OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12

March 14, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Luke A. Williams, III, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Edgefield County
Marc H. Westbrook, Post-Conviction Judge
Luke Brown, Trial Judge

Opinion No. 25950
Submitted February 16, 2005 – Filed March 14, 2005

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia, for Petitioner.

David I. Bruck and Robert Edward Lominack, both of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review a post-conviction relief (PCR) order granting respondent a new capital sentencing proceeding, finding his trial counsel was ineffective in failing to request a "plain and ordinary" meaning jury charge.[1] We find that counsel's performance was deficient, but that there is no evidence of resulting prejudice. We therefore reverse the PCR order.

FACTS

Respondent was convicted of murdering his wife and his son and received two death sentences. His direct appeal was affirmed. State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). At the PCR hearing, trial counsel acknowledged that there was no strategic or tactical reason why he failed to request a "plain meaning" charge. The PCR judge granted relief, and the State sought a writ of certiorari to review that decision.

ISSUE

> Whether there is any evidence in the record to support the PCR judge's finding that respondent received ineffective assistance of counsel in the sentencing phase of his capital trial?

ANALYSIS

A PCR applicant claiming trial counsel rendered ineffective assistance must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a

[1] It is well settled that a capital defendant is entitled upon request to a jury charge in the sentencing phase of his trial that the term life imprisonment is to be understood in its plain and ordinary meaning. See Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999) (reviewing the history of the "plain meaning" charge).

reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 688 (1984); Sellers v. State, ___ S.C. ___, 607 S.E.2d 82 (2005). In other words, the applicant must establish both error and prejudice. Id. On appellate review, this Court will uphold the PCR judge's findings of fact and conclusions of law if there is any evidence of probative value in the record to support them. Id.

The PCR judge found that trial counsel's testimony established the error prong of the ineffective assistance test. We agree. He found resulting prejudice from the failure to give "the plain meaning" charge because:

1) respondent had no prior criminal record;

2) respondent had been out on bond prior to the trial and remained out until the guilty verdicts were returned; and

3) the penalty phase evidence was predominately circumstantial, far from overwhelming, and the State had primarily relied on this weak evidence in aggravation during the penalty phase.

We disagree.

We have carefully considered whether the record supports the PCR judge's conclusion that respondent was prejudiced by the lack of a plain meaning charge, and conclude it does not. While the factors cited by the PCR judge might support a prejudice finding in some cases, they do not in the context of this case. The evidence, albeit circumstantial, showed that respondent and his wife were experiencing significant marital problems and financial difficulties, and had in fact declared bankruptcy and seen foreclosure proceedings initiated against their marital home. In May 1991, respondent substantially increased life insurance benefits on his wife and child, naming himself as beneficiary. He also forged wife's signature on an automobile insurance form in the course of increasing that coverage. On June 19, the bodies of respondent's wife and son were found in the family car, which had been partially burned. The wife had died of blunt head trauma

consistent with that inflicted by a human fist, and son had been strangled. Respondent had hand injuries consistent with beating, and told others the causes of death prior to receiving autopsy results.

We do not agree with the PCR judge's characterization of the evidence of respondent's guilt as weak. Further, the evidence demonstrated that respondent's motives were financial gain and the elimination of his domestic problems. Having achieved what he set out to accomplish, it is not surprising or meaningful that respondent met the obligations of his bond. Further, given the nature of these crimes, we find the fact that he had no prior criminal record irrelevant to the question whether he was prejudiced by the lack of a "plain meaning" charge.

The jury, by its guilty verdicts, found respondent planned in cold blood the deaths of his child and his wife, making arrangements to benefit financially. Further, the "plain meaning" charge evolved from the Court's concern that capital juries were speculating about parole eligibility. See Southerland v. State, footnote 1, *supra*. There is nothing in this record to indicate that the jurors in respondent's capital trial were concerned with parole eligibility, or confused about the meaning of a life sentence. We hold there is no evidence in the record to support the PCR judge's conclusion that respondent was prejudiced by trial counsel's deficient performance, that is, that had the jury been given a "plain meaning" charge there is a reasonable possibility that it would have returned two life sentences. Sellers v. State, *supra.*

CONCLUSION

Finding no evidence to support the PCR judge's conclusion that respondent was prejudiced by the lack of a "plain meaning" charge, the order granting respondent a new sentencing proceeding is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dushun Staten, Appellant.

