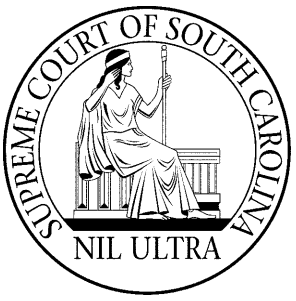

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 6, 2003

ADVANCE SHEET NO. 1

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2002-UP-787 - Fisher v. Hendrix
(Horry, Judge H.E. Bonnoitt, Jr.)

2002-UP-788 - City of Columbia v. Jeremy Neil Floyd
(Richland, John L. Breeden)

2002-UP-789 - Warren v. Merastar Insurance
(Spartanburg, Judge John C. Hayes, III)

2002-UP-790 - The State v. Freda L. Byers
(York, Judge Howard P. King)

2002-UP-791 - The State v. Kenneth Butler
(Laurens, Judge H. Dean Hall)

2002-UP-792 - SCDSS v. Inhatiuk
(Greenwood, Judge Billy A. Tunstall, Jr.)

2002-UP-793 - The State v. Sharrick Halsey
(Chester, Judge Paul E. Short, Jr.)

2002-UP-794 - Jones v. Rentz
(Aiken, Judge Peter R. Nuessle)

2002-UP-795 - Brown v. Calhoun
(Greenville, Judge John W. Kittredge)

2002-UP-796 - The State v. Kenneth Wayne Haynes
(Oconee, Judge J. C. Buddy Nicholson, Jr.)

2002-UP-797 - The State v. Robert Sherer
(York, Judge John C. Hayes, III)

2002-UP-798 - Brantley Construction v. Newberry County
(Newberry, Judge Gary E. Clary)

2002-UP-799 - SCDHEC v. Richard Redding
(Charleston, Judge Jackson V. Gregory)

2002-UP-800 - Crowley v. NationsCredit
(Richland, Judge Kenneth G. Goode)

PETITIONS FOR REHEARING

3533 - Food Lion v. United Food	Denied 12/19/02
3547 - Mathis v. Hair	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Denied 12/19/02
3558 - Binkley v. Burry	Denied 12/19/02
3559 - The State v. Follin	Denied 12/19/02
3561 - Baril v. Aiken Regional Medical Center	Denied 12/19/02
3562 - Heyward v. Christmas	Denied 12/19/02
3563 - State v. Missouri	Pending
3655 - Clark v. SCDPS	Pending
3568 - Hopkins v. Harrell	Pending
3570 - SCDSS v. Meek	Pending
3573 - Gallagher v. Evert	Pending
3574 - Risinger v. Knight	Pending
3575 - Burroughs V. SCDOT	Pending
3579 - The State v. Dudley	Pending
2001-UP-522 - Kenney v. Kenney	Held in Abeyance
2002-UP-611 - Allgood, V., et al. v. GE Capital	Pending
2002-UP-615 - The State v. Floyd	Denied 12/19/02
2002-UP-623 - The State v. Ford	Denied 12/19/02

2002-UP-628 - Thomas v. Cal-Maine	Pending
2002-UP-640 - Elliott v. Elliott	Denied 12/19/02
2002-UP-646 - Hill v. Norman	Denied 12/19/02
2002-UP-647 - Young v. Florence	Denied 12/19/02
2002-UP-656 - SCDOT V. DDD #2	Denied 12/19/02
2002-UP-657 - SCDOT V. DDD	Denied 12/19/02
2002-UP-662 - The State v. Morgan	Denied 12/19/02
2002-UP-669 - Estate of M. Floyd	Pending
2002-UP-670 - The State v. Bunnell	Pending
2002-UP-691 - Grate v. Georgetown	Denied 12/19/02
2002-UP-704 - The State v. Webber	Denied 12/19/02
2002-UP-715 - Brown v. Zamis	Pending
2002-UP-724 - The State v. Stogner	Denied 12/19/02
2002-UP-734 - SCDOT v. Jordan	Pending
2002-UP-735 - Hubbard v. Pearson	Pending
2002-UP-736 - The State v. Stewart	Pending
2002-UP-746 - Floyd v. Pilliod	Pending
2002-UP-747 - City of Rock Hill v. Lawrence	Pending
2002-UP-749 - The State v. Keenon	Pending
2002-UP-748 - Miller v. Deleon	Pending
2002-UP-752 - Addison v. Trident Technical College	Pending

2002-UP-760 - The State v. Hill	Pending
2002-UP-775 - The State v. Charles	Pending
2002-UP-783 - The State v. Fuller	

PETITIONS - SOUTH CAROLINA SUPREME COURT

3314 - The State v. Woody, Minyard	Pending
3489 - The State v. Jarrell	Pending
3495 – Ferrell Cothran v. Alvin Brown	Granted 12/18/2002
3500 - The State v. Cabrera-Pena	Pending
3501 - The State v. Johnson	Pending
3504 - Wilson v. Rivers	Pending
3505 - L-J v. Bituminous	Pending
3511 - Maxwell v. Genez	Pending
3512 - Cheap O's v. Cloyd	Pending
3515 - The State v. Garrett	Pending
3516 - Antley v. Nobel	Pending
3518 - Chambers v. Pingree	Pending
3520 - Alice Pilgrim v. Yvonne Miller	Pending
3521 - Pond Place v. Poole	Pending
3523 - The State v. Arnold	Pending
3525 - Arscott v. Bacon	Pending

3527 - Griffin v. Jordan	Pending
3535 - The State v. Ledford	Pending
3539 - The State v. Charron	Pending
3540 - Greene v. Greene	Pending
3541 - Satcher v. Satcher	Pending
3544 - Gilliland v. Doe	Pending
3546 - Lauro v. Visnapuu	Pending
3548 - Mullis v. Trident	Pending
3549 - The State v. Brown	Pending
2002-UP-220 - The State v. Hallums	Pending
2002-UP- 241 - The State v. Rouse	Pending
2002-UP-256 - Insurit v. Insurit	Denied 12/18/2002
2002-UP-266 - The Town of Mt. Pleasant v. John Lipsky	Pending
2002-UP-329 - Ligon v. Norris	Pending
2002-UP-363 - Curtis Gibbs v. SCDOP	Denied 12/18/2002
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-374 - The State v. Craft	Denied 12/18/02
2002-UP-381 - Rembert v. Unison	Pending
2002-UP-393 - Wright v. Nichols	Denied 12/18/02
2002-UP-395 - The State v Hutto	Pending
2002-UP-401 - The State v. Warren	Pending

2002-UP-411 - The State v. Roumillat	Pending
2002-UP-412 - Hawk v. C&H Roofing	Pending
2002-UP-472 - The State v. Johnson	Pending
2002-UP-480 - The State v. Parker	Pending
2002-UP-485 - Price v. Tarrant	Pending
2002-UP-489 - Fickling v. Taylor	Pending
2002-UP-498 - Singleton v. Stokes Motors	Pending
2002-UP-504 - Thorne v. SCE&G	Pending
2002-UP-509 - Baldwin Const v. Graham, Barry	Pending
2002-UP-513 - Frazier, E'Van v. Badger	Pending
2002-UP-514 - McCleer v. City of Greer	Pending
2002-UP-516 - The State v. Parks	Pending
2002-UP-537 - Walters v. Austen	Pending
2002-UP-547 - Stewart v. Harper	Pending
2002-UP-549 - Davis v. Greenville Hospital	Pending
2002-UP-574 - The State v. Johnson	Pending
2002-UP-586 - Ross v. USC	Pending
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-594 - Williamson v. Bermuda	Pending
2002-UP-603 - The State v. Choice	Pending
2002-UP-609 - Brown v. Shaw	Pending

0000-00-000 - Dreher v. Dreher	Pending
0000-00-000 - Hattie Elam v. SCDOT	Pending
0000-00-000 - Main Corporation v. Thomas Black	Granted 11/21/2002

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Graham Bennett, Respondent.

Opinion No. 25570
Submitted November 25, 2002 - Filed December 23, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Susan M. Johnston, both of Columbia, for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension for a period of up to two years, retroactive to October 17, 2000.[1] We accept the agreement and suspend respondent for eight months, retroactive to October 17, 2000. The following facts are set forth in the agreement.

[1] Respondent was placed on interim suspension on October 17, 2000. In re Bennett, 342 S.C. 625, 539 S.E.2d 387 (2000).

Facts

In August 2000, respondent was retained to represent the client, the seller, in a real estate closing. The buyer's loan amount of approximately $50,000 was entrusted to respondent, and respondent deposited the check into his trust account. After the closing, respondent issued a check to the client from his trust account in the amount of $49,547.04. The client deposited the check into his personal account. The trust account check was presented and returned twice for insufficient funds. Respondent failed to promptly respond to the client's inquiries into this matter. Subsequently, respondent negotiated a bank loan, from which a bank check for the sale proceeds was issued to the client.

In connection with ODC's full investigation of this matter, respondent acknowledged that he had not maintained proper control over his trust account and did not maintain the trust account in accordance with the requirements of Rule 417, SCACR. Respondent advised ODC that a member of his law office staff had misappropriated approximately $37,000 from the trust account and that this individual had been arrested.

Respondent commissioned an audit of his trust account. The audit revealed that, in a separate real estate matter in December 1999 in which respondent served as the closing attorney, an overpayment in the amount of $63,794.26 was made to the seller. Respondent advised ODC that he is attempting to contact this individual to arrange reimbursement for the overpayment.

The audit also uncovered errors in transactions where respondent made disbursements from the trust account taking into account earnest money that he had not actually received, further depleting the trust account.

Respondent has advised ODC that he has deposited personal funds into the trust account to ensure that no client suffers as a result of the theft or respondent's bookkeeping errors.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.15(b) (failing to deliver funds to which the client is entitled to receive); Rule 5.3(b) (failing to ensure that a nonlawyer assistant's conduct is compatible with the professional responsibilities of the lawyer); and Rule 8.4(a) (violating the Rules of Professional Conduct).

Respondent has also violated the following provision of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct).

Additionally, respondent has violated Rule 417, SCACR (failing to maintain proper financial records).

Conclusion

Respondent fully acknowledges that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct, the Rules for Lawyer Disciplinary Enforcement, and Rule 417, SCACR. We hereby suspend respondent from the practice of law for eight months, retroactive to October 17, 2000.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leatrice Williams Collins, Respondent,

v.

John Doe, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Clarendon County
Howard P. King, Circuit Court Judge

Opinion No. 25571
Heard June 12, 2002 - Filed December 30, 2002

REVERSED

Harry C. Wilson, Jr., of Lee, Erter, Wilson, James, Holler & Smith, of Sumter, for petitioner.

Ronnie A. Sabb, of Kingstree, for respondent.

JUSTICE PLEICONES: The Court granted certiorari to consider the Court of Appeals' decision in Collins v. Doe, 343 S.C.

119, 539 S.E.2d 62 (Ct. App. 2000). The Court of Appeals held that for purposes of S.C. Code Ann. § 38-77-170 (2) (Supp. 2001), a witness's sworn trial testimony is the functional equivalent of a sworn affidavit. We reverse.

FACTS/PROCEDURAL BACKGROUND

Respondent sued an unidentified driver, Petitioner John Doe ("Doe"), after she was involved in an automobile collision with another vehicle. Respondent was traveling on Highway 301 in Clarendon County. At the point where 301 intersects with Highway 521, an automobile driven by Doe failed to yield the right of way to Respondent. To avoid a collision with Doe, Respondent took evasive action, and in so doing, collided with the vehicle of Joanne Calvin. Respondent's vehicle never made contact with Doe's vehicle. Respondent suffered injuries in the accident, and sought to recover damages under the uninsured motorist coverage provided by her automobile insurance policy.

Respondent sued Doe and the case went to trial. After Respondent presented her case, Doe moved for directed verdict. The basis for Doe's motion was Respondent's failure to produce an affidavit of a witness, as prescribed by S.C. Code Ann. § 38-77-170 (2) (Supp. 2001).[1] Although Respondent did not produce a witness-signed

---

[1]S.C. Code Ann. § 38-77-170 is entitled:

Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

The statute provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is *no right of action or recovery* under the uninsured motorist provision, unless:

affidavit, at trial she produced a witness who testified that a vehicle driven by Doe caused the accident. Respondent argued the witness's testimony satisfied the requirements of § 38-77-170 (2).

The trial court found that Respondent's failure to produce an affidavit was fatal to her cause of action, and granted Doe's directed verdict motion. The Court of Appeals reversed, holding the witness's trial testimony was the functional equivalent of a sworn affidavit. We granted Doe's petition for certiorari.

> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, *or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit*;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.
>
> (Emphasis supplied).

ISSUE

Did the Court of Appeals err in determining that a witness's testimony at trial is the functional equivalent of the affidavit required by § 38-77-170 (2)?

ANALYSIS

Doe contends the Court of Appeals erred in reversing the circuit court. We agree.

Where a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. City of Columbia v. American Civil Liberties Union of S.C., Inc., 323 S.C. 384, 475 S.E.2d 747 (1996). Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. Id.

The legislature unambiguously required that a plaintiff seeking to recover against her uninsured motorist coverage for the negligence of an unknown John Doe driver strictly comply with the plain language of the statute. The current statute is titled "*Conditions to sue or recover* under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown." (Emphasis supplied).

