN as charged. This appeal follows.

DISCUSSION

I. Character Evidence

First, Myers argues the trial court erred in allowing Thomas to testify he knew Myers was dangerous and carried a knife. On appeal, Myers contends this improperly placed his character into evidence. However, at trial the basis of Myers's objection to Thomas's testimony was that the testimony

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> 4. We the jury unanimously find beyond a reasonable doubt that Joseph Myers, III did in Orangeburg County on or about February 17, 1998, commit an ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE upon Mary Young. **YES** **NO**
>
> **If your answer is yes, stop and end your deliberations, if your answer is no then proceed to question 5.**
>
> 5. We the jury unanimously find beyond a reasonable doubt that Joseph Myers, III did in Orangeburg County on or about February 17, 1998, commit a SIMPLE ASSAULT AND BATTERY upon Mary Young. **YES** **NO**
>
> **Stop and end your deliberations.**

was irrelevant. Myers never argued to the trial court that Thomas's testimony improperly placed his character into evidence. Because his argument now differs from the ground for his trial objection, this issue is not preserved. See State v. McCray, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). Myers may not argue one ground at trial and then an alternative ground on appeal. See State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Accordingly, this issue is not preserved for our review.

II. Special Verdict Form

Next, Myers asserts the trial court's use of interrogatories in its verdict form was confusing and may have obscured the jury's opportunity to find him not guilty.[2] Myers claims the jury form was confusing and prejudiced him by precluding the jury from finding him not guilty. He further asserts that the trial court did not remedy this error through its oral instructions to the jury. We disagree.

The verdict form required the jury to either circle YES or NO for each individual interrogatory reached and instructed the jury how to proceed from one interrogatory to the next. The term "not guilty" did not appear anywhere on the verdict form, although the trial judge stated in her instructions to the jury that one of the possible verdicts was not guilty.

It is the preferred practice to submit the possible verdict of "not guilty" to the jury; however, the law to be charged must be determined from the

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[2] We address the merits of this issue, although we note its preservation is questionable. At trial, Myers objected because the jury form might confuse the jury. However on appeal, Myers argues the form is defective because it did not contain the words "not guilty." Arguably, trial counsel's objections were based on different grounds. (See State v. McCray, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (stating that a party may not argue one ground at trial and another on appeal)).

evidence presented. State v. Somerset, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981); State v. Rogers, 275 S.C. 485, 486, 272 S.E.2d 792, 792 (1980). A jury should be instructed that one verdict it can reach is "not guilty," especially where the crime charged is of a serious nature. State v. Griggs, 184 S.C. 304, 315-16, 192 S.E. 360, 365 (1937) (stating that where the trial judge in his charge instructed the jury that if it had a reasonable doubt as to appellant's guilt it must find him not guilty, there is no reversible error if the trial judge then fails to tell the jury that "not guilty" is one verdict it could render). Here, we believe the trial judge's clear and cogent jury instructions ameliorated any possible prejudice emanating from the failure to include "not guilty" on the verdict form.

The trial judge carefully explained the verdict form, which read that each interrogatory must be answered "unanimously . . . beyond a reasonable doubt." The judge informed the jury no fewer than fifteen times that the State had the burden of proving Myers "guilty beyond a reasonable doubt." While reading the verdict form to the jury, the judge stated at least an additional eight times that the State must find Myers "guilty beyond a reasonable doubt." Further, the words "reasonable doubt" were mentioned at least seventeen times to the jury, and the jury was advised no less than nine times of its duty to find Myers "not guilty" if the State failed to meet its burden of proof. Additionally, although the verdict form did not have the words "not guilty"on it, neither did it contain the word "guilty." Thus, given the charge, we do not find that the verdict form prevented the jury from finding Myers not guilty.

AFFIRMED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Respondent,

v.

John Hamilton,

Appellant.

____

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

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Opinion No. 3317
Heard January 8, 2001 - Filed March 12, 2001

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AFFIRMED

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Assistant Appellate Defender Robert M. Pachak, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Charles H. Richardson; and Solicitor Warren B. Giese, all of Columbia, for Respondent.

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ANDERSON, J.: John Hamilton appeals from his convictions for assault and battery with intent to kill (ABIK) and possession of contraband. Hamilton was sentenced to life imprisonment without parole for ABIK and ten years for possession of contraband. He argues the trial court erred in (1) excluding psychiatric testimony as irrelevant and (2) denying his motion for a mistrial due to the Solicitor's improper comments during closing arguments. Additionally, Hamilton claims the trial court lacked subject matter jurisdiction because the indictment for possession of contraband was insufficient. We affirm.

FACTS/PROCEDURAL BACKGROUND

Hamilton was an inmate at the Broad River Correctional Institute (Broad River) in Richland County, South Carolina. Inmates at Broad River are housed in four dormitories, each divided into two wings. Each wing houses approximately 125 inmates and is manned by one correctional officer. On December 13, 1996, Officer Brandon Jeter was the correctional officer on duty in Hamilton's dormitory wing.

Hamilton worked that morning at his prison job and returned to the dormitory around lunchtime. Hamilton did not intend to return to work for the afternoon, but had forgotten to inform his supervisor, which can result in disciplinary action for an unauthorized absence. Hamilton stated he asked Officer Jeter to allow him to exit the dormitory. Jeter refused, saying he would open the door after he sorted the mail. According to Hamilton, by the time Jeter finished sorting the mail, it would have been too late for him to get to his job and his supervisor would have written him up for refusing to work. He would then have been placed on lockup, which is administrative segregation.

A nearby inmate, Karim Almatin, heard Officer Jeter and Hamilton arguing and convinced Hamilton to step into his room, which was located next to Jeter's desk. Almatin told Hamilton he "need[ed] to let it go." While

Hamilton was in Almatin's room, he heard Officer Jeter open the door for a dorm worker.[1] Hamilton attempted to slip out of the door behind the dorm worker. Jeter refused to allow Hamilton to exit as he was wearing dormitory shoes, similar to flip flops, which the inmates are not permitted to wear outside. Hamilton cursed at Jeter but retreated into the dorm.

Hamilton went back into Almatin's cell. When the dorm worker returned, Officer Jeter opened the door. Hamilton again attempted to exit. This time, he successfully forced his way into the common area. Officer Jeter and Hamilton exchanged words. Jeter asked the yard officer, Tara Hopkins, to take Hamilton to a holding cell while Jeter wrote him up for a disciplinary infraction. Hopkins told Jeter she could not take Hamilton to the holding cell because he was wearing improper shoes. Jeter and Hopkins testified Hamilton yelled words to this effect: "I'll teach you mother f____rs who to mess with."

Hamilton turned around and walked back into the dorm area. Officer Hopkins followed him. Hopkins lost sight of Hamilton, stating he "vanished" as she entered the unit. Hopkins next saw Hamilton approaching Jeter with a homemade knife (shank) in his hand.

Officer Jeter was sitting at his desk sorting mail when he heard Officer Hopkins yell: "Move . . . Get your gas, get your gas." Jeter looked up and saw Hamilton running toward him fumbling with something behind his back. Jeter jumped out of his chair. Hamilton chased him around the office and stabbed him in the back with the shank. Officer Jeter struck Hamilton and was eventually able to spray him with pepper gas. While trying to get away from Hamilton, Jeter dropped the gas and his keys.

Hamilton again pursued Officer Jeter. Officer Hopkins intervened with a billy stick, striking Hamilton on the wrist to knock the shank out of his hand.