Appeal From Richland County
Henry L. McKellar, Circuit Court Judge

Opinion No. 3955
Heard February 9, 2005 – Filed March 7, 2005

AFFIRMED

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

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

ANDERSON, J.: Dushun Staten appeals his convictions for murder and lynching in the first degree. He argues the trial court erred in (1)

admitting a prior statement by the decedent; (2) barring evidence regarding an alleged confession; and (3) refusing to charge the jury on the law of mere association and mere suspicion. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On January 15, 2001, Phillip Lee, Jr., a student of Benedict College and a reputed gang member of the Crips, was gunned down on Benedict's campus. Brothers Lucius and Dushun Staten were indicted for the offenses of murder and lynching in the first degree for this crime. They were tried together in 2002. The jury found Dushun and Lucius guilty of lynching in the first degree, but only Dushun guilty of murder.[1] The trial court sentenced Lucius to fifteen years, suspended upon the service of eight years for lynching. The court sentenced Dushun to thirty years for murder and ten years for lynching, to run concurrently.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, Op. No. 3900 (S.C. Ct. App. filed December 6, 2004) (Shearouse Adv. Sh. No. 47 at 74). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). An abuse of discretion occurs

[1] The trial court declared a mistrial on Lucius's charge for murder.

when the trial court's ruling is based on an error of law. State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004).

The appellate court should examine the record to determine whether there is any evidence to support the trial court's ruling. See Wilson, 345 S.C. at 6, 545 S.E.2d at 829. If there is any evidence in the record, the appellate court should affirm. Id.

LAW/ANALYSIS

I. Statement Made by the Decedent

Dushun claims the trial court erred in admitting Andrew Britt's testimony that Lee told him that Dushun pulled a gun on him shortly prior to the incident. We disagree.

Andrew Britt, Lee's cousin and Benedict roommate, testified that on the evening before the shooting, Lee, normally a "very calm," "laid back kind of person," arrived in his dorm room "very hysterical and like scared." Britt asked: "Phil, what's wrong with you?" Though Lee avoided answering Britt's questions for a while, Lee eventually confessed that "they just pulled a . . . gun on me." When Britt asked who "pulled" the gun on him, Lee declared: "The niggers we had a[n] argument with on Saturday."[2]

Dushun timely objected to this testimony based on the hearsay rule, but the trial court overruled the objection. Later, on cross-examination by Lucius's attorney, Britt stated that Lee actually said, "The small kid pulled out a gun and asked . . . what's up now." Britt believed Lee was specifically referring to the "little brother," Dushun.

[2] Britt stated he was present when Lee and the Statens had a confrontation on the Saturday before the shooting.

A. Efficacy of Crawford v. Washington[3]

The Confrontation Clause of the Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him" in a criminal prosecution. U.S. Const. amend. VI. The provision is applicable to the states under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). The South Carolina constitution provides the same protection to a defendant. S.C. Const. art. I, § 14.

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149 (1970); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The Confrontation Clause guarantees the accused the right to confront those testifying against him in court and further defines the scope of the admissibility of statements against him made by witnesses out-of-court. See Coy v. Iowa, 487 U.S. 1012 (1988). A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for the discovery of truth." Green, 399 U.S. at 158 (internal quotations omitted).

For nearly twenty-five years, the question of whether an unavailable witness's prior statements could be used against a criminal defendant at trial was governed by Ohio v. Roberts, 448 U.S. 56 (1980):

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

[3] 541 U.S. 36, 124 S.Ct. 1354 (2004).

Id. at 66. Thus, under Roberts, an unavailable witness's out-of-court statement was admissible if it: (1) fell within a firmly rooted exception to the hearsay rule; or (2) contained such particularized guarantees of trustworthiness that adversarial testing of the statement through cross-examination would add little to the assessment of the reliability of the evidence.

In March 2004, the Supreme Court concluded that the long-standing Roberts rule was untenable. The Court, in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), announced a new test to determine the admissibility under the Confrontation Clause of hearsay offered against the accused. Crawford was convicted of assault and attempted murder. Over his confrontation objection, the prosecution was allowed to offer a recorded statement his wife made to the police in which she appeared to contradict Crawford's claim that he attacked the victim in self-defense. Because the wife herself was under suspicion of facilitating the assault, her statement was admitted for its truth under Washington's hearsay exception for declarations against penal interest. This exception required the prosecution to show that the declarant was unavailable to testify, and due to that unavailability, Crawford did not have an opportunity to cross-examine his wife about her out-of-court statement. The Court reversed Crawford's conviction. Crawford changes the Court's previous confrontation analysis.