Our General Assembly first enacted a John Doe statute in 1963. The statute as first enacted required "physical contact with the unknown vehicle" before the plaintiff could recover. See Act No. 312, 1963 S.C. Acts 535.

In 1987, the General Assembly relaxed the physical contact requirement, and amended the John Doe statute to provide that a plaintiff has no right of action or recovery unless "the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle." Act No. 166, 1987 S.C. Acts 1122.

Under the 1987 amendment, a witness-sworn affidavit was not required.

The legislature again amended the statute in 1989, and added the sworn affidavit requirement. The statute at large effecting this most recent amendment provides that the act is "to amend section 38-77-170 relating to *the requirements to recover* under the uninsured motorist provisions when the at-fault party is unknown, so as *to require* a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439 (emphasis supplied).

As written, section 38-77-170 contains requirements necessary to support a plaintiff's "right of action." Black's defines "right of action" as:

> 1. The right to bring a specific case to court. 2. A right that can be enforced by legal action; a chose in action. Cf. cause of action.

Black's Law Dictionary 1324 (Bryan A. Garner ed., 7th ed, West 1999). Without a sworn affidavit, a plaintiff has no right of action. In other words, without the affidavit, she has no right to bring her case to court.

This Court has historically required strict compliance with the statute allowing an insured to sue her own insurer where damages are caused by an unknown driver. In Criterion Ins. Co. v. Hoffmann, 258 S.C. 282, 188 S.E.2d 459 (1972), an insured sued his insurer seeking to recover against the uninsured motorist coverage of his policy. The statute[2] required that service of process be accomplished by delivering a copy of the summons and complaint to the insurance commissioner. The insured delivered to the insurance commissioner a copy of the summons, but not a copy of the complaint. The Court affirmed the trial court's ruling that the insured could not recover because he failed to

[2] S.C. Code Ann. § 46-750.35 (1962).

comply with the statutory provisions regarding service of process. The Court remarked:

> The right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature. Except for the statute, and endorsements required, no right exists to recover from one's own insurance carrier. One must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of law. . . .
>
> It is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier. . . .
>
> The terms of the statute . . . are clear and not ambiguous. This being true, there is no room for construction and we are required to apply the statute according to its literal meaning. Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover.

Id. at 290-92, 188 S.E.2d at 462-63.

This Court held that proof of physical contact, a requirement contained in the predecessor statute to Section 38-77-170, was a condition precedent to a plaintiff's right of action against an unknown John Doe defendant. See Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971).

In Wynn v. Doe, the plaintiff brought suit against unknown motorist John Doe after the plaintiff drove her motorcycle through a slippery substance on the highway and crashed. The plaintiff sued the

unknown driver of the vehicle responsible for laying the substance on the highway. The plaintiff admitted that there had been no physical contact between her motorcycle and the unknown driver's vehicle.

The John Doe statute under consideration in Wynn provided that:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action or recovery under the uninsured motorist provision, unless . . .
>
> (2) The injury or damage was caused by physical contact with the unknown vehicle.

S.C. Code Ann. § 46-750.34 (Supp. 1970).[3] The trial court granted judgment in favor of the defendant, holding that the plaintiff had failed to state a cause of action because there had been no physical contact between the unknown vehicle and the plaintiff's motorcycle. This Court agreed, and strictly construed the statute:

> The right to recover for the negligence of an unknown motorist is determined, under the plain terms of Section 46-750.34(2), by whether or not the injury was caused by physical contact with the unknown vehicle. . . . In the words of the statute, there is 'no right of action or recovery under the uninsured motorist provision, unless * * * the injury or damage was caused by physical contact with the unknown vehicle.' The statute makes proof of physical contact *a condition precedent* in any case for the recovery of damages caused by an unknown driver and vehicle. *There are no exceptions to this rule*. . . . It being agreed that there was no physical contact between the unknown vehicle and the motorcycle operated by the appellant, the

[3] In 1987, the legislature renumbered the John Doe statute and placed it in its current section, § 38-77-170. Act No. 155, 1987 S.C. Acts 385.

> absence of any such physical contact is *fatal to her cause of action*.
>
> The appellant contends that since there was actual and physical contact with the chemical substance dumped or spilled onto the public highway by an unidentified and unknown vehicle, such meets the 'physical contact' requirement of Section 46-750.34(2) of the Code. This contention is of no consequence because here the indispensable element of 'physical contact with the unknown vehicle' is absent and, therefore, to adopt the view advanced by the appellant would defeat the clear and unambiguous legislative intent expressed in the statute. . . .

Wynn v. Doe, at 511-12, 180 S.E.2d at 96 (emphasis supplied; citations omitted).

Courts have likewise required strict compliance with the current version of the John Doe statute. In Morehead v. Doe, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996), the plaintiff did not report the accident to the appropriate police authority until eight months after the accident. The trial court ruled that the plaintiff's belated report satisfied § 38-77-170 (1). The Court of Appeals reversed, reasoning that:

> The report to a police authority must be made, as the statute requires, 'within a reasonable time.' . . . Indeed, because a person is presumed to know the law . . . , Morehead is presumed to have known on July 21, 1989, the date of the accident, she had no right of action unless she reported the accident to an appropriate police authority within a reasonable time.
>
> The fact that [the insurer] possessed the same information that Morehead reported to the police authority is also of no significance. By not reporting the accident far earlier, Morehead deprived [the insurer] of meaningful

> police assistance in investigating the accident and identifying the at-fault motorist. . . .

Id. at 562-63, 479 S.E.2d at 818-19 (citation omitted).

In this case, the Court of Appeals held that the purpose of the sworn affidavit requirement is served where a witness testifies at trial. We disagree. We discern three purposes for the sworn affidavit requirement. The obvious purpose, fraud prevention, is seemingly served by the Court of Appeals' conclusion. By offering sworn trial testimony, the witness subjects herself to the criminal penalties for perjury. However, the statute reflects that the legislature's chosen vehicle for fraud prevention under these circumstances is a sworn affidavit prominently displaying the prescribed disclaimer. The disclaimer alerts the affiant that she may be subject to criminal penalties for providing untrue information. The affidavit also allows the defendant, at trial, to cross examine the witness regarding the statement. The Court of Appeals' holding forecloses the defendant's ability to conduct cross examination regarding the witness's statement in the affidavit.

In addition, the affidavit constitutes tangible evidence that the insured has a good faith basis for making the claim.

Finally, the sworn affidavit requirement fulfills a notice function: Providing, upon request, the defendant-insurer with information relating to the validity of the plaintiff's case.[4] Without the affidavit, and without the opportunity to interview the witness, the insurer is deprived of valuable factual information with which to assess and evaluate the claim.

[4] The Court of Appeals recognized that requiring the insured to notify the police within a reasonable time after the accident (codified at § 38-77-170 (1)) provided the defendant-insurer with information valuable to its assessment of the claim. See Morehead, supra.

The plain language of § 38-77-170 requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident "*must* have been witnessed by someone other than the owner or operator of the insured vehicle" and the "witness *must* sign an affidavit attesting to the truth of the facts of the accident contained therein." The statute further prescribes a disclaimer and provides that the disclaimer "*must* be prominently displayed on the face of the affidavit." Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See e.g., In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001); South Carolina Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990); Starnes v. South Carolina Dept. of Public Safety, 342 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000).

A plaintiff's strict compliance with the affidavit requirement is mandatory. The Court of Appeals excused this mandatory requirement where the plaintiff offers up a "functional equivalent" of an affidavit. The statute makes no provision for the functional equivalent of an affidavit.

CONCLUSION

The Court of Appeals' holding creates an exception where none previously existed. Both this Court and the Court of Appeals have held that strict compliance with § 38-77-170 is a prerequisite to maintaining a cause of action under that statute. The plain language of the statute supports this conclusion. Because Respondent failed to produce a sworn witness affidavit as mandated by § 38-77-170 (2), we REVERSE the decision of the Court of Appeals.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the majority's opinion ignores the clear intent of the legislature by holding that sworn testimony by an eye-witness is not the functional equivalent of a sworn affidavit for purposes of S.C. Code Ann. § 38-77-170(2) (Supp. 2001). Section 38-77-170 governs when a motorist can recover under an uninsured motorist provision when the at-fault motorist is unknown.

Originally, an action for recovery against an unknown driver was permitted only when the damages were caused by physical contact with the unknown driver. *See* Act No. 312, 1963 S.C. Acts 535. As the majority points out, the General Assembly relaxed the physical contact requirement in 1987 by allowing an action to proceed when the accident was "witnessed by someone other than the owner or operator of the vehicle." Acts No. 166, 1987 S.C. Acts 1122. In 1989, the General Assembly amended the statute again, adding the sworn affidavit requirement. Act No. 148, 1989 S.C. Acts 439.

The majority reasons that a sworn affidavit accomplishes three objectives: fraud prevention, meaningful cross-examination, and prior notice to the insurer for purposes of claim evaluation. I agree wholeheartedly that the legislature intended for the sworn affidavit requirement to prevent fraudulent claims. However, I disagree that the legislature also intended for the affidavit to allow for more effective cross-examination of the witness at trial or for it to serve a notice function.

The ability to cross-examine a witness effectively at trial does not depend on having a prior statement of the witness. If anything, a witness's testimony at trial should be deemed *more*, not less, reliable than a statement in a sworn affidavit. Further, as the majority points out in footnote 4, the statute requires separately that the insured report the accident to the police within a reasonable time period after the accident. This provision ensures that the defendant-insurer gets information collected by the police, valuable to the assessment of the insured's claim, in a timely manner. S.C. Code Ann. § 38-77-170(1); *See Morehead v. Doe,* 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996). I respectfully disagree with the majority's conclusion that the affidavit is intended to serve as an *additional* form of notice to the insurer.

In conclusion, I believe the legislature intended for the sworn affidavit to prevent motorists from filing fraudulent claims, and sworn testimony, by an eye-witness at trial, ensures against fraud even more effectively than the sworn affidavit. Therefore, I would **AFFIRM** the Court of Appeals' finding that sworn testimony is the functional equivalent of a sworn affidavit for purposes of S.C. Code Ann. § 38-77-170(2).

BURNETT, J., concurs.

The Supreme Court of South Carolina

In the Matter of James G. Longtin, Respondent.

ORDER

Respondent was suspended on October 28, 2002, for a period of thirty (30) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

December 18, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Nexsen, Respondent,

v.

Richard B. Haddock, Aubrey E. Judy, James G. Lifrage, Marion Driggers, Larry Poston, Kenneth E. McClary, Jerry L. Weaver, Billy D. Weaver, Glen Weaver and Gerald Weaver,

Of whom, James G. Lifrage and Marion Driggers are, Appellants.

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

Opinion No. 3581
Heard November 5, 2002 – Filed December 19, 2002

AFFIRMED

Michael G. Nettles, of Lake City; for Appellants.

Jeffrey L. Payne, James D. Smith, Jr., of Florence;
for Respondent.

CURETON, J.: David Nexsen brought this action seeking a declaration that the sublease between Kenneth E. McClary, James G. Lifrage and Marion Driggers is a nullity pursuant to S.C. Code Ann. § 27-35-60 (1976, as amended). The trial judge found the sublease to be invalid. Lifrage and Driggers appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1996, David Nexsen purchased a tract of land on the Black River in Williamsburg County, South Carolina. At the time the property was purchased, the tract had been divided into three lots, with each lot being subject to a lease. Kenneth E. McClary was a tenant on lot 2 and a party to one of the leases. McClary's lease allowed for the use and occupancy of the premises as the tenant "desired." The terms of the lease did not prohibit the subleasing of the property.

In July, 2000, McClary entered into a sublease with James G. Lifrage and Marion Driggers (Appellants). This lease was recorded in the Office of the Clerk of Court for Williamsburg County. Neither McClary, nor Appellants, asked Nexsen's permission prior to entering into the sublease.

Nexsen brought this action seeking to have the lease between McClary and Appellants declared a nullity. Following a hearing on both parties' motions for summary judgment, the trial judge held that S.C. Code Ann. § 27-35-60 prohibits the sublease of property without the written consent of the landlord, and as a result, the sublease between the Appellants and McClary was invalid.

LAW/ANALYSIS

Appellants aver the trial court erred in finding that S.C. Code Ann. § 27-35-60 prohibits the sublease of property without the written consent of the landlord under the facts of this case. Appellants contend that the terms of the lease agreement control the issue of whether McClary was able to sublease the property. Appellants argue that because the lease contains language to the effect that the tenant may use the property "as desired", and because the original owner testified he had no intention of limiting McClary's ability to sublease the property, that under the terms of the lease, McClary had the right to sublease the property.

When Nexsen purchased the tract of land in question, the property continued to be burdened with the lease entered into between McClary and the previous owner of the tract. See S.C. Code Ann. § 27-35-50 (1976):

> When real estate is sold while under lease, the relationship of landlord and tenant is created ipso facto as between the purchaser and the tenant as if the purchaser had been the landlord in the first instance and the purchaser shall be entitled to all the benefits and rights under such lease as if he had been the lessor from the date of the purchase.