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[1]A dorm worker is an inmate allowed more access to common areas by virtue of good behavior. The position is comparable to that commonly referred to as prison trustee.

The shank did not fall because it was tied to Hamilton's wrist. Hamilton attempted to stab Jeter by reaching around Hopkins. Jeter and Hopkins testified Hamilton yelled: "I'm gonna kill, I'm gonna kill you, mother f____."

Officer Hopkins retrieved Officer Jeter's gas and sprayed Hamilton with it. Almatin and another inmate retrieved the keys and assisted Hopkins and Jeter. Hopkins called for assistance and other officers arrived. At least one officer escorted Hamilton outside the dormitory. At that time, Hamilton did not have the shank.

The incident occurred around 11:15 a.m. Thereafter, approximately eight officers instituted a lock-down,[2] a shake-down,[3] and a body strip search of all inmates in the dormitory wing. About 1:45 p.m., Officer Gregory Wells found a shank hidden in a mop head in a room about twenty-five feet from the site of the incident. Wells testified he noticed a small amount of wet blood on the mop head, which led him to inspect the mop.

Officer Jeter suffered serious injuries and stayed in the hospital approximately five days. The shank went between Jeter's ribs and penetrated his lung, requiring surgery to remove a portion of the lung. Jeter had not returned to work as a corrections officer at the time of the trial in November of 1998.

Hamilton testified at trial. He admitted he usually carried a shank and that he carried his shank that day. In addition, Hamilton admitted he stabbed Jeter. Yet, he denied the shank found by Officer Wells was his shank. He further denied threatening to kill Jeter. Hamilton conceded the assault was vicious. Hamilton declared he "wasn't being malicious" when he assaulted Jeter; rather, the verbal altercation "just escalated" and the incident was a result of the "heat of the moment."

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[2]Return of all inmates to their cells.

[3]Full search of all cells.

ISSUES

I. Did the Circuit Court err in excluding as irrelevant the testimony of Dr. Rathle, who performed a psychiatric evaluation of Hamilton in March 1997?

II. Did the Circuit Court err in denying Hamilton's motion for a mistrial based on improper comments in the Solicitor's closing argument?

III. Did the Circuit Court have subject matter jurisdiction to try Hamilton for possession of contraband based on the indictment?

LAW/ANALYSIS

I. Exclusion of Dr. Rathle's Testimony

Hamilton contends the Circuit Court erred in excluding the testimony of Dr. Jacques M. Rathle, who completed a psychiatric evaluation of Hamilton in March 1997. Hamilton asserts the testimony was relevant to the question of malice, a key issue in determining whether Hamilton committed assault and battery of a high and aggravated nature (ABHAN) or ABIK.

A. The Proffer

Upon the close of the State's case, defense counsel made a proffer explaining Dr. Rathle examined Hamilton during a routine examination of all inmates in the medium security unit. Defense counsel requested a ruling that the evidence did not open the door to Hamilton's prior disciplinary records. Defense counsel stated that, as a result of the examination, Dr. Rathle diagnosed Hamilton with antisocial personality disorder. In February of 1997, after he assaulted Officer Jeter, Hamilton was prescribed Buspar. Dr. Rathle replaced

Buspar with Benadryl. Another doctor later prescribed Vistaril, in lieu of Benadryl.

The State objected to the admission of the evidence on the ground of relevancy and on the ground the evidence would confuse the jury. The trial judge listened to Dr. Rathle's testimony in camera. Dr. Rathle testified that, in March of 1997, he diagnosed Hamilton with antisocial personality disorder. Dr. Rathle defined a person with antisocial personality disorder as one "who has some difficulty in adjusting to the societal norms . . . due to irritability, . . . restlessness, . . . anxiety, [or] . . . lack of conformity." Dr. Rathle professed the Benadryl or Vistaril had a calming effect on a patient with antisocial personality disorder. The intent of prescribing the mild tranquilizers, according to Dr. Rathle, is to sedate the prisoner "to be less irritable, by reason of . . . being confined twenty-three, twenty-four hours a day in a cell."

The State again objected to the evidence. The trial judge excluded the evidence as "irrelevant evidence on the grounds of prejudice, confusion or waste of time" under Rule 403, SCRE.

B. Standard of Review - Admissibility of Evidence

The admission of evidence is within the sound discretion of the trial court. State v. McDonald, Op. No. 25225 (S.C. Sup. Ct. filed December 18, 2000)(Shearouse Adv. Sh. No. 44 at 37); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Mansfield, Op. No. 3247 (S.C. Ct. App. filed October 2, 2000)(Shearouse Adv. Sh. No. 37 at 19); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999).

C. Relevancy: Admissibility of Evidence Under the Common Law

The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146

(1991); State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983). Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. Alexander, 303 S.C. at 380, 401 S.E.2d at 148; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Only relevant evidence is admissible. See State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928). "'All that is required is that the fact shown legally tends to establish, or to make more or less probable, some matter in issue and to bear directly or indirectly thereon.' It is not required that the inference sought should 'necessarily follow' from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence." Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987)(quoting Francis v. Mauldin, 215 S.C. 374, 378, 55 S.E.2d 337, 338 (1949)).

However, not all relevant evidence is admissible. Petit, 144 S.C. at 466, 142 S.E. at 730-31. Our Supreme Court, in State v. Petit, discussed the admissibility of testimonial evidence:

> We feel sure that one of the main reasons for much of the misunderstanding as to when evidence should be allowed, and when it ought to be refused, is due to failure to properly distinguish between the legal terms, "relevancy" and "competency," so often used in the law of evidence, and, too generally but erroneously, supposed to be exactly synonymous. Many efforts have been made by courts, judges, and law writers to define the words so as to differentiate them correctly. In all the definitions we have read of "relevancy," we have been impressed much with that given by the New York Supreme Court:
>
> > "The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French relever, which means to assist." Platner v. Platner, 78 N.Y. 95.

As to the other word "competency," or rather, "competent evidence," Black's Law Dictionary gives approval to this definition from Mr. Greenleaf:

> "That which the very nature of the thing to be proven requires, as the production of a writing when its contents are the subject of inquiry."

In the "Preliminary Definitions" on the subject of Evidence, in Corpus Juris, there will be found a part of one sentence that expresses very clearly a thought we now have in mind, namely:

> "* * * It is clear that evidence may be logically relevant and yet inadmissible because not competent, that is, because not the character of proof which the law permits in the particular case." 22 C. J. 65.

Irrelevant evidence is never, properly, admissible in a cause; competent evidence is always admissible; relevant evidence may, or may not, be admissible, depending upon its competency.

Taking together the approved definitions of "relevancy" and "competency" as they are to be applied in the introduction of evidence in the trial of a cause, a fair and brief statement of a rule to keep in mind, seems to us, to be this: Any evidence that assists in getting at the truth of the issue is relevant, unless, because of some legal rule, it is incompetent.

Petit, 144 S.C. at 466-67, 142 S.E. at 730-31 (emphasis omitted). In State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), the Court affirmed the trial judge's refusal to permit the admission of relevant evidence which would confuse the jury. The Court stated:

At the outset we repeat the time-honored tenet that ordinarily the conduct of a trial, including the admission and rejection of

> proffered testimony, is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced. . . . .
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> . . . .
>
> . . . When it became clear to the presiding Judge that the [evidence sought to be admitted] was unconnected (as testified to by the appellant himself) with the miscellaneous items upon which the State was seeking conviction he, we think not improperly, ruled out further evidence concerning the former. The situation seems to us to have been one peculiarly appropriate for the exercise of discretion as to admissibility of evidence and to guard against the confusion of the jury by the injection of collateral issues. . . . .