Crawford traced the development of Confrontation Clause jurisprudence, beginning with English common law and extending to recent decisions made by state and federal courts throughout the country. As a threshold matter, the Supreme Court's analysis identified the "principal evil" which the Confrontation Clause was intended to deter, "the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Id. at ___, 124 S.Ct. at 1363. The Court rejected the view that the regulation of out-of-court statements could be accomplished solely by the rules of evidence. Id. at __, 124 S.Ct. at 1364.

The Crawford Court clarified the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Id. at __, 124 S.Ct. at 1364. "Testimony" is typically a solemn

declaration or affirmation made for the purpose of establishing or proving some fact." Id. (internal quotations omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. Id.

With respect to testimonial hearsay, at least, the Supreme Court overruled its previous decision in Roberts to maintain consistency with the Framers' intent. Id. at ___, 124 S.Ct. at 1374; see also Thomas J. Reed, Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. Rev. 185, 216 (2004) ("In Crawford v. Washington, the United States Supreme Court finally overruled Ohio v. Roberts, divorcing the Confrontation Clause and the hearsay rule because of an irreconcilable breakdown of the relationship.") (footnotes omitted). The unpardonable vice of the Roberts test is "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Id. at __, 124 S.Ct. at 1371. The Court concluded:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at ___, 124 S.Ct. at 1374.

In rejecting the Roberts "indicia of reliability" test, the Court held that the Sixth Amendment bars an out-of-court statement by a witness that is testimonial in nature unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him. Id. at ___, 124 S.Ct. at 1374. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at ___, 124 S.Ct. at 1374. "For

testimonial statements, the Court figuratively erected a 'stop sign' as to admissibility in the absence of confrontation." Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich. L. Rev. 511, 525 (2005). "For statements in this category, [Crawford] firmly rejected the 'reliability' or 'trustworthiness' mode of analysis adopted by Ohio v. Roberts." Id.

The Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 541 U.S. at ___, 124 S.Ct. at 1374. However, the Court provided three "formulations of [the] core class of testimonial statements":

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." . . . .
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

Id. at __, 124 S.Ct. at 1364 (citations omitted). Although the Court declined to settle on a single formulation, it noted: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. at ___, 124 S.Ct. at 1374. In contrast to these examples, casual statements to an acquaintance are not testimonial. Id. at ___, 124 S.Ct. at 1364. Further, business records or

statements in furtherance of a conspiracy are nontestimonial. Id. at ___, 124 S.Ct. at 1367.

B. Testimonial vs. Nontestimonial

In the wake of the Crawford decision, the crucial inquiry is whether a particular statement is testimonial or nontestimonial. Many courts are grappling with the distinction Crawford created between testimonial and nontestimonial hearsay. See United States v. Saget, 377 F.3d 223 (2d Cir. 2004); United States v. Corley, 348 F. Supp. 2d 970 (N.D.Ind. 2004); Thomas J. Reed, Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. Rev. 185 (2004). "In determining whether a statement is testimonial or non-testimonial, courts are consistently applying the Crawford two-pronged analysis to otherwise admissible hearsay statements: (1) Was the statement made to a governmental agent (or in response to questioning from a governmental agent)? (2) Would the declarant expect his/her statement to later be used at trial?" Allie Phillips, A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington, 38-Dec Prosecutor 37 (Nov/Dec 2004).

1. Testimonial Statements

Courts are attempting to define the types of hearsay that constitute testimonial statements. The Colorado Court of Appeals explained that testimonial statements under Crawford will generally be (1) solemn or formal statements (not casual or off-hand remarks); (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes); (3) to a government actor or agent (not to someone unassociated with government activity). People v. Compan, 100 P.3d 533 (Colo. Ct. App. 2004), cert. granted (Oct. 25, 2004). "[S]tatements cited by the [Crawford] Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004); see also United

States v. Saner, 313 F. Supp. 2d 896 (S.D.Ind. 2004) (holding statements made in response to questioning outside of the courtroom by Department of Justice prosecutor were testimonial). The Supreme Court of Georgia, in Moody v. State, 594 S.E.2d 350 (Ga. 2004), held that "police interrogations," as delineated in Crawford as testimonial, include the field investigation of witnesses shortly after the commission of a crime. Id. at 354 n.6; cf. Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S.Ct. 2451, 2463 (2004) (Stevens, J., dissenting) ("Surely police questioning during a Terry stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.").

United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004), found that "[a] statement made knowingly to the authorities that describes criminal activity is almost always testimonial" and thus concluded that the confidential informant's statement to the police wherein the CI implicated the defendant in criminal activity constituted testimonial hearsay. The Sixth Circuit Court of Appeals further noted that statements made to the authorities, who will use them in investigating and prosecuting a crime, made with the full understanding that the statements will be so used, are testimonial.