Nexsen contends, however, that because the lease is silent as to whether or not the property may be subleased, S.C. Code Ann. § 27-35-60 controls. The statute states:

> A sublease by a tenant without written consent of the landlord is a nullity insofar as the rights of the landlord are concerned, except that rent collected by a tenant from a subtenant shall be deemed to be held in trust by the tenant for the benefit of the landlord until the payment of the landlord's claim for rent. But when the premises have been sublet the sublessor, as between himself and the subtenant or sublessee, shall be deemed the landlord and the sublessee the tenant under him . . .

S.C. Code Ann. § 27-35-60 (1976). Nexsen argues § 27-35-60 prohibits McClary from subleasing the property.

"In reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c), SCRCP. Summary judgment is proper when there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991) (citations omitted). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Prop. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

"The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "[W]ords used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id.

Examining the terms of the lease, we find the language in the lease agreement that the tenant shall "use and occupy the premises as desired, including the construction of a dwelling, etc., thereon" is not sufficient to convey to McClary the right to sublease the property. Therefore, applying the plain meaning of S.C. Code Ann. § 27-35-60 to the facts and circumstances of this case, we find that absent Nexsen's written consent, the sublease between McClary and Appellants is a nullity. See Dobyns v. S.C. Dep't of Parks, Recreation and Tourisim, 252 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) (where our supreme court refused to adopt a reasonableness requirement into a lease that permitted subleasing "upon the consent of the leasor").

CONCLUSION

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

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Okatie River, L.L.C., Respondent,

v.

Southeastern Site Prep, L.L.C., Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Special Circuit Court Judge

Opinion No. 3582
Heard December 10, 2002 – Filed January 6, 2003

AFFIRMED

G. Richardson Wieters, of Hilton Head Island; for Appellant.

Frank H. Clabaugh, of Hilton Head Island; for Respondent.

Anderson, J.: Southeastern Site Prep, LLC (Southeastern) appeals the circuit court's order awarding Okatie River, LLC (Okatie) $85,000 plus interest. We affirm.

FACTS/PROCEDURAL BACKGROUND

Incorporated on December 18, 1996, Okatie was formed for the purpose of acquiring and developing a 927-acre plot of land known as Indigo Plantation in Beaufort County. Richard Covelli (Covelli) was named managing member of Okatie, and G. Duane Deline and Sam Mollet were the principal shareholders. Okatie did not own Indigo Plantation, but it had an option to purchase the property. Okatie obtained the proper zoning to develop the property. However, by January 1997, a lawsuit was filed by a third party which halted all development. During the pendency of the lawsuit, Okatie did not take any steps to develop Indigo Plantation. After the resolution of the lawsuit in December 1997, Okatie determined that it would not develop Indigo Plantation, and it did not exercise its option to purchase. The sole purpose for organizing Okatie no longer existed. Consequentially, Okatie closed its office and dismissed Covelli on December 18, 1997.

While development was on hold at Indigo Plantation, Covelli contacted Thomas Viljac and Steve DeSimone about forming another limited liability company for the purpose of performing site development construction at various developments. On February 25, 1997, articles of organization were filed to create Southeastern. The articles named Covelli as the manager. Covelli participated in discussions to develop an operating agreement for Southeastern and attempted to negotiate an ownership interest in it. The parties could not agree on the operating agreement or on Covelli's percentage of ownership, and they decided that Covelli would not have an active management role. During these discussions, Covelli transferred $85,000 of Okatie's funds to Southeastern as "start up funds." Covelli wrote Southeastern a check for $70,000 on March 14, 1997 and another check for $15,000 on August 26, 1997. Covelli gave Southeastern an additional $15,000 from non-Okatie sources. Southeastern's 1997 tax returns referred

to the total $100,000, including the $85,000 from Okatie, as an obligation or loan.

Okatie's principals, Mollet and Deline, did not become aware of the $85,000 transferred to Southeastern until January 1998, when they were wrapping up the business of Okatie. Mollet and Deline contacted DeSimone for the return of the money, and he initially indicated that he thought the money belonged to Covelli. If Covelli did not own the money, DeSimone said Southeastern would return it to Okatie. Viljac and DeSimone later asserted that the money was given to them to secure a discount on work to be performed at Indigo Plantation and refused to return the funds.

When Southeastern filed its 1998 tax return, it again noted that it had an obligation of $100,000. However, Southeastern's accountant made the following notation regarding the tax return:

> The $100,000 "Covelli loan" is comprised of the following:
>
> 15,000.00 Advanced by Rich Covelli personally
> 85,000.00 Advanced by a partnership which Rich Covelli was formerly a member which was formed for the purpose of developing _____.
>
> Nor [sic] formal documentation exists for these advances. Per Thomas Viljac and Steve Dessimone [sic], these funds were non-refundable advances to be used to offset future costs associated with the partnership's development. Subsequently, the option to develop _____ expired and the partnership has been dissolved. Thomas Viljac has been verbally notified by an attorney representing the partnership concerning repayment of the $100,000. This is as far as it has gone. [Southeastern's] attorney has represented that there is a possible claim to these funds, despite Thomas's position that they are non-refundable. Consequently, we have left the liability on the books as of 12/31/98.

In February 1998, Viljac executed an affidavit concerning his transactions with Covelli. In his affidavit, Viljac stated that Southeastern contracted successfully with Indian Hills, another property development company managed by Covelli, to perform site development. Southeastern performed the work and submitted invoices for work performed.[1] Viljac contended that Covelli gave him funds from Okatie to cover start-up costs, and their understanding was that Okatie would be paid back "solely through a reduced price on any work to be performed at Okatie when it was developed." Viljac also declared:

> I further understand that our company's internal financial statements at one point may have reflected the Okatie advances as "capital contributions" by Mr. Covelli. This was a misnomer. In 1997, we changed our accounting software to a new package offered by Peachtree Software which we were still learning, and the internal financial statements are inaccurate. [Southeastern] currently treats the advances as loans from Mr. Covelli on behalf of Okatie.

(emphasis added).

Okatie filed a complaint against Southeastern in June 1999. Okatie alleged the $85,000 was "either loaned to, and/or advanced to Southeastern by Covelli, without the knowledge or consent of Okatie's shareholders." The complaint acknowledged that Southeastern variously referred to the money as a loan or as an advance payment for work to be done at Indigo Plantation. Okatie sought return of the funds and interest. The parties stipulated that the sum of $85,000 was in fact a loan. At issue in the instant case are the terms, conditions, and obligations of repayment.

[1] Prior to Okatie's discovery of Covelli's actions, Indian Hills fired Covelli and brought a lawsuit against him, claiming he diverted funds from that company as well.

At trial, Okatie called Viljac as an adverse witness. He denied that Covelli had any managing authority over Southeastern. Viljac maintained that his oral agreement with Covelli was that Okatie would advance Southeastern $85,000 in exchange for Southeastern agreeing to perform site preparation construction at a reduced cost at the Indigo Plantation development, if Okatie decided to give the work to Southeastern. Following Okatie's decision not to develop Indigo Plantation, Viljac believed Southeastern was not obligated to return the money, stating:

> We refuse to refund that money dollar for dollar due to the fact that the agreement between us and Mr. Covelli who controlled that property. The money was to be repaid for a reduction in construction costs on that project. Whether it was to happen tomorrow, a week from tomorrow, 20,000 years from tomorrow, that was the agreement with our company and Mr. Covelli.

Viljac admitted that he called the money a "loan" from Okatie in his previous affidavit.

Viljac attested that Southeastern could have avoided paying back the money by not bidding competitively on work at Indigo Plantation. According to Viljac, the agreement only applied to site preparation work performed on the Indigo Plantation property; therefore, Southeastern would not perform site preparation work for Okatie on another project at a reduced rate pursuant to their agreement. Viljac admitted the agreement with Covelli to perform site construction at a reduced rate did not have a time limit for performance and did not define how the reduced rate would be determined.

Deline averred that although Covelli had authority to enter into a contract for the purchase of the Indigo Plantation property and to get zoning changes, he was not authorized by Okatie to begin negotiations for site construction. Because Okatie did not own Indigo Plantation and the development was on hold pending the outcome of the lawsuit, Deline found no need for Okatie to contract with Southeastern for site preparation. After

reviewing Okatie's accounts, Deline discovered that Covelli misappropriated nearly $800,000 in Okatie funds. Okatie filed a lawsuit against Covelli for return of the funds.

Southeastern called Covelli to testify. He avowed there was a specific agreement with Southeastern for Okatie to pay $85,000 as an advancement to Southeastern for future site preparation at Indigo Plantation at a reduced rate. However, he admitted that Southeastern was not really bound by the agreement to perform any actual work. Covelli's 1999 affidavit professed that the $85,000 was "not conditioned upon performance of the horizontal construction by [Southeastern], nor was it a loan, nor did [Southeastern] agree to repay the money in the event that the work was not performed or not requested."

The circuit court found the testimony presented in support of Southeastern was not credible. Referring to the documents submitted by Southeastern, including Viljac's affidavit and the tax returns, the court concluded Southeastern treated the $85,000 as a loan. The court treated the money as a loan and determined the money was a loan payable on demand as a result of there not being a due date. The court further found that even if a contract existed with the terms Southeastern proposed, the contract would be unenforceable on the basis that it was unconscionable and "illusionary." The court held that Okatie was entitled to a judgment of $85,000 plus prejudgment interest, and ruled Southeastern would be unjustly enriched if it did not pay Okatie the judgment.

STANDARD OF REVIEW

This case concerns an action for money had and received. "The action is at law for money had and received but it is well-settled that equitable principles govern." Town of Bennettsville v. Bledsoe, 226 S.C. 214, 218, 84 S.E.2d 554, 556 (1954); accord McDonald's Corp. v. Moore, 237 F.Supp. 874, 877 (W.D.S.C. 1965). In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538

S.E.2d 672, 675 (Ct. App. 2000); Snell v. Parlette, 273 S.C. 317, 322, 256 S.E.2d 410, 412 (1979).

ISSUES

I. Did the circuit court err in finding the $85,000 advanced to Southeastern by Okatie was a loan payable on demand?

II. Did the circuit court err in permitting Okatie to impeach its own witness?

III. Did the circuit court err in ruling the agreement was contrary to the evidence produced at trial?

LAW/ANALYSIS

I. MONEY HAD AND RECEIVED/IMPLIED BY LAW CONTRACT/QUASI-CONTRACT

An action for money had and received exists where a defendant has money belonging to the plaintiff which in equity should be repaid to the plaintiff. Jackson v. White, 194 F. 677 (4th Cir. 1912); 42 C.J.S. Implied Contracts § 11 (1991). "In order to recover on a count for money had and received, . . . the plaintiff must show he has equity and conscience on his side, and that he could recover in a court of equity." Marvin v. McRae, 10 S.C.L. (Rice) 171, 176-77 (1839); accord Cary v. Curtis, 44 U.S. 236, 247 (1845); see also Bledsoe, 226 S.C. at 218, 84 S.E.2d at 556 (in an action for money had and received, contractor was not entitled in equity and good conscience to retain the overpayment which would result in contractor's unjust enrichment at the city's expense). Examples of when an action for money had and received will lie are when the plaintiff paid money to the defendant under an unenforceable contract or where the defendant received money from the plaintiff for a special purpose and the money has not been

applied to the purpose, the specific purpose has been abandoned, or the specific purpose cannot be carried out. 42 C.J.S. Implied Contracts §§ 14 and 19 (1991). Once the requirements of an action for money had and received are proven, the equitable principles of unjust enrichment and restitution provide a remedy. 42 C.J.S. Implied Contracts § 5 (1991). An action for money had and received is based upon a quasi-contract or a contract implied in law. King County v. Odman, 111 P.2d 228, 229 (Wash. 1941); 66 Am. Jur. 2d Restitution and Implied Contracts § 172 (2001). The recent development in the law in regard to an action in this nature is academically reviewed with certitude in Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000). Our supreme court, in critiquing prior precedent in this area, concluded "quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Id. at 8, 532 S.E.2d at 872. In addition, the court adopted the "Scudder May test as the sole test for a quantum meruit/quasi-contract/implied by law claim." Id. at 9, 532 S.E.2d at 872. This test mandates: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. Id. at 8-9, 532 S.E.2d at 872 (citing Columbia Wholesale Co. v. Scudder May, N.V., 312 S.C. 259, 440 S.E.2d 129 (1994)).

In theory and actual practice, an action for money had and received is subsumed and amalgamated under the theories of quantum meruit/quasi-contract/implied by law actions. See id. Whereas the action for money had and received is founded upon a quasi-contract or a contract implied in law, we are bound by and apply with exactitude Myrtle Beach Hospital, Inc. to the case sub judice.

II. SUFFICIENT EVIDENCE

Southeastern argues the court erred in holding the verbal agreement was a loan payable on demand because there was no evidence to support the court's decision. We disagree.

Okatie alleged in its complaint that the $85,000 was money advanced, without its knowledge, to Southeastern as a loan or as an advance payment for work to be done at Indigo Plantation. The circuit court found this was an action for money had and received or money lent.