Gregory, 198 S.C. at 103-04, 16 S.E.2d at 534. The Gregory Court found no abuse of discretion.

Relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987). The Supreme Court adopted the language of Rule 403 of the Federal Rules of Evidence in State v. Alexander, 303 S.C. at 382, 401 S.E.2d at 149:

> It does not appear that this Court has ever explicitly approved of this general rule, although such a test has been applied in a variety of contexts. We now adopt the language, in pertinent part, of Federal Rule of Evidence 403 that, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." (Footnote omitted).

Prior to the adoption of the South Carolina Rules of Evidence, our appellate courts often relied on the Federal Rules of Evidence for guidance. See Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994)(establishing procedure in accordance with Rule 614 of the Federal Rules of Evidence, supplemented by South Carolina common law); State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992)(following Federal Rule of Evidence 804(b)(3)); State v. Sarvis, 317 S.C. 102, 106, 450 S.E.2d 606, 608 (Ct. App. 1994)(stating that although Fed. R. Evid. 609(b) is not binding, "its bright-line rule does provide some assistance"); Johnson v. Pritchard, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990)(following Rule 803(16) of the Uniform Rules of Evidence and Federal Rules of Evidence governing the admissibility of ancient documents); Bain v. Self Mem'l Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984)(adopting Rule 805 of the Federal Rules of Evidence).

D. Relevancy: Admissibility Under the SCRE

South Carolina adopted the South Carolina Rules of Evidence effective September 3, 1995. Relevant evidence is defined as "evidence having 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. See also State v. Aleksey, Op. No. 25212 (S.C. Sup. Ct. filed November 13, 2000)(Shearouse Adv. Sh. No. 41 at 1)(evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. See also State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000)(although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value).

Rules 401 and 403, SCRE, are identical to their federal counterparts and are consistent with South Carolina common law. Rules 401 & 403, SCRE (advisory committee's notes). Rule 402, SCRE, is identical to the federal rule, except as amended to reference South Carolina law. Rule 402, SCRE (advisory committee's note).

The State objected to Dr. Rathle's testimony on the grounds of relevance and confusion of the jury. The trial judge excluded the evidence as "irrelevant evidence on the grounds of prejudice, confusion or waste of time" under Rule 403, SCRE.

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." United States v. Green, 887 F.2d 25, 27 (1st Cir. 1989). See also State v. Slocumb, 336 S.C. 619, 633, 521 S.E.2d 507, 514 (Ct. App. 1999)(in addressing the admissibility of evidence under Rule 403, this Court stated: "[G]iven these reports were relevant and the subject of proper cross-examination, we cannot say the trial judge abused his discretion in finding the probative value of this testimony outweighed the danger for unfair prejudice."). We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. See Green, 887 F.2d at 27. See also State v. Aleksey, Op. No. 25212 (S.C. Sup. Ct. filed November 13, 2000)(Shearouse Adv. Sh. No. 41 at 1)(trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion). A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. United States v. Long, 574 F.2d 761 (3d Cir. 1978). If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. Id.

The federal appellate courts are deferential in reviewing a trial judge's evidentiary rulings. See Salem v. United States Lines Co., 370 U.S. 31, 82 S.Ct.

1119, 8 L.Ed.2d 313 (1962)(stating the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence and his action is to be sustained unless manifestly erroneous); United States v. Love, 134 F.3d 595, 603 (4th Cir. 1998)(reviewing a district court's admission of evidence over a Rule 403 objection under a "broadly deferential standard"); United States v. MacDonald, 688 F.2d 224, 227-28 (4th Cir. 1982)(finding "the appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge; absent extraordinary circumstances, the Courts of Appeal will not intervene in its resolution"); United States v. Leon-Reyes, 177 F.3d 816, 819 (9th Cir. 1999)(appellate court reviews district court's decision to admit or exclude evidence utilizing an abuse of discretion standard); United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000)(reviewing the district court's ruling on admission of evidence for abuse of discretion).

Under our broadly deferential standard of review, we find Dr. Rathle's testimony was not relevant. Further, we rule that, even if relevant, the evidence should be excluded under Rule 403, SCRE, as tending to confuse the jury.

E. Right to Present a Defense

Hamilton maintains the exclusion of Dr. Rathle's testimony deprived him of his constitutional right to fully present a defense. We disagree.

The right to present a defense is not unlimited, but must "'bow to accommodate other legitimate interests in the criminal trial process.'" Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37, 49 (1987)(quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297, 309 (1973)). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence, regardless of its admissibility under the rules of evidence. See United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996).

II. Solicitor's Comments During Closing Argument

Hamilton complains the trial judge erred in denying his motion for a mistrial based on the Solicitor's improper comments during the closing argument.

During his closing argument, the Solicitor stated:

> [Solicitor]: [L]adies and gentlemen, . . . I received good legal training at the start of my legal career. I, like Ms. Quinn, who sits up there with Judge Manning, worked for a Circuit Court Judge and one thing he told me—
>
> [Defense Counsel]: Your Honor, I would object to that. I don't know how that's relevant.
>
> The Court: Basis. Basis of your objection.
>
> [Defense Counsel]: Well - - -
>
> The Court: Overruled. . . . .
>
> [Solicitor]: Thank you, your Honor. . . . Mr. Hamilton has violated [the] laws. He has violated our system of justice and he has asked you to be here. Ladies and gentlemen, as the court knows, as our system of justice works, he decided on having a jury trial this week in this case. He got up on the witness stand and said, "I don't deny these charges." We could have taken fifteen minutes on Monday morning and gotten rid of that.
>
> [Defense Counsel]: Your Honor, may we approach?
>
> The Court: Sure.

The judge conducted a bench conference. Thereafter, the Solicitor continued his closing argument:

> [Solicitor]: [The defense] tell[s] you this case is not about malice, that this is some type of borderline assault. Well, ladies and gentlemen, you put me here as a representative of your system of justice, a representative of your community, and I wouldn't bring in to you a borderline case.
>
> [Defense Counsel]: Your Honor, I object to that also.

At this point, another bench conference was held. The Solicitor then resumed his closing argument.

A. Preservation of Error

Hamilton avers the Solicitor improperly commented on Hamilton's exercise of his constitutional right to a jury trial. The State contends any errors raised by Hamilton in the bench conferences are off the record and, thus, not preserved. The State further alleges the issue regarding improper argument is not preserved for appellate review claiming that, although defense counsel stated "I object to that also," she did not place the basis for the objection on the record.

1. Objection Made During Bench Conference

After the judge's instructions to the jury, defense counsel requested an instruction explaining the Solicitor's comments regarding Hamilton's right to a jury trial. Defense counsel argued the jury needed to be informed that, contrary to the Solicitor's implication, Hamilton did not refuse to plead when given an opportunity. She wanted the jury advised "there were never any plea offers or negotiations or anything ever offered to [Hamilton]." The trial judge denied the request and declared: "Actually, [defense counsel], I think you objected before that actually came out of his mouth, in terms of the guilty plea, although it came close. It was a timely objection. We had a side-bar

conference. The Solicitor didn't go any further." Defense counsel moved for a mistrial, which was denied.

An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997). Here, the initial off-the-record bench conferences were later made a part of the record by the acquiescence and agreement of the judge, Solicitor, and defense counsel. Under this scenario, York is inapplicable.