"If an out-of-court statement is taken by a government agent (police officer, prosecutor, child protective services worker employed by the state), the statement will be considered testimonial so long as the witness reasonably could expect that statement to be used at a later trial." Phillips, 38-Dec Prosecutor at 37.

In United States v. Nielsen, 371 F.3d 574 (9th Cir. 2004), the defendant's girlfriend made statements to the police that incriminated the defendant during the service of a search warrant at their mutual residence. The police asked the girlfriend who had access to the floor safe where the methamphetamine was found. She replied that the defendant did. The Ninth Circuit Court of Appeals found the statements were testimonial.

United States v. McClain, 377 F.3d 219 (2d Cir. 2004), discussed the testimonial aspect of a plea allocution: "In light of [the] examples cited by the

[Crawford] Court as testimonial, it is clear that a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor." Id. at 221; see also People v. Woods, 779 N.Y.S.2d 494 (N.Y. App. Div. 2004) (finding that admission of robbery accomplice's plea allocution into evidence, following accomplice's refusal to testify on constitutional grounds, violated defendant's Sixth Amendment confrontation rights because plea allocutions are among the core testimonial statements that the Confrontation Clause plainly meant to exclude).

City of Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004), recognized that an affidavit prepared by a registered nurse, in connection with the drawing of blood for use in evidence regarding intoxication, was testimonial, despite the nurse's apparent private status. The Supreme Court of Nevada emphasized that such an affidavit is "prepared solely for the prosecution's use at trial." Id. at 595.

2. Nontestimonial Statements

Courts are beginning to formulate case law defining what nontestimonial statements entail. "[S]tatements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminating to another." Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich. L. Rev. 511, 540 (2005). Private conversations between confidants have been found to be nontestimonial.

In United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004), the Eighth Circuit Court of Appeals ruled that Crawford was inapplicable because the statements "were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which Crawford speaks."

State v. Blackstock, 598 S.E.2d 412 (N.C. Ct. App. 2004), involved extended statements made by a victim fatally shot during a robbery to his wife and daughter while in the hospital. The Court of Appeals of North

Carolina concluded the statements were nontestimonial. The statements were made during personal conversations that took place at the hospital over a series of several days after the shooting and at a time when the victim's physical condition was improving and therefore would not have been anticipated by him to be used prosecutorially.

In State v. Rivera, 844 A.2d 191 (Conn. 2004), an unavailable declarant's statement to his nephew, admitting his participation with defendant in a burglary that had given rise to a homicide, was found to be nontestimonial because it failed under the most expansive test articulated by Crawford: an objective witness would not reasonably believe that the statement would be available for use at a later trial. The declarant made the statement in confidence and on his own initiative to a close family member, almost eighteen months before the defendant was arrested and more than four years before his own arrest. The Supreme Court of Connecticut held: "In light of these circumstances, [the declarant's] communication to . . . his nephew clearly does not fall within the core category of ex parte testimonial statements that the court was concerned with in Crawford." Id. at 202.

In People v. Shepherd, 689 N.W.2d 721 (Mich. Ct. App. 2004), the codefendant had made spontaneous, unprompted statements to his relatives about his role in an offense. The statements were made in a custodial setting and were overheard by jail guards. The Court of Appeals of Michigan explained the statements were not testimonial in nature, stating the declarant could not have reasonably believed that the statements would later be used at a trial.

The Supreme Court of Georgia, in Demons v. State, 595 S.E.2d 76 (Ga. 2004), articulated that a murder victim's statements to his friend, made during an incident involving the defendant several weeks prior to the murder, to the effect that the defendant was going to kill him, were not testimonial in nature. Thereafter, the court addressed a similar issue in Watson v. State, 604 S.E.2d 804 (Ga. 2004), and found statements that an alleged murder victim made to three close friends over approximately ten years were not testimonial. The statements concerned threats by the defendant and episodes of physical and mental abuse.

In People v. Cervantes, 12 Cal. Rptr. 3d 774 (Cal. Ct. App. 2004), evidence of one defendant's incriminating hearsay statement, which also implicated codefendants in a murder prosecution, was nontestimonial. The declarant made the statement to a friend of long standing in the context of a request for medical assistance from the friend, and, given that the friend was afraid to testify since she knew that all the defendants were gang members, the statement was made without any reasonable expectation that it would be used at a later trial.

In People v. Griffin, 93 P.3d 344, 369 (Cal. 2004), the Supreme Court of California held a child murder victim's statement to a school friend made on the day that the crime occurred that the "defendant had been fondling her for some time and that [the victim] intended to confront him if he continued" was not testimonial.