Southeastern's tax documents and financial statements showed that it originally treated the $85,000 as a loan from Okatie in 1997. On various occasions, DeSimone informed Okatie's shareholders that he would return the money, that he thought the money was from Covelli, or that there was an agreement with Covelli which, in sum, did not require Southeastern to return the money. After the trial judge, who was able to observe the witnesses, found both Viljac's and Covelli's testimony not credible with regard to the contract, the judge relied upon the tax documents and Viljac's statement in his original affidavit. Southeastern, which failed to perform any work for Okatie, should have returned the funds "in equity and good conscience" when Okatie disbanded. Applying the Scudder May test to this quasi-contract or contract implied by law, we find in favor of Okatie. Okatie conferred a benefit upon Southeastern by advancing Southeastern $85,000. Southeastern indubitably realized the benefit by accepting and depositing the two checks. Retention of the $85,000 by Southeastern is inequitable if Southeastern does not repay the amount to Okatie because it never rendered services or money to Okatie. Based on our standard of review, we find there was sufficient evidence to support the circuit court's finding that Okatie proved their action for money had and received. Further, in view of the fact that no time was set for repayment of the loan, the circuit court correctly held it was a loan payable on demand.

III. IMPEACHING A WITNESS

Southeastern argues the court erred in allowing Okatie to impeach Viljac's testimony regarding the terms of the agreement. We disagree.

Prior to the adoption of the South Carolina Rules of Evidence, the law provided that a party could not impeach its own witness. See State v. Russ, 208 S.C. 449, 452, 3 S.E.2d 385, 386 (1946) ("Generally, a party cannot impeach a witness he has introduced, either in a criminal case or a civil

case."). One exception to the rule was where the witness' testimony took the party by surprise. See Gilfillan v. Gilfillan, 242 S.C. 258, 261, 130 S.E.2d 578, 580 (1963) ("Contradictory statements may not be used to impeach a party's own witness except upon a showing of surprise."); Hicks v. Coleman, 240 S.C. 227, 230, 125 S.E.2d 473, 474 (1962) (In order for a party to impeach his own witness based on surprise, it must appear "that the party has been actually surprised by the testimony of such witness, or that he has been deceived or entrapped into introducing the witness because of such contradictory statements."). Further, a party was generally bound by the testimony of that witness. See Crider v. Infinger Transp. Co., 248 S.C. 10, 17, 148 S.E.2d 732, 735 (1966).

Enacted in 1995, Rule 607, SCRE provides: "WHO MAY IMPEACH. The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 607, SCRE. Parties may attack the credibility of their own witnesses without having to show surprise. Id.

The Note to the rule edifies in regard to the change in courtroom practice. The former law in this state mandated that a party vouch for its own witness and could not impeach its witness unless the witness was declared hostile upon a showing of actual surprise.

In contrariety to former law, Rule 607 inculcates the Bench and Bar that the credibility of a witness may be attacked by any party, including the party calling the witness. Southeastern cites pre-Rules of Evidence cases to support its contention that Okatie could not impeach its witness, Viljac, and was bound by Viljac's testimony. Although Okatie presented Viljac as its witness, it was certainly able to impeach him. Concomitantly, Okatie had no way to establish the necessary facts in the case other than to call the involved parties to the stand. Okatie's examination of Viljac exposed problems with his credibility. Using other evidence in the case, such as Viljac's affidavit and the tax returns, Okatie was able to show that Southeastern considered the $85,000 a loan. Thus, Okatie was not bound by Viljac's testimony, and it merely sought to show Viljac's bias through his testimony. Based on Rule 607, SCRE, this type of impeachment is proper.

IV. INTERPRETATION OF THE AGREEMENT

Southeastern proclaims that Okatie produced no evidence to refute Covelli's and Viljac's testimony regarding the terms of the verbal agreement. Thus, Southeastern maintains the circuit court erred in concluding the agreement was different from the evidence produced at trial. We disagree.

"The fact that testimony is not contradicted directly does not render it undisputed." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) accord Terwilliger v. Marion, 222 S.C. 185, 72 S.E.2d 165 (1952); Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). The court is not required to accept undisputed evidence as establishing the truth where there is reason for disbelief. Johnson v. Painter, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983).

This is especially true where the court finds the unchallenged testimony not convincing. Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal. South Carolina Dep't of Soc. Serv. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001); Dorchester County Dep't of Soc. Serv. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996); South Carolina Dep't of Soc. Serv. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984).

Despite the fact that Covelli and Viljac were the only parties to testify regarding their "agreement," the circuit court in the present case found both Covelli and Viljac unbelievable. Because the court was in a better position to view the witnesses and judge their trustworthiness, we must give great deference to those findings. Neither the court nor Okatie was bound by Covelli's and Viljac's "uncontradicted" testimony that Southeastern was entitled to keep the money. There was other evidence in the record to support the court's judgment that the transaction actually amounted to money had and received or money lent (an implied by law contract/quasi-contract). Accordingly, we find no error.

CONCLUSION

Based on the foregoing, the order of the circuit court is

AFFIRMED.[2]

HEARN, C.J., and CURETON, J., concur.

[2] We affirm on these grounds; therefore, we need not address the remaining issue on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carol H. Evans,

Respondent,

v.

Accent Manufactured Homes, Inc., d/b/a Accent Mobile Homes; Doug Perkins and Fleetwood of Homes of Virginia, Inc.,

Defendants,

Of whom Accent Manufactured Homes, Inc., d/b/a Accent Mobile Homes is,

Appellant.

Appeal From Orangeburg County
O. Davie Burgdorf, Special Circuit Court Judge

Opinion No. 3583
Heard December 10, 2002 – Filed January 6, 2003

AFFIRMED

M.M. Weinberg, Jr., and M.M. Weinberg, III, both of Sumter; and Michael P. Horger of Orangeburg, for Appellant.

A.F. Carter, III, and Cynthia Bailey Berry, both of Orangeburg, for Respondent.

ANDERSON, J.: Accent Manufactured Homes, Inc., d/b/a Accent Mobile Homes ("Accent") appeals a circuit court order denying its motion to dismiss and compel arbitration, arguing the circuit court erred in finding Accent waived its right to compel arbitration. We affirm.

FACTS/PROCEDURAL BACKGROUND

Carol H. Evans negotiated with Accent to purchase a mobile home in the summer of 1997. Accent agreed that if it sold Evans a mobile home, it would make specific modifications to the mobile home to accommodate her disabled son's special needs related to his blindness, cerebal palsy, spastic quadripalegia, and mental retardation. It further agreed to deliver and set up the mobile home, with the modifications complete, within time constraints specified by Evans.

The contract Evans and Accent entered into for the mobile home contained an express warranty against defects in materials and workmanship. It also included the following language:

> ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the parties thereto shall be decided by binding arbitration by one arbitrator selected by [Evans] with [Accent's] consent. This agreement is made pursuant to a action [sic] in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1.

An "Arbitration Agreement" contemporaneously executed with the contract provided more detailed terms governing the arbitration of disputes between the parties.

Accent delivered the mobile home on September 22, 1997. Following delays related to the set up of the mobile home, Evans first moved into the home on October 18, 1997.

In June 1998, Evans sued Accent for breach of express warranty, breach of implied warranty of fitness, negligence, and fraud.[1] She alleged Accent failed to provide numerous items specified in their agreement, including utility room cabinets, a remote-controlled garage door, and a larger bathtub to accommodate her son's therapy. She professed numerous defects in the mobile home, including leaks, holes in garage sheetrock, cracked kitchen tiles, inadequate grouting, a hole in the bedroom wall, and numerous scratches. Additionally, she asserted the two halves of the mobile home were not properly joined, the ductwork was poorly installed, which resulted in heating problems, the refrigerator door was defective, and sand and debris were in her water.

Accent answered in August 1998, generally denying her causes of action for breach of implied warranty for fitness, negligence, and fraud. It argued it remedied problems for which she claimed a breach of express warranty, but contended it had not satisfied her request for a larger bathtub due to her alleged failure to cooperate with the selection of an appropriate bathtub. It averred it remedied all other defects for which it was responsible, and any remaining defects were the responsibility of Fleetwood Homes of Virginia, Inc., the mobile home's manufacturer. Accent's answer contained no mention of the option of arbitration.

Discovery began in August 1999, when Accent served Evans with a set of interrogatories. Evans answered the interrogatories in November 1999.

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[1] Evans also sued Accent's sales manager, Doug Perkins, and her mobile home's manufacturer, Fleetwood Homes of Virginia, Inc. Neither is a party to this appeal.

The case first appeared on the circuit court's trial roster in December 1999. Accent continued discovery by serving Evans with a request to produce documents pursuant to Rule 34 of the South Carolina Rules of Civil Procedure.

Accent made a motion to the court seeking to dismiss Evans's action in January 2000. It sought to compel arbitration pursuant to their contract's provisions.

In February 2000, Evans subpoenaed an Accent employee with whom she had dealt when purchasing the mobile home. The subpoena required the employee to give his deposition at a specified time and place in March 2000. Accent did not seek an order of protection from the court to avoid the deposition of its employee. Instead, Accent noticed Evans that it wanted to take her deposition on the same date when she planned to take Accent's employee's deposition. Depositions of the employee and Evans were taken on March 6, 2000.

Evans served Accent with interrogatories on March 2, 2000 and supplemental interrogatories the next month. Accent answered the interrogatories in June 2000. Evans served Accent with a request for the production of documents in April 2000, which Accent answered in June 2000.

On March 29, 2000, the circuit court conducted a hearing on Accent's dismissal motion. Accent moved to dismiss the case so that it could be arbitrated pursuant to the arbitration provision in the contract and the arbitration agreement contemporaneously signed with the contract.

Evans countered that Accent knew of its right to arbitrate when litigation began, but waived the right by taking advantage of the judicial system by engaging in discovery. She claimed that Accent's failure to seek arbitration for approximately nineteen months after she initiated her action prejudiced her because of the time delay. She

argued Accent's initiation and use of discovery, unavailable in arbitration, further prejudiced her.

In a May 2000 order, the circuit court denied Accent's motion. It found Accent waived its right to arbitrate by failing to seek arbitration for nineteen months after the action commenced even though it knew of its right to arbitrate. The circuit court found Evans suffered prejudice from Accent's pursuit of discovery to which it would not have been entitled under arbitration, causing her to incur "substantial costs."

ISSUE

Did the circuit court err in finding Accent waived its contractual right to compel arbitration?

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999); General Equip. & Supp. Co. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001); see U.S. v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001); Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). Nevertheless, the circuit court's factual findings underlying that conclusion will not be overruled if reasonably supported by any evidence. Liberty Builders, Inc., 336 S.C. at 664-65, 521 S.E.2d at 753; Stokes, 351 S.C. at 609-10, 571 S.E.2d at 713.

LAW/ANALYSIS

CONTRACTUAL ARBITRATION/WAIVER

Accent contends the trial court erred in finding it waived its contractual right to compel arbitration. We disagree.

The parties do not challenge that their agreement contains provisions mandating arbitration of disputes between the parties. Furthermore, Accent does not contest that it knew about its right to arbitrate under the agreement throughout the entire course of litigation and discovery, but failed to exercise its right until approximately nineteen months after Evans commenced litigation.

"Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays . . . ." 4 Am. Jur. 2d Alternative Dispute Resolution § 131 (1995). "A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration." Id. at § 129. Hence, generally the right to enforce an arbitration clause may be waived. General Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001); Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App. 1992); 6 C.J.S. Arbitration § 37 (1975). A party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration. Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985); General Equip. & Supply Co., 344 S.C. at 556, 544 S.E.2d at 645; Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct.App. 1999). "Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate." General Equip. & Supply Co., 344 S.C. at 557, 544 S.E.2d at 645. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Liberty Builders, Inc., 336 S.C. at 665, 521 S.E.2d at 753, Hyload, Inc., 308 S.C. at 280, 417 S.E.2d at 624. Furthermore, the policy in South Carolina is to favor arbitration of

disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995); Towles v. United Healthcare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999).

Accent argues that no evidence supports the trial court's finding that Evans suffered prejudice from its delay in seeking arbitration. Accent likens the facts in the present case to those in General Equipment & Supply. In General Equipment & Supply, this court found no evidence of prejudice from delay in demanding arbitration where a party sought arbitration after less than eight months of litigation which "consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" and the parties availed themselves of the court's services only twice before the motion seeking arbitration was filed. Id. at 557, 544 S.E.2d at 645.

We find the facts in the present case more similar to those in Liberty Builders. In Liberty Builders, this court found evidence of prejudice where a party sought arbitration after engaging in litigation over approximately two and one-half years. Id. As in the case sub judice, the party seeking arbitration in Liberty Builders obtained information from an opposing party through discovery before seeking arbitration. See Liberty Builders, 336 S.C. at 656-66, 521 S.E.2d at 753. Here, Accent persisted with discovery by deposing Evans after making its motion to dismiss. Thus, we find evidence in the record that Accent availed itself of discovery tools unavailable in arbitration, thereby prejudicing Evans by obtaining information from her it might not have been able to otherwise obtain.

Moreover, Accent's prolongation of discovery necessitated Evans's pursuit of discovery, thereby forcing her to incur costs she would not have incurred in arbitration. Thus, we find evidence that Accent's continuation of discovery, rather than seeking arbitration in a timelier manner, prejudiced Evans by forcing her to incur discovery costs.