2. Objection Must Be on a Specific Ground

It is well settled that an objection must be on a specific ground. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge. New, 338 S.C. at 318, 526 S.E.2d at 239. See also Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990)(where ground for objection is not stated in record, there is no basis for appellate review). Rule 103(a)(1), SCRE, however, only requires specificity where the ground for objection is not apparent from the context of the discussion contained in the record. New, 338 S.C. at 318, 526 S.E.2d at 239.

As part of the first objection to the Solicitor's closing argument, defense counsel explained the basis of her objection was relevancy. Her second objection referred to the initial objection. After the trial judge's instructions, defense counsel requested curative instructions. Upon denial of the request, defense counsel moved for a mistrial. We hold the issue is preserved for our review.

B. The Test

A Solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Moreover, the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)("When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right.").

The test of granting a new trial for alleged improper closing argument is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). See also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996)(test of granting new trial for alleged improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

We find the Solicitor's comments are highly inappropriate and constitutionally impermissible.

C. Harmless Error Analysis

Improper comments during closing argument, however, do not automatically require reversal of a conviction if they are not prejudicial to the defendant. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct. App. 2000), cert. granted. The harmless error rule governs improper comments made by a Solicitor during closing argument. Primus, 341 S.C. at 608, 535 S.E.2d at 160. It is the duty of

a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

The trial judge is allowed wide discretion in dealing with the range and propriety of argument of the Solicitor to the jury. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). The defendant bears the burden of proving the improper argument deprived him of a fair trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). See also Coleman, 301 S.C. at 61-62, 389 S.E.2d at 661 (appellants bear burden of proving error and prejudice which resulted in denial of fair trial). An appellate court will review the alleged impropriety of the Solicitor's argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt. See Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

Officers Jeter and Hopkins testified Hamilton assaulted Jeter and attempted to repeatedly assault him. Hamilton admitted he stabbed Jeter. Considering the State's closing argument in the context of the entire record, we find the court's error in allowing the Solicitor's improper comments during the jury argument were harmless in light of the overwhelming evidence of Hamilton's guilt. The Solicitor's comments did not infect Hamilton's trial with unfairness to the extent that his conviction was a denial of due process. Although we find the comments highly inappropriate, we affirm the trial judge's ruling under a harmless error analysis.

III. Subject Matter Jurisdiction

Finally, Hamilton argues the trial court lacked subject matter jurisdiction to try him for possession of contraband because the indictment failed to specify that the knife possessed by Hamilton had been declared contraband by the Director of the Department of Corrections. We disagree.

The indictment alleged "Hamilton . . . did . . . unlawfully possess a quantity of contraband, to wit: a homemade knife approximately 12 inches long in violation of § 24-3-950." South Carolina Code Annotated section 24-3-950 (Supp. 2000) provides:

> It shall be unlawful for any person to furnish or attempt to furnish any prisoner under the jurisdiction of the Department of Corrections with any matter declared by the director to be contraband. It shall also be unlawful for any prisoner under the jurisdiction of the Department of Corrections to possess any matter declared to be contraband. Matters considered contraband within the meaning of this section shall be those which are determined to be such by the director and published by him in a conspicuous place available to visitors and inmates at each correctional institution. Any person violating the provisions of this section shall be deemed guilty of a felony and, upon conviction, shall be punished by a fine of not less than one thousand dollars nor more than ten thousand dollars or imprisonment for not less than one year nor more than ten years, or both.

An indictment survives legal scrutiny if 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. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998). Under South Carolina Code Annotated section 17-19-20, an indictment passes legal muster if it "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 (1985). See also State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974)(indictment phrased substantially in language of statute which creates and defines offense charged is ordinarily sufficient). An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended

to be charged and informs the defendant of the circumstances he must be prepared to defend. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).

In reviewing the sufficiency of an indictment, an appellate court must "look at the issue with a practical eye in view of the surrounding circumstances." State v. Gunn, 313 S.C. 124, 129, 437 S.E.2d 75, 78 (1993).

Hamilton relies upon State v. Tabory, 262 S.C. at 139-40, 202 S.E.2d at 853-54, to support his contention the indictment was insufficient. Tabory is inapposite because the indictment in Tabory did not charge a violation of the section relating to contraband.

Viewing the indictment "with a practical eye," we find it stated the charge with sufficient certainty to enable both the trial court and Hamilton to know what crime it alleged. The indictment specifically identified the contraband involved, incorporated the statute, section 24-3-950, by reference, and named the offense in the title. Under the circumstances of this case, we determine the indictment vested the trial court with subject matter jurisdiction.

CONCLUSION

We hold Dr. Rathle's testimony was not relevant. Additionally, even if the testimony was relevant, the evidence should be excluded under Rule 403, SCRE, as tending to confuse the jury. We rule the Solicitor's comments during closing argument were highly inappropriate. We caution judges to strictly monitor the argument of Solicitors. Given the overwhelming evidence of Hamilton's guilt and based on a review of the record as a whole, we conclude the Solicitor's comments did not infect Hamilton's trial with unfairness so that he was denied a fair trial. Thus, the trial court did not err in overruling defense counsel's objections and motion for mistrial. Finally, Hamilton's indictment was sufficient to convey subject matter jurisdiction on the court. Accordingly, Hamilton's convictions are

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The State,

Appellant,

v.

Jeffrey C. Sheldon,

Respondent.

____

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

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Opinion No. 3318
Heard February 6, 2001 - Filed March 12, 2001

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REVERSED AND REMANDED

____

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Assistant Attorney General Melody J. Brown, all of Columbia, for appellant.

John A. O'Leary, of O'Leary Associates; and Joseph C. Coleman, both of Columbia, for respondent.

____

HUFF, J.: The Orangeburg County Grand Jury indicted Jeffrey C. Sheldon on two charges of reckless homicide. The State appeals the trial court's pre-trial decision to exclude a report by the South Carolina Highway Patrol's Multi-disciplinary Accident Investigation Team (MAIT). We reverse and remand.

BACKGROUND

On October 10, 1996, Sheldon, a then on-duty South Carolina State Trooper, was driving his marked patrol vehicle when it collided with a car driven by Rodney Stokes. Stokes and his wife, Wendy, died as a result of the collision. Although state law required the Orangeburg Sheriff's Office, rather than the Highway Patrol, investigate the collision, MAIT assisted in the investigation. S.C. Code Ann. § 56-5-765 (Supp. 2000).

Before trial, Sheldon moved to suppress any and all evidence gathered or prepared by MAIT because such evidence was obtained in violation of S.C. Code Ann. § 56-5-765. After a hearing on the motion, the trial court granted Sheldon's motion. The State appeals from that order.

STANDARD OF REVIEW

The trial court has considerable discretion in ruling on the admissibility of evidence. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. Id.; State v. Smicklevich, 268 S.C. 411, 234 S.E.2d 230 (1977).

DISCUSSION

The State argues the trial court erred in excluding the accident team's report. We agree.

Ordinarily, the State Highway Patrol investigates any collision involving a law enforcement vehicle that results in an injury or death or involves a privately-owned vehicle. § 56-5-765(A). However, such collisions involving a vehicle of the Department of Public Safety, including the Highway Patrol, must be investigated by the sheriff's office in the county where the collision occurred. § 56-5-765(B). Furthermore, a law enforcement department or agency may not investigate any collision involving an employee of that department or agency if the collision results in injury or death or involves a privately-owned vehicle. § 56-5-765(C).