The Court of Criminal Appeals of Texas, in Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004), analyzed the co-defendant's out-of-court statements to two acquaintances, indicating his involvement in murders with the defendant. The court recognized the statements were casual remarks that he spontaneously made to acquaintances. They were "street corner" statements that the co-defendant made to friends without any motive to shift blame to another or minimize his own involvement in the murders. The court found the statements were nontestimonial in nature.

In People v. Compan, 100 P.3d 533 (Colo. Ct. App. 2004), cert. granted (Oct. 25, 2004), the Colorado Court of Appeals concluded that statements of a non-testifying domestic violence victim to her friend immediately after the attack did not qualify as testimonial. Subsequently, the court decided People v. Garrison, No. 01CA0527, 2004 WL 2278287 (Colo. Ct. App. 2004). In Garrison, the court determined the murder victim's hearsay statements to his training manager that "an old friend" was threatening to kill him were not testimonial. Thus, admission of the statements did not violate the defendant's right of confrontation. The statements were not made to the police, and there was no indication that the training manager was acting as a police agent.

Horton v. Allen, 370 F.3d 75 (1st Cir. 2004), amplified that a statement, admitted under the state of mind hearsay exception, that on the day of the murders defendant's accomplice had told a witness that he needed money and that the victim had refused to give him drugs on credit, was nontestimonial. The First Circuit Court of Appeals emphasized the accomplice's statements were made during a private conversation with the witness. "In short, [the accomplice] did not make the statements under circumstances in which an objective person would 'reasonably believe that the statement would be available for use at a later trial.'" Id. at 84.

Parle v. Runnels, 387 F.3d 1030 (9th Cir. 2004), clarified that an unavailable declarant's diary entries were nontestimonial. The diary "was not created 'under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.'" Id. at 1037.

United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005), expounded that surreptitiously monitored private conversations and statements contained in Title III wiretap recordings are not "testimonial statements" for purposes of Crawford. The Third Circuit Court of Appeals noted: (1) the recorded conversations neither fell within nor were analogous to any of the specific examples of testimonial statements mentioned by the Crawford Court; (2) each of the examples referred to by the Crawford Court or the definitions it considered entails a formality to the statement absent from the recorded statements in Hendricks; (3) the Title III recordings cannot be deemed testimonial as the speakers certainly did not make the statements thinking that they would be available for use at a later trial; and (4) the very purpose of Title III intercepts is to capture conversations that the participants believe are not being heard by the authorities and will not be available for use in a prosecution.

The status of 911 calls has been addressed by the courts. In People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004), the court determined that a 911 call is not testimonial because it is typically initiated by the witness looking for assistance rather than by the police summoning a witness to provide evidence. People v. Conyers, 777 N.Y.S.2d 274, 277 (N.Y. Sup. Ct.

2004), held that a caller's statements were nontestimonial because her "intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding." Cf. People v. Cortes, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (reasoning that statements about an ongoing shooting made by a witness during a 911 call amounted to testimonial evidence because the information was elicited by 911 operator's use of an accepted pattern of questioning for the purpose of investigation, prosecution, and potential use at judicial proceedings; "an objective reasonable person knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution.").

The Court of Appeals of Washington, in State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004), rejected a bright line rule that all 911 recordings are nontestimonial, opting instead to employ a case-by-case analysis into whether statements contained on a 911 recording originated from interrogation.

The Court of Appeals of Minnesota concluded statements made by the victims during their 911 call were not testimonial statements and, thus, were admissible in the assault trial despite the victims' unavailability at trial and the defendant's lack of prior opportunity to cross-examine the victims. State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004), review granted (Nov. 23, 2004). The statements in Wright were made moments after the assault while the victims were struggling for self-control and survival, no evidence suggested the call was handled by the 911 operator under formalized protocol, and the victims were providing information for immediate intervention and not for eventual prosecution. Wright inculcated:

> [T]hese statements do not fit within the definitions or the examples of testimonial statements. A 911 call is usually made because the caller wants protection from an immediate danger, not because the 911 caller expects the report to be used later at trial with the caller bearing witness—rather, there is a cloak of anonymity surrounding 911 calls that encourages citizens to make emergency calls and not fear repercussion.

Id. at 302.

A number of courts have found that statements made for the purpose of medical diagnosis or treatment are nontestimonial. In State v. Vaught, 682 N.W.2d 284 (Neb. 2004), a four-year-old victim of sexual abuse informed a physician during a medical examination about the identity of the defendant. The Supreme Court of Nebraska decided the statements by the child to the physician were nontestimonial. The court explicated:

> [T]he victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.