We further note that, during the pendency of a ruling on its motion to dismiss and compel arbitration, Accent could have sought the circuit court's protection under SCRCP 26(c)(1) from requirements that it engage in further litigation. As the party seeking arbitration, Accent bore the onus to halt discovery by seeking the court's protection. Instead, Accent failed to seek court protection and continued to engage in discovery to its benefit.

CONCLUSION

We find abundant evidence in the record to support the circuit court's findings that Evans suffered prejudice resulting from Accent's discovery activities and delay in seeking arbitration. Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Danny Thompson,

Appellant.

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

Opinion No. 3584
Submitted December 10, 2002 – Filed January 6, 2003

AFFIRMED

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

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

ANDERSON, J.: Danny Thompson was indicted for first degree criminal sexual conduct, kidnapping, and carjacking. A jury convicted Thompson of all three charges. The trial court sentenced him to concurrent thirty year terms of imprisonment for criminal sexual conduct and kidnapping, and a concurrent twenty year term of imprisonment for carjacking. Thompson argues the trial court erred in admitting improper hearsay testimony and in failing to declare a mistrial after evidence of his prior bad acts was improperly introduced. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

At approximately 2:30 a.m. on October 8, 1999, the victim parked her Camaro in a lot located on the University of South Carolina's campus. As the victim was exiting her car, a man approached her, pushed her back inside the car, and jumped in the backseat. The man grabbed the victim by the hair and threatened to kill her if she did not drive him to his destination.

The victim cooperated with the man and drove to a rural area in lower Richland County. The man directed the victim to pull her car over on a dirt road and he raped her. After the sexual assault, the man asked the victim for money. When the victim indicated she did not have any money, the man allowed her to exit the car. The victim, wearing only her skirt and a bra, then "took off" running toward some lights she saw in the distance. She "remembered that there were houses that way." The victim ran to a house on Lykesland Trail to ask for assistance. The residents telephoned 911 and the victim was taken to a hospital. After the victim escaped, the man drove off in her Camaro.

The victim was examined at the hospital pursuant to the protocol for sexual assault victims. Her clothing was taken for evidence and a pelvic examination was performed. The examination revealed vaginal tears and bruising, which are indicative of forcible sexual intercourse. A sexual assault nurse examiner collected vaginal swabs from the victim.

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

The victim described her assailant to the police as a black male "a little bit shorter than" six feet tall weighing about 160 pounds and wearing dark clothing. She gave a description of her car and the license plate number.

On the morning of the assault, a police officer from the University of South Carolina went to the parking lot where the victim was abducted and discovered that several cars in the lot had been vandalized. The officer noticed a Mitsubishi parked in the lot without a student parking decal. He ran a check of the license plate number and discovered the Mitsubishi had been reported stolen. Lynette Metze, the owner of the Mitsubishi, testified that on October 7, 1999, her friend, Danny Thompson, took her car without permission. Metze stated that, after unsuccessfully attempting to locate either Thompson or her car, she notified the police that Thompson had stolen her car.

Acting on the information obtained from the campus police officer and Metze, the Richland County Sheriff's Department issued a BOLO notice ("be on the look-out") for Thompson. The police provided a description of the victim's Camaro to the local media. The next morning, the police received an anonymous tip that the victim's Camaro was located on Old Ferry Road in lower Richland County. Officers went to Old Ferry Road and found the victim's Camaro parked in a driveway of an abandoned farm. A bystander, who knew one of the officers, informed the investigators that the man driving the Camaro could be found in a home located about 200 yards from where the car was parked. The Thompson family lived in the home, which was owned by Thompson's father.

The officers went to the home and found Thompson. Thompson's father consented to a search of the house. The officers retrieved a pair of baggy, blue sweat pants that matched the victim's description of her attacker's clothing. The police drove Thompson to the police station.

At the police station, Thompson was read his Miranda rights and questioned by Sgt. Lancy Weeks. Thompson signed a statement in which he admitted taking Metze's Mistubishi, abducting the victim, raping her, and taking her car. Thompson informed the officer questioning him that the blue sweat pants retrieved from his home were the same pants he wore when he

raped the victim. Additionally, Thompson wrote a letter to the victim apologizing for his actions.

Thompson's palm print was recovered from the exterior of Metze's Mitsubishi, but none of the prints found in the victim's Camaro belonged to Thompson. The police found Metze's car keys inside the victim's car. The victim's wallet, which contained the driver's license of the owner of one of the cars broken into on the campus parking lot, was discovered on Air Base Road where Thompson told police he had driven the victim's car.

The victim was unable to identify Thompson in a photo line-up that was presented to her. However, the victim testified that she did not look directly at her attacker during the assault because she was afraid he might hurt her if he thought she could recognize him.

At trial, a forensic expert declared that Thompson's DNA matched the DNA obtained from the vaginal swabs taken from the victim and the semen found on her underwear. The expert further opined that only one in thirty-two quadrillion persons have the same genetic marker as Thompson.

The jury found Thompson guilty of first degree criminal sexual conduct, kidnapping, and carjacking.

LAW/ANALYSIS

I. Hearsay/Bystander Statement

Thompson contends the trial court erred in admitting the police officers' testimony about the bystander who told them that the person driving the Camaro lived in the Thompsons' home. Thompson alleges this testimony was inadmissible hearsay and, "even if it were not hearsay, it was an improper reference to [Thompson's] character and its prejudicial effect outweighed its probative value." We disagree.

At trial, Deputy Thomas Vail, with the Richland County Sheriff's Department, testified an anonymous citizen reported that the victim's Camaro was on Old Ferry Road. He further stated that when he and Sergeant Bruce Scott arrived at the scene, they found the car. Thereafter, the Solicitor asked

Deputy Vail if he received any other information while at the scene. Over Thompson's hearsay objection, Deputy Vail declared:

> While we were out with the vehicle, Sergeant Scott and myself—Sergeant Scott saw an individual that he knew from personal—personally. This individual who lives out in that area said, as I recall, he said, told Sergeant Scott, the guy who was driving that car is over there and he pointed to a house just at the intersection of Old Ferry and Congaree Road.

According to Sergeant Scott, the bystander told him that "the person that we were looking for that was the [sic] driving the Camaro lived on Congaree Road and he actually pointed to the mobile home." Scott testified the bystander told him that he did not want to be identified.

Thompson objected to the testimony of both Vail and Scott regarding the bystander. He claimed the testimony was hearsay. Thompson maintained he needed the opportunity to cross-examine the bystander because the bystander directly implicated Thompson as the driver of the victim's car. The trial court overruled Thompson's objection, concluding that the officers' testimony regarding the bystander was not offered to prove the truth of the matter asserted but rather to explain the officers' reasoning for going to the Thompson home.

A leading case in South Carolina in regard to evidence offered for the purpose of explaining why a government investigation was undertaken is State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). Brown edifies:

> Brown argues the trial judge erred in failing to direct a mistrial after two police officers' statements were admitted. Brown claims the officers' statements about receiving information before establishing a surveillance, receiving complaints while in the neighborhood, and being "familiar with" the neighborhood were hearsay.
>
> Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502

> U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986). Here, these statements were not entered for their truth but rather to explain why the officers began their surveillance. These statements are not hearsay and, therefore, the trial judge committed no error in allowing these statements into evidence.

Brown, 317 S.C. at 63, 451 S.E.2d at 893-94. Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct. App. 1995); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992).

The case of Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002), is instructive. Rhodes involves testimony from the victim's friend that he gave the victim a middle school yearbook with the defendant's picture in it because the friend had heard rumors that the defendant was involved in shooting "a guy and a girl." The Rhodes court determined:

> We find that the testimony admitted in this case about Thompson hearing petitioner was the shooter does not constitute hearsay. The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. E.g., Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Here, it was repeatedly made clear during trial that the information Thompson had heard was "from the street," i.e., a "rumor." It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook. This in turn led to petitioner's apprehension and the subsequent identification of him by both victims via the photographic line-up.

Rhodes, 349 S.C. at 31, 561 S.E.2d at 609 (footnote omitted).

In the instant case, the officers' testimony regarding statements made by the bystander were not entered for their truth but rather to explain and outline the officers' investigation and their reasons for going to the Thompsons' home. Thus, the evidence was not hearsay and was properly before the trial court. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes not hearsay where "officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth"); State v. Kirby, 325 S.C. 390, 396, 481 S.E.2d 150, 153 (Ct. App. 1996) (concluding testimony by police officer about dispatcher's call was not hearsay where offered to explain "the reason for the initiation of police surveillance of the vehicle in question"); State v. Johnson, 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (ruling testimony that defendant was in a "high drug traffic area" was not hearsay because it was introduced as "background information" about the investigation). Cf. German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) (determining, in context of post-conviction claim of ineffective assistance of counsel, that undercover drug agent's testimony that he had tips that defendant was distributing drugs and that he had been given description of defendant that would make him easily identifiable was not admissible to explain why police first stopped defendant, and testimony was objectionable; noting that, while State v. Brown, supra, allowed general statements referring to drug activity in an apartment complex in which a defendant lived, agent's testimony in German specifically referred to defendant and his character).

II. Mistrial

Thompson argues the trial court erred in failing to declare a mistrial based on Deputy Vail's testimony concerning warrants against Thompson. Thompson contends the reference to the warrants "constituted improper evidence of prior bad acts." We disagree.

The Solicitor questioned Vail regarding what he and Scott were trying to ascertain when they approached the Thompsons' home. Vail responded: "We were trying to ascertain if the suspect, the defendant at the time that we knew had warrants, Mr. Thompson, if he was actually at the residence or not."

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Simmons, Op. No. 3572 (S.C. Ct. App. filed Nov. 25, 2002) (Shearouse Adv. Sh. No. 39 at 85); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); see also State v. Arnold, 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (the general rule of this State is that "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law.").

"The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977); see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (granting of motion for mistrial is extreme measure which should be taken only where incident is so grievous that prejudicial effect can be removed in no other way); Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Harris, 340 S.C. at 63, 530 S.E.2d at 628; see also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

We find that Deputy Vail's single reference to warrants that existed against Thompson did not constitute sufficient prejudice to justify a mistrial. As an initial matter, there is no indication from Deputy Vail's testimony that the warrants referred to unrelated charges or other bad acts committed by Thompson. Prior to the testimony concerning the warrants, the jury heard testimony that a BOLO had been issued against Thompson based on the suspicion that he had been involved in the attack of the victim. Thus, it

would be reasonable to assume the jury inferred that the warrants related to the charged offenses. Additionally, a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony that he compared defendant's fingerprints with fingerprint card agency had on record was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony that he told defendant that he was under arrest for escape and murder and that he asked defendant where correctional truck was were extremely vague); State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Court emphasizing that, even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime).

III. Harmless Error

Finally, considering the overwhelming evidence of Thompson's guilt, any possible error that resulted in the introduction of the alleged hearsay evidence and the testimony concerning the warrants was harmless.

Whether an error is harmless depends on the circumstances of the particular case. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Error is harmless when it could not reasonably have affected the result of the trial. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971). Where a review of the entire record establishes the error is harmless

beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).

Here, the victim's car was located near Thompson's home. Moreover, Thompson confessed to raping and abducting the victim, as well as taking her car; he identified the clothes seized from his home as the ones he wore when he raped the victim; and he wrote the victim a letter apologizing for his actions. Additionally, keys from the car Thompson took from Metze were found inside the victim's car. Furthermore, forensic evidence established that Thompson's DNA matched the DNA obtained from the vaginal swabs taken from the victim and semen found in the victim's clothing. Thus, there was overwhelming evidence indicating Thompson's guilt, and any perceived error from the officers' testimony was harmless.

CONCLUSION

Accordingly, Thompson's convictions are

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Murray Roger Adkins, III,

Appellant.

Appeal From Lancaster County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3585
Heard December 11, 2002 – Filed January 6, 2003

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor John R. Justice, of Chester, for Respondent.

ANDERSON, J.: Murray Adkins was convicted of the murder of Greg Sims and possession of a firearm during the commission of a violent crime. He appeals his convictions asserting the judge erred in the jury instructions and allowing testimony about the victim's participation in high school athletics. We affirm.

FACTS/PROCEDURAL BACKGROUND

Josh Cramer, Tyrone Anthony, Marcus Hinton, Ryan Sims, and Greg Sims, the victim in this case, were involved in a drug transaction that went awry and ended in the deaths of three people. Cramer received a telephone call from Greg Sims, who told Cramer that he knew some people who wanted to purchase drugs. Anthony, Hinton, Greg Sims, and Ryan Sims rode to Cramer's house.

Upon arriving at Cramer's house, Greg Sims exited the vehicle and told Cramer the occupants of the vehicle wanted to "look" at the drugs. Cramer entered the vehicle and sat in the back seat. Greg Sims stayed at Cramer's house while Anthony, Hinton, Cramer, and Ryan Sims drove away. Cramer directed Hinton to drive to a location less than one mile from his house so the men could inspect the pound of marijuana Cramer had brought with him.

When Hinton stopped the car, Anthony asked to see the marijuana. Cramer gave the marijuana to Anthony, who then transferred it to Ryan Sims. Ryan Sims immediately jumped out of the car and ran away with the marijuana. Cramer stated that Hinton and Anthony pretended to look for Ryan Sims. Thereafter, Hinton drove back to Cramer's house and picked up Greg Sims. After riding around unsuccessfully searching for Ryan Sims, Cramer shot both Anthony and Hinton in the head. Greg Sims helped Cramer put the bodies of Anthony and Hinton in the trunk of the car Hinton had been driving.