The State asserts MAIT's investigation did not violate § 56-5-765 because it was "not the type of investigation contemplated" by that section. It contends that the sheriff's office remained the investigating agency, while MAIT merely performed technical portions of the investigation, as the sheriff's office had neither the trained personnel nor the equipment to conduct a detailed investigation of the dynamics of the collision. Further, the State maintains the MAIT report takes into account only objective factors which can be measured and replicated and makes no conclusions other than the pre-impact speed of the vehicles.

The statute, however, clearly prohibits the Highway Patrol from investigating accidents involving its employees. § 56-5-765(B), (C). There is no exception to this rule. We find the State's argument that MAIT's investigation into this collision is not an "investigation" under § 56-5-765 unconvincing. While the Orangeburg Sheriff's Office may not have had the necessary resources to perform the speed tests, it should have sought assistance elsewhere. Thus, we agree with the trial court that MAIT's investigation of the collision violated § 56-5-765.

We next consider whether this violation of § 56-5-765 renders the results of the investigation inadmissible. Although § 56-5-765 (D) provides for criminal sanctions for a violation of the statute, the statute is silent about the admissibility of evidence resulting from an investigation made in violation of the statute.

In the context of the application of the exclusionary rule, our supreme court held the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures." State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976). We hold evidence obtained in violation of § 56-5-765 is not necessarily inadmissible absent a demonstration of prejudice resulting from the violation.

Upon finding a violation of the statute, the trial court suppressed the MAIT report. It did not make any findings on whether Sheldon would be prejudiced by MAIT's investigation of the collision. The trial court, thus, committed an error of law, amounting to an abuse of discretion. We, therefore, reverse the order of the trial court suppressing the MAIT report and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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James W. Breeden, Jr., Employee,

Respondent/Appellant,

v.

TCW, Inc./Tennessee Express, Employer, and Granite State Insurance Co., Carrier,

Appellants/Respondents.

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Appeal From Colleton County
Gerald C. Smoak, Sr., Circuit Court Judge

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Opinion No. 3319
Heard February 7, 2001 - Filed March 12, 2001

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AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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Stanford E. Lacy, of Collins & Lacy, of Columbia, for appellants/respondents.

Saunders F. Aldridge, III, of Hunter, Maclean, Exley & Dunn, of Savannah, GA; D. Michael Kelly, of Suggs & Kelly, of Columbia; and William B. Harvey, III, of Harvey & Battey, of Beaufort, for respondent/appellant.

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STILWELL, J.: TCW, Inc./Tennessee Express (Employer) and its workers' compensation carrier, Granite State Insurance Company (Carrier), appeal the order of the circuit court affirming the full commission's decision to reduce Carrier's lien and the finding that Carrier's lien does not include future medical expenses. James Breeden, Jr. cross-appeals asserting that the circuit court did not have jurisdiction to hear Employer's and Carrier's appeal from the full commission because their notice of intent to appeal was deficient. As to Employer's and Carrier's appeal, we affirm in part, reverse in part, and remand. As to Breeden's cross-appeal, we affirm.

FACTS

On December 14, 1993, Breeden was severely injured when a truck owned by Piggly Wiggly crossed the center line and hit Breeden's truck head on. At the time of the accident Breeden was an owner/operator driving under Employer's ICC license. Breeden filed a workers' compensation claim which Employer denied on the theory that Breeden was an independent contractor, not an employee. The single commissioner found Breeden was an employee, and the full commission affirmed. Employer and Carrier did not appeal further. Workers' compensation benefits were brought current and provided thereafter.

On July 28, 1995, Breeden filed another Form 50 alleging he was totally disabled as a result of traumatic physical brain injury. The single commissioner found for Breeden and awarded lifetime benefits pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2000). Employer and Carrier did not appeal this decision.

During this same time, Breeden pursued a third party claim against Piggly Wiggly. Piggly Wiggly's liability carrier advanced $50,000 to help defray expenses, including living expenses, for Breeden's family. This was done with Carrier's consent and with the understanding that this money would be included as part of the ultimate settlement. Piggly Wiggly had $11 million in liability insurance coverage, and the parties acknowledge that liability was clear. Breeden alleged economic losses alone that were over $9 million including future medical expenses and a range of total cognizable damages from $18 to $25 million. However, no lawsuit was ever filed against Piggly Wiggly, and Mr. Breeden's claim was settled for $4.2 million while his wife's loss of

consortium claim was settled for $1.8 million. The Breedens' attorney explained that the claims were settled for such a low sum compared to the amount of insurance available and the extent of provable damages because "[w]e had to. This family was coming apart at the seams."

Subsequent to settling the third party claim against Piggly Wiggly, Breeden notified the workers' compensation commission of the settlement and moved to have the commission determine Carrier's lien and the balance remaining to be paid to Carrier under S.C. Code Ann. § 42-1-560(g) (1985). At the hearing, Breeden took the position that Carrier's lien should be reduced using the total cognizable damages provision of S.C. Code Ann. § 42-1-560(f). Both sides introduced detailed life care plans projecting Breeden's future medical needs.

The single commissioner found that Breeden was not entitled to a lien reduction and ordered the proceeds from the third party claim distributed in accordance with section 42-1-560(g). He also found section 42-1-560(f) relating to total cognizable damages was not applicable and did not impact the provisions of 42-1-560(g). Additionally, he held "compensation" as used in section 42-1-560 to include all future medical expenses. The single commissioner awarded Breeden's attorneys $1,456,626 in fees and litigation expenses and ordered $801,713.81 be paid to Carrier for its lien to date. He ordered the balance of the $4.2 million settlement paid to Carrier to hold in trust until further order of the commission. The single commissioner then ordered Dr. Weed, Breeden's life care plan expert, to update the life care plan and provide it to an insurance annuities expert. The expert was ordered to determine the cost to annuitize future benefits, including future medical expenses, using rated age costs and an installment refund feature. The single commissioner then directed that this information would be utilized to determine the present value of future benefits. Carrier would be allowed to retain that amount and the balance would be paid to Breeden.

Breeden appealed to the full commission which reversed virtually every holding by the single commissioner. The full commission found that it would be appropriate under the statutory scheme to utilize the concept of total cognizable damages and determined them to be $13.5 million. The commission

then found that the lien should be reduced, applying the factors from Kirkland v. Allcraft Steel Co., 329 S.C. 389, 496 S.E.2d 624 (1998). Using these factors, the full commission reduced the Carrier's lien to 31% of what it found its current value to be, applied the same reduction to future compensation, and held that Carrier's lien did not apply to future medical expenses. Carrier appealed to the circuit court which affirmed the full commission.

ISSUES

Employer/Carrier's Appeal

I. Did the full commission err in its application of the Kirkland factors when it determined that Carrier's lien should be reduced?

II. Did the full commission err in applying the lien reduction to future compensation?

III. Did the full commission err in determining that under section 42-1-560 Carrier's lien did not include future medical expenses not yet incurred at the time of the third party settlement?

IV. Did the full commission err in freezing the lien to its current amount of $801,713.81?

Breeden's Cross-Appeal

Did the circuit court have jurisdiction to hear Employer's and Carrier's appeal because their notice of intent to appeal was defective?

LAW/ANALYSIS

Breeden's Cross-Appeal

Jurisdiction of the Circuit Court

In his cross-appeal, Breeden asserts the circuit court did not have jurisdiction to address the order of the full commission because Employer's and Carrier's notice of intent to appeal was deficient. We find this argument to be without merit.