Id. at 291. In State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005), the Court of Appeals of Minnesota ruled a three-year-old victim's out-of-court statements to her examining physician that defendant's penis touched her vaginal and anal openings, together with videotaped statements during her conversation with the physician that defendant put his hands "right in there," referring to her anal opening, were not testimonial. Admission of the statements in a criminal sexual conduct trial did not violate the defendant's right of confrontation where they were made in response to questions by the physician for purposes of medical diagnosis and the physician was not working on behalf of law enforcement for the purpose of developing a case against the defendant.

In re T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004), reasoned that a victim's statements to medical personnel regarding descriptions of the cause of symptoms, pain or sensations, or the inception or general character of the

cause or external source thereof are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault.

The Court of Appeals of Michigan concluded admission of the child victim's statement through the testimony of the executive director of the local Children's Assessment Center, a private organization, did not violate the defendant's right to confront his accuser in a trial for criminal sexual conduct. People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004). The statement did not constitute testimonial evidence, as it was not made to a government employee, and the child's answer to the question whether she had an "owie" was not a statement in the nature of ex parte in-court testimony or its functional equivalent. Id.

Courts have discussed the nontestimonial nature of various reports. The Court of Criminal Appeals of Alabama held an autopsy report showing the cause of death of a homicide victim was not testimonial. Perkins v. State, CR-02-1779, 2004 WL 923506 (Ala. Crim. App. 2004). The Supreme Court of New Mexico, in State v. Dedman, 102 P.3d 628 (N.M. 2004), declared a blood alcohol report showing the defendant's blood alcohol level at the time of the vehicle accident was nontestimonial for purposes of determining whether admission of the report, without testimony of the nurse who drew the blood sample, violated the defendant's Sixth Amendment right to confrontation in a prosecution for aggravated driving while under the influence of intoxicating drugs. The report was generated by State laboratory personnel, not law enforcement, and the report was not investigative or prosecutorial.

Co-conspirator statements have been found to be nontestimonial. See, e.g., United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) (stating that Crawford does not apply to co-conspirator statements because they are nontestimonial). In United States v. Saget, 377 F.3d 223 (2d Cir. 2004), the Second Circuit Court of Appeals determined a co-conspirator's statements against the defendant to a confidential informant, whose true status was unknown to the co-conspirator, were not testimonial. Noting Crawford's specific caveat that it only pertains to testimonial statements, the court pointed out that the co-conspirator had no knowledge of the confidential

informant's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator. Id. In fact, all circuits that have considered this issue with respect to co-conspirators have reached a similar conclusion. See, e.g., Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); United States v. Lee, 374 F.3d 637 (8th Cir. 2004); People v. Cook, 815 N.E.2d 879 (Ill. App. Ct. 2004); Thomas J. Reed, Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. Rev. 185 (2004); see also Williams v. SCI-Huntingdon, No. Civ.A. 02-CV-7693, 2004 WL 2203734, at *11 n.7 (E.D.Pa. Sept. 30, 2004) ("'an off-hand, overheard remark' to an acquaintance, such as . . . one made by [a] co-conspirator . . ., is outside the scope of Crawford and thus does not violate the Confrontation Clause.").

Some courts have examined what encompasses "interrogation" within the meaning of Crawford. In Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004), transfer granted (Dec. 9, 2004), the Court of Appeals of Indiana ruled that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not testimonial. The court observed that what constitutes a testimonial statement is the official and formal quality of such a statement. The court noted that Crawford chose not to say that **any** police questioning of a witness would make a statement in response thereto testimonial. Rather, Crawford expressly limited its holding to police "interrogation." The court stated: "Whatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred." Id. at 964.

In People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004), the California Court of Appeal illuminated:

> Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an "interrogation." Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is

> required for a police interrogation [that results in inadmissible testimonial hearsay].

The Supreme Judicial Court of Maine, in State v. Barnes, 854 A.2d 208 (Me. 2004), found to be nontestimonial statements that were made by the murder defendant's mother (the victim) to police officers at the station house where she went after an earlier assault by her son. The interaction did not involve structured police interrogation triggering the cross-examination requirement of the Confrontation Clause in admitting the officer's testimony regarding the mother's statements. The mother went to the police station on her own, her statements to the officers were made when she was still under the stress of the alleged assault by the defendant, and officers were not questioning her regarding known criminal activity.