Cramer and Greg Sims went to Kimbell Lee's house to ask for Lee's assistance in disposing the bodies. Cramer stated: "I told [Lee] I needed his

help; that I was in way over my head." Lee agreed to help. According to Cramer, Lee declared "that he would page Murray [Adkins]." Cramer testified as to a conversation he and Lee had regarding Greg Sims and Cramer's fear that Sims would tell the police about the killings: "Well, I did say something to [Lee] about what I felt like I had to do. . . . That was to kill Greg [Sims]. . . . I told him what I was going to do next."

After driving Hinton's car to a secluded area and leaving it, Cramer, along with Greg Sims, rode with Lee to an apartment complex where Murray Adkins was visiting with Anna Stanley. Lee went to the door of the apartment and asked Adkins to step outside. Lee informed Adkins that Cramer "had just killed two people." Adkins went back inside and told Stanley they had to leave. Cramer, Lee, and Greg Sims rode to Lee's uncle's home, where they picked up Adkins, who had been dropped off at the house by Stanley.

Cramer, Greg Sims, Lee, and Adkins collectively decided the car with the bodies in it should be burned. Lee drove Cramer and Greg Sims back to the car Hinton had been driving and left the two men there. Cramer and Greg Sims set the car on fire. Afterward, they started running toward the place where they planned to meet Lee and Adkins. Cramer pointed a gun at Greg Sims's head and pulled the trigger. However, the gun did not fire.

Cramer and Greg Sims then returned to Lee's car. Lee drove Cramer home. Cramer testified: "I got out and went in. And [Adkins] come up to the window. And he asked me for my nine millimeter. And I told him there was no more bullets in it. Then he asked for—I had a rifle; but I told him that it had not been shot. . . . The firing pin had broke, and it had not been fired." According to Cramer, Adkins told him "that he would just get his own gun." Lee corroborated, to some extent, Cramer's account of what occurred when the men arrived at Cramer's house. Lee averred that "[w]hen [Cramer] got out, Murray Adkins got out of the car and them two went around the back of [Cramer's] house" and the two men were "alone for some period of time." Lee, Adkins, and Greg Sims left Cramer's house.

Adkins instructed Lee to drive to a location where Adkins claimed he wanted to "get rid of" Cramer's gun. Once the men reached this area, they

exited the car. Lee stated Murray "said 'go look for a place to stash [the gun] like a tree trunk or a rock.'" Lee testified: "[A]bout that time I looked up, and [Adkins] just raised up and just started shooting; just shot Greg [Sims] about six or seven times."

During the early morning hours, Cramer returned "to the original scene of the drug transaction" to retrieve his pager which he had dropped. When Cramer checked his pager, he noticed that he had a voice mail. Cramer declared: "I called my pager to get the voice mail. . . . [I]t sounded like [Adkins's] voice. . . . All it said was 'I took care of that.'"

After police unraveled the story, Adkins was charged with Greg Sims's murder and possession of a firearm during the commission of a violent crime. Adkins did not testify during the trial. He was convicted of both offenses.

LAW/ANALYSIS

I. JURY CHARGE ISSUES

A. Appellate Review of Jury Charges

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998); see also State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) (holding jury charge is proper if, as a whole, it is free from error and reflects current and correct law of South Carolina). In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Burroughs & Chapin Co. v. South Carolina Dep't of Transp., Op. No. 3575 (S.C. Ct. App. filed Dec. 9, 2002) (Shearouse Adv. Sh. No. 40 at 71); see also State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) (when reviewing jury charge for error, Court must consider charge as a whole); see also Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (when reviewing jury charge for alleged error, appellate court must consider charge as a whole in

light of evidence and issues presented at trial). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989); see also State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) (jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error); Waldrup v. Metropolitan Life Ins. Co., 274 S.C. 344, 263 S.E.2d 652 (1980) (stating appellate court must view jury charge as a whole before assigning prejudicial error to a discrete portion of the charge); State v. Hicks, 305 S.C. 277, 407 S.E.2d 907 (Ct. App. 1991) (in reviewing challenged jury charge, judge's instructions must be considered as a whole; Court of Appeals will not find error based upon isolated excerpts which, standing alone, might be misleading).

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994); State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (charge is sufficient if, when considered as a whole, it covers law applicable to case). The substance of the law is what must be charged to the jury, not any particular verbiage. Burkhart, 350 S.C. at 261, 565 S.E.2d at 303; Keaton, 334 S.C. at 496, 514 S.E.2d at 574; State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

A jury charge which is substantially correct and covers the law does not require reversal. Keaton, 334 S.C. at 497-98, 514 S.E.2d at 575; State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); see also State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (as long as the charge is substantially correct and covers the law, reversal is not required). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); see also Priest v. Scott, 266 S.C. 321, 223 S.E.2d 36 (1976) (in general, an alleged error in a

portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial).

B. Jury Charge – Exercise of the Right to Remain Silent

Adkins argues he is entitled to a new trial because the judge, in charging the jury, used the term "failure to testify" to refer to Adkins's choice to exercise his right to remain silent. We disagree.

Under the United States and South Carolina Constitutions, a defendant has a right to remain silent and to not testify during his trial. See U.S. Const. amend. V; S.C. Const. art. I, § 12. To make this right meaningful, our courts have held that it is impermissible for the State to comment directly or indirectly upon a defendant's failure to testify at trial. See Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997); see also Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding accused has right to remain silent and the exercise of that right cannot be used against him); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002) (as a rule, solicitor cannot comment directly or indirectly upon defendant's failure to testify at trial). "However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Gill, 346 S.C. at 221, 552 S.E.2d at 33. "The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial." Id. "Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instruction emphasizing the jury cannot consider [the] defendant's failure to testify against him will cure any potential error." Id.

The judge's jury charge regarding the defendant's failure to testify reads:

> I charge you now and emphasize to you that the failure of the defendant in the trial of this case to testify in his own behalf is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of the guilt or the innocence of the defendant. I charge you, it must not

be considered by you in any manner whatsoever against the defendant or mitigate against him in any respect whatsoever.

Ladies and gentlemen, a defendant has a constitutional right not to testify, and the assertion of such constitutional right cannot and must not be considered by you in your deliberations. Under your sworn oath, you are to reach no inference and draw no conclusion whatsoever from the fact that the defendant did not testify in this case. The failure of the defendant to testify should not even be discussed by you in the jury room. Ladies and gentlemen, the burden of proof as I have stated to you is upon the State of South Carolina. It is not incumbent upon a defendant to prove his innocence, but the burden of proof always remains upon the State of South Carolina to prove guilt beyond a reasonable doubt. And failure of a defendant to testify is not a factor to be considered by you in determining the guilt or the innocence of the defendant.

When defense counsel objected to the charge, the following colloquy occurred:

[Defense Counsel]: Your Honor, [I object to] the court's construction regarding the failure of the defendant to testify which we had requested and we talked about yesterday. In that instruction several times as part of that instruction and as part of an instruction that may be a standard instruction, we talk about the failure of the defendant to testify. The failure of the defendant to testify, . . . that wording in and of itself implies that the defendant failed to do something; that he had an obligation he had to meet and he failed to do it. And as I said, I understand there may be a standard instruction.

The Court: Well, that's what [your co-counsel] asked [m]e to charge yesterday, sir.

[Defense Counsel]: Your Honor---

> The Court: I was going to use the word[s] "remain silent;" and [your co-counsel] asked that we use the word[s] "failure to testify" which I ordered the charge for that. I'll note your exception.

We agree with Adkins that the trial court erred in using the phrase "failure to testify" in the jury charge. Although the charge instructs the jury they cannot consider the defendant's failure to testify during their deliberations, the very use of the phrase "failure to testify" creates an inference that the defendant did not fulfill an obligation or duty. The United States and South Carolina Constitutions provide that there is no obligation or duty upon a defendant to testify on his behalf during a criminal trial. Moreover, our Supreme Court, in Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001), found it is impermissible for the State to comment directly or indirectly upon a defendant's failure to testify at trial. We disapprove of the use of this language when explaining to the jury the impact of a defendant choosing not to testify on his behalf during a criminal trial.

However, we reject Adkins's argument that he is entitled to a new trial. First, when viewing the challenged portion of the jury charge as a whole with the rest of the judge's instruction, we find the trial court adequately charged the law regarding the defendant's right to remain silent and not to testify during his criminal trial.

Second, Adkins's attorney was the one who requested the charge using the language "failure to testify." A party cannot complain of an error which his own conduct created. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); see also State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (party cannot complain of error which his own conduct has induced).

For the benefit of the Bench and the Bar, we propose the following jury charge be used when instructing a jury in regard to a defendant's decision not to testify during a criminal trial:

> The defendant in this case has not testified. This is his constitutional right, and it is not a circumstance that you can take into your consideration, or even allow to enter into your

discussion in your jury room. Under the Constitution of South Carolina and under the United States Constitution, it is his constitutional right not to testify. The burden of proof is upon the State of South Carolina to establish his guilt by competent testimony beyond a reasonable doubt.

The fact that the defendant did not take the witness stand and testify in his own behalf does not create any inference against him; the jury must not permit that fact to weigh in the slightest degree against this defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

C. Jury Charge –Definition of Reasonable Doubt – State's Burden of Proof

Adkins contends he is entitled to a new trial because the judge erred when charging the jury on the definition of reasonable doubt and the State's burden of proof. Additionally, Adkins asserts the court erred in failing to give a curative instruction. We disagree.

A defendant is not required to present a defense and can instead rely entirely on the weakness of the State's case since the State has the burden of proving guilt beyond a reasonable doubt. See State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977).

The judge used the following language when defining reasonable doubt and the State's burden of proof:

> If . . . upon the whole case you have a reasonable doubt as to the guilt or the innocence of the defendant, he would be entitled to that reasonable doubt and would be entitled to an acquittal and a verdict of not guilty at your hands. **Likewise, should you have a reasonable doubt as to whether or not the defendant has made out his defense**, then he would be entitled to that reasonable doubt and would be entitled to an acquittal and a verdict of not guilty.

Clearly, this portion of the jury charge was in error because it states that reasonable doubt relates to whether the defendant has proved his defense. However, the charge, when considered as a whole, was correct.

The judge instructed:

> These pleas of not guilty by [Adkins] places [sic] the burden of proof on the State of South Carolina to prove the guilt of the defendant beyond a reasonable doubt before you, the jury, could convict the defendant and find him guilty.
>
> I charge you, the Defendant Mr. Adkins, is presumed in law innocent of the charges contained in each of these indictments. Ladies and gentlemen, it is a cardinal and fundamental rule of the law of evidence that a defendant, irrespective of the enormity of the charges against him[,] will always be presumed innocent of the crimes for which he is indicted unless and until the guilt of the defendant has been proved by evidence which satisfies the jury of the guilt of the defendant beyond a reasonable doubt.
>
> . . . .
>
> I charge you, the presumption of innocence accompanies the defendant from the time of his appearance in this courtroom and continues with him throughout every stage of this trial and continues with him after you retire to your jury room to deliberate your verdict. Ladies and gentlemen, the presumption of innocence continues in existence to the benefit of the defendant until and unless you, the ladies and gentlemen of the trial jury, reach the conclusion that the State of South Carolina has proved the guilt of the defendant beyond a reasonable doubt. The State of South Carolina is not required to prove the guilt of a defendant beyond all doubt or beyond every doubt but beyond a reasonable doubt every doubt.

Madam forelady and ladies and gentlemen, I charge you a reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. I charge you that the defendant is entitled to every reasonable doubt arising in the whole case or any defenses asserted by him. If, then, upon any issue of fact essential to a conviction and a verdict of guilty you have a reasonable doubt as to how that issue should be resolved, I charge you it would be your duty to resolve that reasonable doubt in favor of the defendant.

A defendant, ladies and gentlemen, is not required to prove his innocence; but the State of South Carolina is required in law to prove every essential element of the offense charged against the defendant by evidence which satisfies the jury of the guilt of the defendant beyond a reasonable doubt before you could convict the defendant and find him guilty. . . .

. . . .

Ladies and gentlemen, you should weigh all of the evidence in this case, and after weighing all of the evidence in this case, if you're not convinced of the guilt of the defendant beyond a reasonable doubt, then it would be your duty to find the defendant not guilty. However, if after weighing all of the evidence in this case you are convinced of the guilt of the defendant beyond a reasonable doubt, then likewise, ladies and gentlemen, it would be your duty to convict the defendant and find him guilty.

. . . .

. . . Ladies and gentlemen, the burden of proof as I have stated to you is upon the State of South Carolina. It is not incumbent upon a defendant to prove his innocence, but the burden of proof always remains upon the State of South Carolina to prove guilt beyond a reasonable doubt. . . .

When looking at the charge as a whole, the judge adequately explained that the State has the burden of proving every element of a charged offense and the defendant is not required to prove his innocence. The language defining reasonable doubt as "the kind of doubt which would cause a reasonable person to hesitate to act" is the exact language expressly approved in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). Examining the charge in its entirety, we hold the judge adequately explicated the law on reasonable doubt and burden of proof.