Breeden contends Employer's and Carrier's notice of intent to appeal did not comply with the requirements of the Administrative Procedures Act because the grounds listed for alleged error did not reflect a complete explanation of the alleged error. As support for this contention, Breeden cites Pringle v. Builder's Transport, which provides:

> A petition for circuit court review pursuant to the Administrative Procedures Act (APA) must direct the court's attention to the abuse allegedly committed below, including a distinct and specific statement of the rulings of which appellant complains. The circuit court lacks jurisdiction of the appeal if the notice is insufficient.

298 S.C. 494, 495, 381 S.E.2d 731, 732 (1989) (citations omitted).

The notice of intent to appeal contains twelve exceptions to the order of the commission. We have reviewed these twelve exceptions and hold that they were sufficient to satisfy the requirements of the APA. They are clear as to what the commission ordered and as to the error assigned to the provisions of the order. Therefore, we hold the notice of appeal was sufficient and the circuit court had jurisdiction over this appeal.

Employer/Carrier's Appeal

I. Kirkland Factors

Employer and Carrier argue the commission erred in incorrectly applying the Kirkland factors when it determined Carrier's lien should be reduced. We agree.

In all cases involving the distribution of third party proceeds, the threshold issue is whether the carrier's lien should be reduced. Section 42-1-560(f) provides in relevant part:

> Notwithstanding other provisions of this item, where an employee or his representative enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of such settlement in the proportion that such settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law. Any such reduction shall be based on a determination by the commission that such reduction would be equitable to all parties concerned and serve the interests of justice.

S.C. Code Ann. § 42-1-560(f) (1985).

In Kirkland, our supreme court recognized that the commission may reduce the carrier's lien in the manner set forth in the above statute, but the reduction is not automatic. 329 S.C. at 394, 496 S.E.2d at 626. In Kirkland, the court listed four factors the commission should consider in deciding whether or in what amount to reduce the lien. The court held that "[i]n considering whether or not to reduce the lien, the commission may consider factors such as the strength of the claimant's case, the likelihood of third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to a settlement." Id. These factors all focus on the circumstances surrounding the third party settlement.

Employer and Carrier contend that in determining whether to authorize a reduction of Carrier's lien, the commission erred in failing to properly analyze the factors set out in Kirkland. To an extent, we agree.

The first Kirkland factor analyzed by the commission was the likelihood of third party liability. The commission found:

> Kirkland provides no guidance as to how this factor is to be considered. However, it is only appropriate that the strong likelihood of Third Party's liability lends support to reducing the Carrier's lien. The weaker the case of third party liability, it is more likely it would be that any portion of the third party monies actually received by the Claimant would be a windfall to him. Conversely, the stronger the Claimant's case, the more equitable it would be for he or his family to receive a greater portion of the economic consequences of his tragic injury.

We believe this rationale to be the opposite of the court's intent in Kirkland. In actuality, the stronger the likelihood of third party liability, the less weight the commission should give to the claimant's request for a reduction in the lien. The employer should not have to shoulder an undue proportion of the burden of liability for claimant's damages when a third party has unquestioned liability for the claimant's injuries. Therefore, as the likelihood of the liability of a third party increases, the justification for reducing the carrier's lien is proportionately reduced. Since there is little if any question as to Piggly Wiggly's liability in this case, we find this factor's weight militates against a reduction in the lien.

The next factor in Kirkland is the strength of claimant's case. We hold the full commission also applied this factor in a manner opposite to that intended in Kirkland.

The commission found this factor weighed toward reduction because Breeden's total cognizable damages were great. Because liability was clear, damages were the primary issue in Breeden's case against Piggly Wiggly. Breeden had a strong case against Piggly Wiggly with excellent proof of

substantial damages. However, Breeden settled his third party claim much lower than his actual provable damages. The fact that he had a strong case, yet settled for such a relatively low amount, militates against lien reduction. The Employer/Carrier, having no right to involve itself in the third party action, should not be penalized because the case was undervalued or for whatever other reason, valid or not, was not aggressively pursued. Again, this factor's weight militates against a reduction in the lien.

The third Kirkland factor addressed by the full commission is the claimant's desire to settle. This factor relates to the need or desire of the claimant to settle his claim against the third party, not against the employer or its carrier. Testimony was presented that it was desirable for Breeden to settle his third party claim against Piggly Wiggly because his "family was coming apart at the seams." Therefore, we find that while Breeden settled for an amount substantially smaller than he possibly could have obtained, this factor weighs favorably toward a reduction in the lien.

The fourth and final Kirkland factor is whether the carrier is unreasonably refusing to consent to the settlement. The commission interpreted this factor to mean whether the carrier is unreasonably refusing to settle its lien against the proceeds of the third party settlement. This is incorrect. As pointed out above, the factors in Kirkland focus on the circumstances surrounding the third party settlement, not the workers' compensation lien. This factor actually relates to a provision in section 42-1-560(f) that provides: "[t]he carrier shall not unreasonably refuse to approve a proposed compromise settlement with the third party." S.C. Code Ann. § 42-1-560(f) (1985). It is clear from the record that Carrier interposed no objection to the settlement of the third party claim. Therefore, the weight of this factor also militates against a reduction in the lien.

In addition to the Kirkland factors, the full commission included three other factors in its analysis of whether to allow a lien reduction and to what degree to reduce Carrier's lien. These factors were: (1) Carrier's conduct in fulfilling its statutory obligations; (2) the extent of Breeden's injuries; and (3) whether Carrier has an actual exposure. While we are certain the four factors set forth in Kirkland are not exclusive, the additional factors analyzed by the commission are not mentioned in Kirkland.

However, we find two of the three additional factors utilized by the commission are not relevant to the consideration of the lien reduction. Carrier's conduct in fulfilling its statutory obligations has no bearing on settlement of the third party claim. There has been no evidence presented that any act or omission of Carrier prejudiced Breeden's settlement in any manner. Likewise, whether Carrier has an actual exposure is not relevant to the determination of a lien reduction and has no bearing on the third party settlement. The fact that a carrier is re-insured on a claim has nothing to do with the third party settlement. Furthermore, a carrier has a right to purchase reinsurance and be covered by it without that bearing upon the determination of whether a claimant is entitled to a lien reduction.

We do, however, find that the extent of Breeden's injuries should be considered as a factor in determining whether he is entitled to a reduction in the lien. There is no doubt that Breeden is severely injured both mentally and physically, and the damages he has suffered will run into the millions of dollars. This factor could, of course, be considered as a subset of the analysis as to the strength of claimant's case. To the extent that it is considered as a separate factor, we hold it should be analyzed in the same fashion as the strength of claimant's case factor.

Due to the seriousness of Breeden's injuries and his legitimate desire to settle for the sake of his family, we find a reduction of Carrier's lien is warranted. However, we believe the analysis employed by the full commission in connection with the Kirkland factors to be erroneous and most probably resulted in an excessive reduction. Therefore, we remand this issue to the full commission to make a determination on the percentage by which the lien should be reduced in light of the total cognizable damages, applying the Kirkland factors as set out above.[1]

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[1] We offer no opinion as to what relative weight the commission may give to any of the factors employed, and we do not believe it is necessary to give equal weight to each applicable factor.

II. Application of Lien Reduction to Future Compensation

Additionally, Employer and Carrier contend the full commission erred in applying the lien reduction to future compensation. They assert that because distribution of third party proceeds is governed by section 42-1-560(g), section 42-1-560(f) does not apply and a lien reduction may not be made to future compensation. We disagree.