In State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004), the Court of Appeals of North Carolina concluded a crime victim's statements to an officer made shortly after she was rescued from a kidnapping and assault by the police were not testimonial. The statements were made immediately after the rescue and with no time for reflection or thought on the victim's part and were initiated spontaneously by the victim. The victim was not (1) providing a formal statement, deposition, or affidavit; (2) aware she was bearing witness; or (3) aware her utterances might impact further legal proceedings. Id. at 27; see also People v. Newland, 775 N.Y.S.2d 308, 309 (N.Y. App. Div. 2004) ("[A] brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' should not be considered testimonial."); People v. Mackey, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004) (stating responses to police officers during a preliminary field investigation are not barred as testimonial statements under Crawford if the statements and the circumstances in which they were made lack the requisite formality to constitute a police interrogation).

Various jurisdictions have addressed the status of excited utterances as nontestimonial. In People v. King, No. 02CA0201, 2005 WL 170727, at *5 (Colo. Ct. App., Jan 27, 2005), the Colorado Court of Appeals elucidated:

> [C]lassification of a statement as an excited utterance, while not dispositive, supports a conclusion that a statement is nontestimonial. An excited utterance by definition is one made before the declarant has had an opportunity to reflect on the event. Therefore, it is consistent with the definition of an excited utterance to conclude that it is not a statement which a declarant would reasonably believe at the time it was made might later be used at trial.

In Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), transfer granted (Dec. 9, 2004), the victim made a number of excited utterances to police officers at the scene of the crime, in response to preliminary police questions. In concluding these excited utterances did not constitute testimonial statements, the Court of Appeals of Indiana declared:

> [T]he very concept of an "excited utterance" is such that it is difficult to perceive how such a statement could ever be "testimonial." The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful. . . . An unrehearsed statement made without time for reflection or deliberation, as required to be an excited utterance, is not "testimonial" in that such a statement, by definition, has not been made in contemplation of its use in a future trial.

Id. at 952-53 (citations omitted).

A number of courts dealing with excited utterances have taken the approach of analyzing the intent of the declarant and determining whether the recipient of the excited utterance questions the declarant. See Allie Phillips, A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington, 38-Dec Prosecutor 37 (Nov/Dec 2004). For example, if a declarant provides an excited utterance that is simply a cry for help or for medical treatment, and if the witness would not reasonably expect the statement to be used in a prosecutorial manner at the time the utterance is made, then those utterances are being declared nontestimonial and are subject

to a traditional hearsay analysis. See, e.g., People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004); State v. Orndorff, 95 P.3d 406 (Wash. Ct. App. 2004). However, if a declarant provides an excited utterance that could reasonably be expected to be used at a later trial (such as reporting a crime), or if a statement is made in response to questioning by a 911 operator, those utterances are being declared testimonial and will require the witness to testify. Phillips, 38-Dec Prosecutor at 41.

C. Status of Lee's Statements under Crawford

The analysis of whether the admission of Lee's statements violated the Confrontation Clause begins with the question of whether the statements are testimonial, triggering Crawford's per se rule against their admission. In this case, Lee's statements were not: (1) ex parte in-court testimony or its functional equivalent; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony transcripts, or confessions; or (3) taken by police officers in the course of an interrogation. Rather, Lee's statements were made during a private conversation with his cousin and roommate, Britt. See Crawford, 541 U.S. at ___, 124 S.Ct. at 1364 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Significantly, the decedent did not make the statements "'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Id. Concomitantly, Lee's statements do not qualify as testimonial.

Lee's statements are nontestimonial. Consequently, their admission is outside of Crawford's scope. See Crawford, 541 U.S. at ___, 124 S.Ct. at 1364.

D. Applicability of Ohio v. Roberts

"Justice Scalia's opinion [in Crawford] hints, but does not decide, that the Confrontation Clause no longer applies to non-testimonial hearsay, and

that its admission is governed by a jurisdiction's hearsay rules" and Roberts' "indicia of reliability" approach. David F. Binder, Hearsay Handbook § 7:2 (4th ed. 2004). Most jurisdictions are leaning toward the idea that "Crawford [left] the Roberts approach untouched with respect to nontestimonial statements." United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004); see also Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) ("Thus, unless Christian's statements qualify as 'testimonial,' Crawford is inapplicable and Roberts continues to apply."); State v. Manuel, 685 N.W.2d 525, 533 (Wis. Ct. App. 2004), review granted, 689 N.W.2d 55 (Wis. 2004) ("[W]e proceed, in an abundance of caution, to analyze Manuel's confrontation clause claim under the Roberts analysis").

Because nontestimonial hearsay is at issue here, we apply the reliability test of Roberts to determine whether the admission of Lee's hearsay statements violated Dushun's Confrontation Clause rights.