II. VICTIM'S ACTIVITIES

Adkins asserts he is entitled to a new trial because the Circuit Court erred when it overruled his objection to testimony about the victim's participation in high school sports. He maintains this testimony had no relevance and was only offered to unduly prejudice the jury. We disagree.

The following colloquy occurred during the State's direct examination of Deborah Sims Swinton, the victim's mother:

> Q. At that time prior to the night of March the second, how many children did you have?
>
> A. Three.
>
> Q. What were their names and ages?
>
> A. Greg 17, Jeremy eight, and Madison six at the time.
>
> Q. Okay. Greg, who of course is the victim in this case, was 17 years old?
>
> A. Yes, sir.
>
> Q. Was he still in high school?
>
> A. Yes, sir.

Q. Did he have outside employment other than high school?

A. Yes, sir.

Q. What kind [of] employment did he have?

A. He was a cook at a restaurant.

Q. Did he also participate in high school sports?

[Defense Counsel]: Judge; I'm going to object to this testimony. I don't see the relevancy or the probative value of this testimony.

The Court: All right. What's the testimony offered for, Solicitor?

[The State]: I'm just laying a foundation of who it is we're talking about that's been murdered.

The Court: All right. I overrule the objection. I'll allow a little bit; but we can't get too far.

Q. Didn't he participate in high school athletics?

A. Yes, he did.

Q. What sports did he play in?

A. He played football, wrestle [sic], track, and baseball.

Thereafter, during Swinton's testimony, the State attempted to introduce a school photograph of the victim. Adkins objected and the judge sustained the objection.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an

abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); see also State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (trial judge's decision to admit or exclude evidence is reviewed on appeal under abuse of discretion standard). The trial judge's determination of admissibility will not be disturbed absent abuse of discretion resulting in prejudice to the complaining party. State v. Irick, 344 S.C. 460, 545 S.E.2d 282 (2001); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); see also State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (trial judge has considerable latitude in ruling on admissibility of evidence and his decision will not be disturbed absent prejudicial abuse of discretion). An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. Irick, 344 S.C. at 464, 545 S.E.2d at 284.

Adkins cites State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), in support of his argument. In Langley, the victim's sister described how the victim acquired a family nickname and testified about the victim's family. She stated the victim attended Burke High School and played in the band. In addition, the Solicitor introduced a photograph of the victim which the court allowed over defense objection. The Supreme Court ruled that admitting the photograph and the testimony about the victim and the victim's family was not relevant and should have been excluded. Id.

This case differs from Langley. Swinton testified in a very brief manner regarding the nature of the victim's activities. The judge sustained Adkins's objection to the photograph of the victim. Swinton did not go into detail about the victim's relationship with the family or how he acquired any family nicknames. Under these facts, allowing testimony that the victim played sports and attended Northwestern High School, without more, does not rise to the level of abuse of discretion. The judge did not err when he overruled Adkins's objection to Swinton's testimony.

CONCLUSION

Accordingly, Adkins's convictions are

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Ippolito and Marie Ippolito, Respondents,

v.

Hospitality Management Associates and Holiday Inns, Inc., Appellants.

Appeal From Colleton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3586
Heard November 5, 2002 – Filed January 6, 2003

AFFIRMED

I. Keith McCarty and Lindsay K. Smith-Yancey, both of Charleston; for Appellants.

M. Anderson Griffith, of Aiken; for Respondent.

HEARN, C.J.: This is an action in tort for loss of baggage and jewelry by Joseph and Marie Ippolito against Hospitality Management Associates and Holiday Inns, Inc. (collectively "Innkeeper"). The jury awarded the Ippolitos $210,000. After the trial, Innkeeper moved for

judgment notwithstanding the verdict and new trial *nisi remittitur*, arguing that its compliance with the South Carolina Innkeeper's Statute either shielded it from liability or limited its liability. Innkeeper also moved for a new trial absolute, contending the trial judge erroneously admitted evidence of past criminal incidents at the hotel. The trial judge denied all three motions, and Innkeeper appeals. We affirm.

FACTS

While traveling from Florida to Connecticut, Mr. and Mrs. Ipppolito stopped in Walterboro, South Carolina and paid for a room at a Holiday Inn. At the hotel, Mr. Ippolito signed a registration card on which was written, "The management is not responsible for any valuables not secured in safety deposit boxes provided at the front office." In addition to the language on the registration card, notice that the hotel had safety deposit boxes available for guests' valuables was also printed on the pouch that enclosed the key-card to the Ippolitos' room.

After bringing their luggage to the room, the Ippolitos walked to a nearby restaurant, and they returned approximately forty minutes later. Upon their return, they noticed that pieces of their luggage, which contained jewelry valued at over $500,000 and approximately $8,000 in cash, were missing.

The Ippolitos sued Innkeeper, alleging their property loss resulted from " . . . the negligence, gross negligence, reckless, willful, wanton and careless action . . ." of Innkeeper, including ". . . failing to post proper notices as required under South Carolina law." In its answer, Innkeeper generally denied the allegations and argued, *inter alia*, that its liability was limited or eliminated because it complied with South Carolina's "Innkeepers' Statute," which limits an innkeeper's liability for guests' loss of property where the Innkeeper provides "conspicuous notice" that safety deposit boxes are available for the guests' use.

At trial, Mrs. Ippolito testified that, prior to the disappearance of their belongings, she looked around the hotel room for notice of the availability of hotel safety deposit boxes for her valuables, but saw no such

notice. Mr. Ippolito also testified he did not see any notice of the availability of safety deposit boxes posted in the room; however, he admitted that if such notice was posted, he may have overlooked it. Despite not seeing a notice in the room, Mr. Ippolito testified he was aware that Innkeeper provided safety deposit boxes, but he chose not to request a box from the Innkeeper because "[he] felt that the less anybody knew what [he] had[,] the better."[1]

Innkeeper provided testimony from several of its former and current employees regarding its security procedures and its dedication to adhering to those procedures, particularly for providing guests with notice of the availability of safety deposit boxes. Officer Arthur McTeer Sadler, who investigated the incident, also testified on Innkeeper's behalf, claiming that although he made no mention of it in his incident report, he saw a notice posted on the back of the hotel room door indicating Innkeeper had safety deposit boxes available. A security expert also testified, saying Innkeeper's level of security at the time of the incident exceeded the industry standard.

On cross-examination of the security expert, the trial judge overruled Innkeeper's objection and allowed opposing counsel to ask whether the expert knew about past security problems at Innkeeper's hotel in which Innkeeper's employees spied on guests through peepholes. The expert replied that he was not aware of those prior incidents.

At the end of the trial, Innkeeper moved for a directed verdict on the grounds that (1) it complied with the South Carolina "Innkeepers' Statute," and (2) it did not fall under an exception to the liability protection afforded by the statute because there was no evidence Innkeeper acted

[1] In arguing its post trial motions, Innkeeper urged the court to consider Mr. Ippolito's actual knowledge of the availability of safety deposit boxes. However, to fall within the protections of the Innkeeper's Statute, the notice innkeepers post must inform guests that they are required to place their jewels and money in the innkeeper's safe. S.C. Code Ann. § 45-1-40 (1976). Here, Mr. Ippolito only admitted to knowing that Innkeeper had a safe available; he did not admit to knowing he was required to place his money and jewelry in that safe.

willfully or wantonly. The trial judge granted Innkeeper's motion on willfulness, but denied Innkeeper's motion regarding compliance with the statute.

The jury awarded the Ippolitos $350,000 in actual damages. However, the jury found that the Ippolitos were forty percent comparatively negligent, and reduced the award to $210,000. Innkeeper promptly moved for a judgment notwithstanding the verdict (JNOV), new trial absolute, and new trial *nisi remittitur*. The trial judge denied all three motions, and this appeal follows.

ISSUES

I. Did the trial judge err in denying the JNOV motion because Innkeeper complied with the statute, thus relieving it from liability for property missing from the Ippolitos' hotel room?

II. Did the trial judge err in denying Innkeeper's new trial *nisi remittitur* motion where no evidence of willful conduct existed?

III. Did the trial judge err in denying Innkeeper's motion for a new trial absolute where the judge admitted evidence of past criminal incidents at the hotel that Innkeeper contends were irrelevant to the Ippolitos' civil action?

LAW/ANALYSIS

Initially, we note this is a matter of first impression in South Carolina. Although our Innkeeper's Statute has been in place for over a century, until now, no appellate court in our state has interpreted the statute's meaning. S.C. Code Ann. § 45-1-40 (1976).

The first portion of the South Carolina Innkeeper's Statute states that Innkeepers who post a conspicuous notice in guests' rooms requiring guests to lock their doors, leave their keys at the office, and deposit money and jewels in the Innkeeper's safety deposit box are not liable for the loss of

any baggage, money, or jewels left in the room. Id. Specifically, the statute states:

> Whenever an innkeeper shall post and keep posted in a **conspicuous manner** in the room occupied by any guest a notice requiring such guest to bolt the door of his room, or leaving his room to lock the door and leave the keys at the office, and also to deposit such money and jewels as are not ordinarily carried upon the person in the office safe, and the guest shall neglect to comply with the requirements of such notice, the innkeeper shall not be liable for the loss of any baggage of such guest which may be lost or stolen from his room or for the loss of any money or jewels not deposited in the safe.

Id. (emphasis added).

The statute further states that regardless of this exemption from liability provision, even innkeepers who meet the posting requirement will be liable for up to $500 for lost or stolen baggage from the room and up to $2,000 for lost or stolen money and jewelry from the safe if the innkeeper's negligence contributed to the guest's loss. This part of the statute reads as follows:

> Provided, however, that notwithstanding the provisions of this section, any innkeeper who by his own negligence contributes to the loss or damage to baggage or personal property, other than money or jewelry, from guest rooms, or to the loss or damage to money or jewelry from his safe, may be liable to the guest for the actual value of such baggage or personal property or five hundred dollars, whichever is less, or the actual value of such money or jewelry or two thousand dollars, whichever is less.

Id. Accordingly, if an innkeeper fails to post notice, this section is not applicable, and the innkeeper's liability is not limited. Likewise, even if an innkeeper is negligent, so long as the innkeeper properly posts notice, the innkeeper will not be liable for any money or jewelry left in the guest's room. Only when guests abide by the properly posted notice and the innkeeper's negligence contributes to the loss of guest's baggage, jewelry, or money does the innkeeper have this limited liability.

Finally, the statute includes the following language providing no protection from liability when an Innkeeper's willful or wanton conduct contributes to the guest's property loss, even where the Innkeeper complies with the statute's notice requirements:

> Provided, however, that, notwithstanding the provisions of this section, any innkeeper who by his own willfulness contributes to the loss or damage to the personal property of a guest shall not have his liability limited in any manner by the provisions of this section.

Id.

I. JNOV Motion

Innkeeper first argues the trial court erred in denying its JNOV motion because it complied with the statute's notice requirements, thereby limiting its liability for property missing from the Ippolitos' hotel room. We disagree.

In ruling on a JNOV motion, the trial court must view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The trial court must deny the motion when the evidence yields more than one inference or its inference is in doubt. Id. Here, the Ippolitos testified that neither of them saw any conspicuously posted notice in

their room indicating that the hotel had safety deposit boxes available in which they could store their valuables. Although testimony from Officer Sadler, as well as several of Innkeeper's current and former employees, contradicts this evidence, the existence of conflicting evidence precludes us from finding as a matter of law that Innkeeper complied with the statute.

II. New Trial *Nisi Remittitur* Motion

Innkeeper argues the trial court erred in denying its motion for a new trial *nisi remittitur*, arguing the Ippolitos failed to prove their loss resulted from its willful conduct and that its liability should accordingly be reduced to conform with the statute's limits. However, we need not reach this issue because the finder of fact implicitly found that Innkeeper failed to comply with the statute's notice requirements. Thus, Innkeeper cannot avail itself of the statute's protection from liability, regardless of whether its actions contributed to the Ippolitos' loss.

III. New Trial Absolute Motion

Finally, Innkeeper argues the circuit court erred in denying its motion for a new trial absolute, where the court admitted evidence of past criminal incidents at the hotel that Innkeeper contends were irrelevant to the Ippolitos' civil action. We disagree.

The admission and rejection of testimony is largely within the trial judge's sound discretion and will not be disturbed on appeal absent appellant's showing that the trial court abused its discretion or its decision was controlled by an error of law. Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998). Here, Innkeeper presented evidence concerning the quality of its security practices to refute allegations of negligence. Significantly, its security expert testified that he found the level of security at the hotel to be "extremely good." On cross-examination, the Ippolitos sought to question Booth, the security expert, about his knowledge of peephole incidents at the hotel, arguing the past incidents were relevant to the soundness of Innkeeper's security standards and practices. The trial court allowed the testimony. The Ippolitos asked

Booth two questions regarding whether he learned about the peephole incidents during his investigation of the incident. Booth answered that he did not.