Section 42-1-560(f), in pertinent part, speaks in terms of "estimated total damages" and "total cognizable damages at law." S.C. Code Ann. § 42-1-560(f) (1985). Section 42-1-560(g) provides:

> When there remains a balance of five thousand dollars or more of the amount recovered from a third party by the beneficiary or carrier after payment of necessary expenses, and satisfaction of the carrier's lien and payment of the share of any person not a beneficiary under this Title, which is applicable as a credit against future compensation benefits for the same injury or death under either subsection (b) or subsection (c) of this section, the entire balance shall in the first instance be paid to the carrier by the third party. The present value of all amounts estimated by the Industrial Commission to be thereafter payable as compensation, with the present value to be computed in accordance with a schedule prepared by the Industrial Commission, shall be held by the carrier as a fund to pay future compensation as it becomes due, and to pay any sum finally remaining in excess thereof to the beneficiaries.

S.C. Code Ann. § 42-1-560(g) (1985).

Employer and Carrier assert that these sections cannot be read together because section 42-1-560(g) only specifically incorporates sections (b) and (c). They further contend there is a conflict between these sections and the rules of statutory construction require the subsequent provision, (g), to prevail over the prior one, (f). See Nat'l Adver. Co. v. Mount Pleasant Bd. of Adjustment, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994) (stating where conflicting statutory provisions exist, the most recent or last in order of arrangement prevails).

However, we see no conflict in these provisions. "If the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." In the Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980). Section 42-1-560(f) provides for a lien reduction if a claimant "enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages." Section 42-1-560(g) governs the method of distributing excess proceeds from a third party judgment or settlement when future compensation will be owed to the claimant. The carrier retains the present value of future compensation and establishes a fund by which it pays future compensation benefits as they come due. Nothing in the distribution scheme set out in section (g) conflicts with the ability of the commission to reduce the entire carrier's lien. Section (g) may still be applied after a lien reduction under section (f) has been ordered. Furthermore, the clear language of section (f) indicates that the lien reduction should apply to future compensation benefits because it refers to the "employee's estimated total damages." The fact that these damages are to be estimated clearly contemplates that at least some of them have not yet accrued but will in the future. Therefore, the lien reduction is based on the whole of the damages that the claimant has and will suffer—past, present, and future—and should be applied as such.

III. Future Medical Expenses

Next, Employer and Carrier argue the commission erred in determining that under section 42-1-560 Carrier's lien does not encumber future medical expenses which have not been incurred at the time of the third party settlement. We agree.

Employer and Carrier contend "compensation" as it appears in section 42-1-560(g) means both income benefits and medically related benefits. Therefore, they assert that under section 42-1-560(g) medical expenses yet to be incurred by Breeden should also be considered part of Carrier's lien for the purpose of establishing a fund from settlement proceeds to pay future medical expenses. As support for this argument, Employer and Carrier point to the fact that the third party recovery statute, 42-1-560, was adopted from the Model Act which includes future medical expenses in its definition of compensation, and that for the purposes of section 42-1-560 the legislature expanded the definition of

"compensation" to conform with the Model Act. Additionally, they argue it would be inequitable to allow Breeden to receive all of his medical expenses from Carrier on the one hand and use the same medical expenses to justify recovery from the third party on the other.

Breeden argues, and the commission found, that this argument is incorrect as the word "compensation" is specifically defined by the legislature in section 42-1-100 as "the money allowance payable to an employee or to his dependents as provided for in this Title and includes funeral benefits provided in this Title." S.C. Code Ann. § 42-1-100 (1985). He contends this definition, and not the definition found in the Model Act, is controlling and further notes that in section 42-1-560 (a), (b), and (c), the statute refers to "the right to compensation and other benefits under this Title." Therefore, he argues, the legislature meant to specifically exclude those "other benefits" from section 42-1-560(g) because it failed to mention them as it did in other provisions of the same section.

We agree with Employer and Carrier that the legislature intended future medicals to be included in the calculation of the value of Carrier's lien for the purpose of establishing a fund from excess third party settlement proceeds to pay future medical compensation benefits. We hold this to be so for two compelling reasons.

First, the legislature's adoption of the third party liability portion of the Model Act verbatim leads us to the conclusion that the legislative intent was for compensation as used in section 42-1-560(g) to include both monetary benefits and medical benefits as it does in the definition section of the Model Act. While it is true that upon adopting the portions of the Model Act the legislature did not amend the definition of compensation as contained in section 42-1-100, it did specifically provide, in subsection (b), that the carrier's lien shall extend to the proceeds of recovery "to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier . . ." S.C. Code Ann. § 42-1-560(b) (1985). Therefore, the legislature clearly intended for the carrier's lien to extend to medical expenses "to be paid in the future." "The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998).

Second, as a matter of policy, it would be inequitable to allow a claimant to recover an award from a third party based on damages including future medical expenses and then require the carrier to pay those same medical expenses which claimant has already recovered without contribution from the third party proceeds. This would result in a double recovery for the claimant. Our courts have consistently held that there can be no double recovery for a single injury. See Collins Music Co. v. Smith, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998).

This conclusion comports with the views of Professor Larson in his well-respected and oft-quoted work on workers' compensation wherein he stated that this "is the correct result even if the reimbursement provision speaks only of 'compensation' paid." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 117.03 (2000).

For these reasons, we find that the legislature intended future medicals to be included in the calculation of the value of Carrier's lien for the purpose of establishing a fund from excess third party settlement proceeds to pay future medical benefits. The circuit court erred in affirming the full commission's determination that under section 42-1-560(g) Carrier's lien does not include future medical expenses which have not yet been incurred at the time of the third party settlement.

This case should be remanded for a determination by the full commission as to the present-day value of future benefits, including medical expenses, for the purpose of establishing a fund from excess third party settlement proceeds to pay future compensation benefits. Additionally, in light of our finding that a lien reduction applies to future damages as well as past and present damages, the full commission should, upon determining the value of Carrier's future lien, reduce that lien by a percentage not to exceed the percentage by which it determines to reduce Carrier's current lien.

IV. Value of Current Lien

Finally, Employer and Carrier assert the full commission erred in freezing the current lien amount at $801,713.81. In light of our disposition of the above issues, we agree.

Breeden's damages are ever increasing. They have certainly increased since the time of the full commission's hearing. Because we are remanding this case to the full commission to determine the proper amount for the lien reduction based on the Kirkland factors and to include future medical expenses in Carrier's lien, the full commission should bring the amount of Carrier's current lien up to date to reflect this increase.

CONCLUSION

Based on our determination that the circuit court erred in affirming the full commission's order which improperly analyzed the factors for lien reduction in Kirkland and failed to include future medical expenses in determining the value of Carrier's lien, we affirm in part, reverse in part, and remand this case to the full commission to determine the amount by which Carrier's lien should be reduced, include future medical expenses in the value of Carrier's lien, and bring the value of Carrier's present lien up to date.

For the foregoing reasons, the order of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

____

Marilu Dowaliby,

Respondent,

v.

Thelma I. Chambless, an incapacitated person, and Robert J. Chambless, her next of kin,

Appellants.

____

Appeal From Charleston County
Diane S. Goodstein, Circuit Court Judge

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Opinion No. 3320
Submitted January 8, 2001 - Filed March 19, 2001

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REVERSED

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Don C. Gibson, of North Charleston, for appellants.

John Kachmarsky, of Charleston, for respondent.

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CONNOR, J.: Marilu Dowaliby filed petitions in the Charleston County Probate Court asking to be appointed as guardian and conservator for her mother, appellant Thelma I. Chambless. Dowaliby's brother, appellant

Robert J. Chambless, opposed the petitions. The probate court found Thelma Chambless was in need of a guardian and appointed Robert Chambless, but determined a conservatorship was unnecessary. The probate court awarded attorney's fees to Dowaliby, which the circuit court affirmed. Robert Chambless appeals on behalf of his mother, challenging the award of attorney's fees. We reverse.

FACTS

This appeal arises from a dispute between siblings Marilu Dowaliby and Robert J. Chambless over the care of their mother, Thelma Chambless. On June 11, 1998, Dowaliby filed separate petitions in the Charleston County Probate Court seeking the appointment of a guardian and a conservator for Thelma Chambless. Dowaliby alleged her mother was suffering from dementia and was incapacitated. In the petitions, Dowaliby asked that she be appointed as guardian and conservator.

Robert Chambless, as next of kin, filed an answer and counterclaim to Dowaliby's petitions admitting their mother suffered from dementia and was unable to manage her own affairs. However, he denied the need for the appointment of a conservator, stating their mother had set up an independent trust on April 23, 1994, appointing him to be the trustee in the event of her incapacity.[1] Also on April 23, 1994, Thelma Chambless executed a durable power of attorney in favor of her son, Robert, as well as a will naming him the executor. Robert Chambless attached copies of the trust, the power of attorney, and the will to his answer.

Chambless asserted their mother had transferred to the trust the deeds to her real property prior to becoming incapacitated and that all liquid assets were being held in the trust for the purpose of their mother's lifetime care. He asked that their mother be declared incompetent and that the court recognize

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[1] The Thelma I. Chambless Trust included assets such as Thelma Chambless's personal residence (valued at $85,000), some home furnishings, and investments of approximately $40,000. The total estate was valued at about $137,000.

the validity of the trust, or that the court "appoint himself or some other uninterested party as a Conservator in the event it is determined that the Thelma I. Chambless Trust is for some reason not satisfactory in taking care of his mother." Chambless asserted he should be appointed conservator because he had cared for their mother prior to her being placed in a nursing home, and because Dowaliby had been living out of state for years and was not a proper person to handle their mother's financial affairs. Chambless asked that Dowaliby's petitions be dismissed and that Dowaliby pay attorney's fees and costs for his defense of the trust.

By order dated February 3, 1999, the probate court found "clear and convincing evidence that Thelma I. Chambless is an incapacitated person" and found good cause to appoint Robert Chambless as the sole guardian.[2] In a separate order, the probate court denied the petition for appointment of a conservator finding it was unnecessary because Thelma Chambless had placed her assets in the trust dated April 23, 1994. The court determined the trust and its named trustee, Robert Chambless, were valid and concluded there was "no rationale for supplementing its terms with a Court appointed Conservator." The probate court reserved the issues of attorney's fees and costs "for further hearing if necessary."

Dowaliby's attorney subsequently filed a petition seeking $7,427.05 in attorney's fees allegedly incurred on behalf of Thelma Chambless. Dowaliby's attorney submitted invoices and an affidavit in support of the award.

The probate court awarded Dowaliby attorney's fees of $4,427.05. In so doing, the probate court stated:

> There is South Carolina case law precedent that allows expenditures for reasonable necessities of a

[2] The probate court specifically found Robert Chambless had fulfilled the role of de facto guardian for his mother for "at least the last four or five years if not longer," had assisted her in making medical decisions, and had provided care to her both in her own home and his before making a placement decision.

ward even if the expenses occurred before the appointment of a guardian. (citations omitted).

The probate court found Dowaliby's petitions benefitted Thelma Chambless because a guardian was appointed to provide for her care, comfort, and maintenance, and the guardian was required to consult with and/or inform her daughter and grandchildren regarding health care and placement decisions. The court found Thelma Chambless was further benefitted by the court's validation of the trust.

The circuit court affirmed the award, and Chambless appeals.

LAW/ANALYSIS

On appeal, Chambless asserts Dowaliby is not entitled to an award of attorney's fees.

It is well established that "[a]ttorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); see Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."); Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) ("Ordinarily, an attorney must look to his client for compensation for services performed by his employment" unless authorized by contract or statute.); Prevatte v. Asbury Arms, 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990) ("Under the common law of South Carolina, a prevailing party has no right to recover attorney's fees. In the absence of a common law right, the plaintiff must plead either a contract or a statute to receive enhanced damages or attorney's fees.") (citation omitted).

Because there is no contractual provision at issue here, we must determine whether there is a statutory basis for Dowaliby to recover attorney's

fees.[3] Dowaliby argues the award of attorney's fees is authorized by S.C. Code Ann. § 62-5-414 (1987), which provides:

> If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator *appointed in a protective proceeding* is entitled to reasonable compensation from the estate, as determined by the court.

S.C. Code Ann. § 62-5-414 (1987) (emphasis added).

"A statute allowing attorney fees is in derogation of the common law and must be strictly construed." Belton v. State, 339 S.C. 71, 74, 529 S.E.2d 4, 5 (2000); accord Steinert v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985) (holding statute allowing recovery of costs was in derogation of the common law and therefore must be strictly construed to allow only the recovery of costs and not attorney's fees); Flynn v. Scott, 969 S.W.2d 260 (Mo. Ct. App. 1998) (holding attorney was not entitled to recover fees absent statutory authorization); In re Guardianship of the Person & Estate of Jacobsen, 482 N.W.2d 634 (S.D. 1992) (holding that party unsuccessfully petitioning to be named guardian could not recover attorney's fees under a statute allowing recovery of attorney's fees as necessary expense for the care and management of the estate where said party had not undertaken the care and management of the estate and the court was "unable to find any precise authority allowing attorney's fees to petitioners in guardianship proceedings").

The plain language of section 62-5-414 authorizes reasonable compensation to lawyers that are "appointed" in protective proceedings. S.C. Code Ann. § 62-5-414 (1987). Dowaliby's attorney was never appointed to represent Thelma Chambless. Rather, the probate court appointed Ruth Williams Cupp as Thelma Chambless's attorney and guardian ad litem for these proceedings. See S.C. Code Ann. § 62-5-303(b) (1987) (providing that unless the allegedly incapacitated person has her own counsel the probate court shall

[3] It is undisputed that Dowaliby's attorney did not enter into a contract with Thelma Chambless or her estate to provide legal services.

appoint an attorney to represent her in the proceedings who shall also act as the guardian ad litem).[4]

Accordingly, because we can find no statutory basis for an award of attorney's fees to Dowaliby, the probate court's award of attorney's fees must be reversed. See First Union Nat'l Bank of South Carolina v. FCVS Communications, 328 S.C. 290, 494 S.E.2d 429 (1997) (reversing award of attorney's fees because the attorney's fees were not authorized by contract or statute); South Carolina Dep't of Soc. Servs. v. Tharp, 312 S.C. 243, 439 S.E.2d 854 (1994) (holding it was error to award attorney's fees without statutory authority).

CONCLUSION

For the foregoing reasons, the award of attorney's fees to Dowaliby is

REVERSED.

CURETON and GOOLSBY, JJ., concur.

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[4] Furthermore, Dowaliby is not seeking expenses incurred prior to her appointment as guardian or conservator, as she was never appointed to either position. This situation is, therefore, distinguishable from the cases cited by the probate court and the circuit court, which provide an appointed guardian may be able to recover expenses incurred prior to the formal appointment if such expenditures benefitted the ward. Moreover, the probate court determined Robert Chambless, not Dowaliby, was acting as Thelma Chambless's guardian for "at least the last four or five years" prior to this proceeding.