Because we find the Innkeeper offered evidence concerning the quality of its security, we cannot say as a matter of law that the trial court erred in admitting evidence contradicting this testimony. We find no evidence in the record indicating that Innkeeper suffered any prejudice from the Ippolitos' two questions concerning Booth's knowledge of the peephole incidents or his negative responses. See Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994) (stating that to warrant reversal based on admission of evidence, an appellant "must show both the error of the ruling of law and resulting prejudice.") Accordingly, we find the trial court did not err in denying Innkeeper's motion for a new trial absolute. See Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990) (stating that an appellate court will uphold a trial judge's order granting or denying a new trial unless it is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law").

For the foregoing reasons, the trial court's decision is

AFFIRMED.

CURETON and ANDERSON, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Vang, Appellant.

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

Opinion No. 3587
Heard November 7, 2002 – Filed January 6, 2003

AFFIRMED

Paige Weeks Johnson and James E. Whittle, Jr., both of Aiken; for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Tracey C. Green, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken; for Respondent.

HEARN, C.J.: James Vang was convicted of murder, conspiracy to commit armed robbery, and armed robbery. He appeals arguing he is entitled to a new trial. We affirm.

FACTS

On June 23, 1997, James Vang, Curtis Kesl, Kai Yang, and Ae Khingratsaiphon drove from Charlotte, North Carolina to Aiken, South Carolina to rob the Southside Pawn Shop. The original plan was for Yang to handcuff Carlton Ennis, the owner of the store, and rob him at gunpoint. However, once the men were in the store, Yang did not follow through on the plan and exited the store. The men left the scene and decided to drive around. While driving, Ae stated he would go in the store and kill Ennis.

The men then returned to the store and Ae reentered the pawnshop armed with a gun. The other three remained in the car. Vang told Yang to go get Ae, and when the two did not exit, Vang entered the store as well. Vang saw Yang standing by the video poker machines and joined him. Ennis approached them and told them they were too young to play the machines. While Ennis addressed the men, Ae approached him from behind and shot him in the back of the head. Ae threw a bag to Vang and told him to take the guns from the store. Vang collected the guns and the men left the shop and returned to Charlotte. They were arrested the next day.

Vang was charged with murder, conspiracy to commit armed robbery, armed robbery, and possession of a firearm or a knife during the commission, or attempted commission, of a violent crime. Vang was tried and convicted on the murder, armed robbery, and conspiracy to commit armed robbery charges; however, the trial judge directed a verdict on the possession of a firearm charge. Vang argues he is entitled to a new trial based on any one of the following grounds: (1) a State's witness made a prejudicial statement in the jury's presence; (2) the trial court failed to individually question each juror following the receipt of an allegedly prejudicial note from the foreperson; (3) the trial court incorrectly charged the jury on the law of withdrawal from a conspiracy; (4) the trial court erred

in admitting a prejudicial and inflammatory photograph; and (5) the trial court failed to conduct an individual voir dire of the members of the jury.

LAW/ANALYSIS

I. Prejudicial comment made by State's witness

During the State's questioning of Lieutenant Robert Anderson, the solicitor asked whether Anderson took a statement from Vang. While describing the circumstances of taking Vang's statement, Anderson said, "Ms. Poteat, [Vang's] attorney, accompanied me to Columbia where [Vang] was being held in the Department of Juvenile Justice." Vang's counsel objected to this comment on the basis that it showed Vang was incarcerated and created an unduly prejudicial inference to the jury that Vang is "a criminal." The trial judge overruled the objection, but cautioned the solicitor to not place any undue focus on the fact that Vang was at the Department of Juvenile Justice (D.J.J.) when the statement was given.

Vang argues the trial judge erred by not sustaining the objection and issuing a curative instruction. Vang asserts he is entitled to a new trial because the jury was improperly influenced by Anderson's remark. We disagree.

The admission or rejection of testimony is within the sound discretion of the trial judge and will not be overturned absent a showing of abuse of discretion, legal error, and prejudice to the appellant. South Carolina Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 524, 548 S.E.2d 880, 886 (Ct. App. 2001). A jury must consider the totality of the circumstances under which a statement was given to determine whether it was voluntarily made. See State v. Torrence, 305 S.C. 45, 52, 406 S.E.2d 315, 319 (1991) ("[T]he jury should be instructed that they must find beyond reasonable doubt that the statement was freely and voluntarily given under the totality of the circumstances before the statement may be considered.") Accordingly, the trial judge did not abuse his discretion because the jury must consider the totality of the circumstances surrounding Vang's statement –

including the setting in which it was made – to assess its credibility and whether it was voluntarily made. Id.

Nor do we find that Vang was unfairly prejudiced by Anderson's statement. This evidence was cumulative to other testimony that was admitted. Prior to this trial, Vang testified as a witness during Ae's criminal trial. Vang's former testimony, which was read into evidence during his trial without objection, indicated he was held in custody at D.J.J. Because this testimony is cumulative to Anderson's statement, we find any error harmless. See State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.").

II. Jury deliberations

During Vang's trial, the judge received a note from the foreperson of the jury asking, "Are our addresses confidential? Do the families have access to our addresses?" The judge immediately stopped the proceedings and questioned the foreperson in chambers. This discussion was made part of the record. The discussion revealed members of the jury were concerned about being followed upon leaving the courthouse. The foreperson also indicated some members had expressed their discomfort with having to enter the court by walking by "the Oriental [sic] family" because the family looked at them as they walked by. Significantly, the judge specifically inquired as to whether the comments arose as a result of the members discussing the evidence in the case, and the foreperson twice indicated that it did not.

Vang, who is Asian, contends that the questioning between the judge and the foreperson revealed a potential jury bias against Asians and the judge should have individually questioned the jurors to determine if any bias existed. Vang also contends the judge should have questioned each juror individually to determine if the jury was participating in premature deliberations. Vang argues that the judge's failure to individually question the jurors after receiving the note is error and entitles him to a new trial. We disagree.

This issue is not preserved. When the trial judge reentered the courtroom he stated, "I have shared with the attorneys the impressions I have of the *in-camera* matter. I have stated that I would permit them to have the transcription read back. Both have indicated to me that they are satisfied with what I communicated to them and they do not desire any further inquiry related to [the *in-camera* matter]." Vang's counsel failed to object to this ruling and counsel did not request individual questioning of the jurors at this time. Thus the issue is not preserved for our review. See State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (to preserve an issue of juror misconduct for appellate review a party must object at the first opportunity at trial).

III. Withdrawal charge

Vang's principal defense during the trial was that he withdrew from the plan and Ae acted independently when he shot Ennis. The trial judge charged the jury on the law of withdrawal, and when doing so, added language which had not previously been charged in South Carolina. The trial judge added the statement, "A person who continues in the common design cannot claim withdrawal." Vang argues this statement is an inaccurate statement of law that misinformed the jury and resulted in prejudice to him. We disagree.

A trial judge is required to charge the correct and current law of South Carolina. State v. Buckner, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct. App. 2000). "Jury instructions should be considered as a whole and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." Id. at 246-247, 534 S.E.2d at 18. The law of withdrawal is set forth in State v. Woods, 189 S.C. 281, 288, 1 S.E.2d 190, 193-94 (1939), which states that one who has entered a common design to commit a crime escapes responsibility for the acts of his associates " . . . if, before the [crime] is committed, he withdraws entirely from the undertaking, and the fact of his withdrawal is communicated to his associates, under such circumstances as would permit them to take the same action."

Viewed in its entirety, we believe the trial court properly charged the jury on the law of withdrawal. The judge stated,

> If a person completely withdraws from the common design or plan and communicates his withdrawal to his associates under circumstances that permit the associates to withdraw, then the person escapes criminal responsibility for the acts of the associates.
>
> However, if the withdrawal was not communicated to a particular associate or if that associate did not have an opportunity to withdraw after the communication, then the person remains responsible for the actions of that associate that were the natural and probable consequences of the common design.
>
> Now the law requires that a person involved in a common design must withdraw entirely and completely from it and must communicate that withdrawal to his associates. A person who continues in the common design cannot claim withdrawal. It's the burden of the State to prove that the defendant had not withdrawn from an unlawful common design or plan at the relevant time.

(emphasis added).

The trial judge justified charging the additional language stating that without the language, the charge would be misleading to the jury under the particular facts of this case. The judge indicated that without this language, the charge might be interpreted as relieving one's criminal liability upon communicating his withdrawal from the common plan, even if he subsequently reentered the plan.

Here the jury could have believed Vang initially withdrew from the plan but subsequently resumed the plan when he went back into the store with Ae and Yang. We agree with the trial judge that the additional language was necessary under these circumstances to avoid misleading the jury about whether Vang entirely withdrew from the plan. The Woods charge requires a person to withdraw entirely and unequivocally from the plan throughout the commission of the entire plan and to communicate his withdrawal to all of the associates involved in the plan. Woods, 189 S.C. at 288, 1 S.E.2d at 193-94. The trial judge's additional sentence does not state the law any differently. The substance of the law is what must be communicated to the jury, not any particular words. State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). Therefore, we find no error in the charge.

Vang further argues the jury charge shifted the burden to Vang to prove he withdrew and did not continue in the execution of the plan. The final sentence of the judge's charge clearly communicates that the State bears the burden to show that Vang had continued in the execution of the plan. The State presented evidence upon which the jury could infer Vang remained involved in the plan by stealing the guns from the store after Ennis was shot. Accordingly, there was no error in the charge.

IV. Admissibility of the Photograph

Vang next argues the trial judge erred by allowing the admission of a photograph depicting the shell casing of the fatal shot close to Ennis's head. Vang argues the photograph was cumulative to other photographs admitted into evidence, did not corroborate the testimony of any witness, and was introduced solely to arouse the passion and prejudices of the jury. We find no error.

"The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). "The trial judge must balance the prejudicial effect of graphic photographs against their probative value. To constitute unfair prejudice, the photographs must create a

'tendency to suggest a decision on an improper basis, commonly, though not necessarily an emotional one.'" Hughey, 339 S.C. at 460, 529 S.E.2d at 732. A test to determine whether the trial judge abused his discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial. "If the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." Rosemond, at 597, 518 S.E.2d at 590.

Pursuant to a motion in limine, the trial judge initially excluded the photograph because it was cumulative to another photograph that showed the shell casing. However, the trial judge acknowledged the ruling was only preliminary. At trial, the State sought to introduce the photograph to allow a firearms expert to opine the general type of the gun used from the location of the shell casing in relationship to the body. The State argued the photograph in question better depicted the placement of the shell casing as compared to the other photograph admitted by the court. The pathologist testified the position of the body and of the shell casing in relation to the body corroborated her finding that the gunshot was a close contact wound.

We have reviewed the photograph and find no abuse of discretion in its admission into evidence. The trial judge initially denied its admissibility but reevaluated the photograph in the context of the testimony of the witnesses and found the photograph served to corroborate the testimony offered by the firearms expert and the pathologist. Because the photograph corroborated this testimony, it was not an abuse of discretion to admit it. Id.

V. Individual voir dire of the jurors

Vang argues the trial judge erred by failing to individually question each juror on matters of racial prejudice and bias, and by failing to ask nineteen voir dire questions requested by Vang. We disagree.

During voir dire, the trial judge informed the jurors that they could come forward and speak personally to him when answering any of the voir dire questions if discussing the matter openly would cause them embarrassment. Subsequently, the trial judge asked the jury venire, "Ladies

and gentlemen, do any of you have any biases or prejudices that would cause you to favor or disfavor any person associated with this case in any way, based upon that person's race? If so, please stand." No one stood in response.

The trial judge is statutorily required to ask the jurors whether they are related to either party, have any interest in the cause, have expressed or formed an opinion, or know of any bias or prejudice to either party. S.C. Code Ann. § 14-7-1020 (Supp. 2001). Specific individual questions designed to reveal racial prejudices of the particular juror are required only when "special circumstances" exist. State v. Cason, 317 S.C. 430, 432, 454 S.E.2d 888, 889 (1995). A special circumstance exists when race is an integral part of the case. Id. However, "[a] special circumstance . . . does not exist . . . when the only racial fact in the case is that the defendant and the victim are of different races." Id. at 432, 454 S.E.2d at 889-90. In the absence of special circumstances, the questions asked pursuant to the statute during general voir dire are sufficient to determine the existence of bias or prejudice. Id. at 432, 454 S.E.2d at 889. The manner and scope of any additional voir dire questions are in the trial judge's discretion. State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997). "[A]s a general rule, the trial court is not required to ask all voir dire questions submitted by the attorneys." Wall v. Keels, 331 S.C. 310, 318, 501 S.E.2d 754, 757 (Ct. App. 1998).

In this case, the difference in race between the victim and the defendant was the only racial fact before the court; therefore, no special circumstances existed requiring individual questioning of the jurors. Accordingly, the trial judge fulfilled his obligation upon asking the statutorily required questions, which included the question regarding bias and prejudice. Cason, 317 S.C. at 432, 454 S.E.2d at 889.

Moreover, upon reviewing Vang's propounded questions, we find the trial judge's voir dire encompassed the relevant scope of the propounded questions. Therefore, no harm resulted to Vang from the trial judge's refusal to ask the specific voir dire questions. It was entirely within the trial judge's discretion to decide the manner and scope of the voir dire and we find no abuse of that discretion.

CONCLUSION

We find no merit to any of the arguments raised on appeal. Accordingly, for the foregoing reasons, Vang's convictions are

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.