Under Ohio v. Roberts, 448 U.S. 56 (1980), for the statement to be admissible, the declarant must be unavailable, and the statement must fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness. Obviously, Lee's death rendered him unavailable to testify. Therefore, we examine whether Lee's statements fall within a firmly rooted hearsay exception.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; see also State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) ("Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted."). The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. See Huggler v. State, 360 S.C. 627, 602 S.E.2d 753 (2004); State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004); see also Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Rule 803, SCRE (setting out exceptions to the hearsay rule).

One exception to the hearsay rule is an excited utterance. Rule 803(2), SCRE. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Id. A statement that is admissible because it falls within an exception in Rule 803, such as the excited utterance exception, may be used substantively, that is, to prove the truth of the matter asserted. State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999).

"The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Sims, 348 S.C. at 20, 558 S.E.2d at 521; see also State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001) (stating the basis for the excited utterance exception to the hearsay rule is that the perceived event produces nervous excitement, making fabrication of the statements about the event unlikely). An excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection. McHoney, 344 S.C. at 94, 544 S.E.2d at 34. In deciding whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances. Id. Such a determination is left to the sound discretion of the trial court. Sims, 348 S.C. at 21, 558 S.E.2d at 521; State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

"Three elements must be met to find the statement [is] an excited utterance." Sims, 348 S.C. at 21, 558 S.E.2d at 521. First, the statement must relate to a startling event or condition. Id. Second, the statement must have been made while the declarant was under the stress of excitement. Id. Third, the stress of excitement must be caused by the startling event or condition. Id. (citing Rule 803(2), SCRE). Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event. Id. at 22, 558 S.E.2d at 521.

The statements here clearly meet the first element because they relate to the startling event of Lee having a gun "pulled" on him. As for whether Lee

was "under the stress of excitement" when he made the statements, we note that the amount of time that passed between the startling event and the time the statement was made is one of several factors to consider when deciding whether a statement is an excited utterance. Id. at 21, 558 S.E.2d at 521. While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor. Id. Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress. Id. at 22, 558 S.E.2d at 521. Lee, normally a "calm, humble, laid back kind of person," was described by Britt as being "storm, angry, storm, angry, just temper-high kind of person when he came in the room" on the Sunday evening before the shooting. Britt testified that Lee "just kept walking back, walking back and forth in the room. Just like . . . banging on stuff." When asked what had happened, Lee replied: "They just pulled a . . . gun on me." (emphasis added). Lee's demeanor and the severity of the startling event are factors that weigh in favor of finding his statements to be excited utterances. Finally, the third element is satisfied. The "stress of excitement" was caused by the "startling event" of Lee having a gun "pulled" on him.

Moreover, the fact that the statements were made in regard to questioning by Britt does not preclude their admissibility. See United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (noting the single question, "what happened," has been held not to destroy the excitement necessary to qualify under excited utterance exception to hearsay rule); United States v. Glenn, 473 F.2d 191 (D.C. Cir. 1972) (stating fact that excited utterance is made in response to inquiry is not decisive on issue of admissibility).

Given the totality of the circumstances, we find Lee was under the continuing stress of excitement when he told Britt "they just pulled a . . . gun on me." When Britt asked who "pulled" the gun on him, Lee declared: "The niggers we had a[n] argument with on Saturday." On cross-examination by Lucius's attorney, Britt stated that Lee actually said, "The small kid pulled out a gun and asked . . . what's up now." Britt believed Lee was specifically referring to the "little brother," Dushun. The trial court did not abuse its discretion in admitting Lee's statements to Britt because the statements fall under the excited utterance hearsay exception.

We are not required to find any other guarantees of trustworthiness because the court will only look to this prong if a statement does not fall within a firmly rooted hearsay exception. See State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). Lee's statements constitute excited utterances. The United States Supreme Court has held that an excited utterance is a firmly rooted exception to the hearsay rule. See White v. Illinois, 502 U.S. 346 (1992); see also State v. Burdette, 335 S.C. 34, 45, 515 S.E.2d 525, 531 (1999) ("excited utterance exception is firmly rooted in South Carolina law and satisfies the requirements of the Confrontation Clause").

The admission of Lee's statements satisfies Roberts. The trial court correctly admitted the hearsay statements. Dushun's Confrontation Clause rights were not violated.[4]

II. Statement Against Penal Interest by Unavailable Witness

Dushun maintains the trial court erred in excluding Michelle Buff's testimony that Maurice Sanders told her he shot the decedent. We disagree.

A. Relevance

For evidence to be admissible, it must be relevant. Rules 401 & 402, SCRE; State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App.

[4] Dushun further claims the trial court erred in admitting the hearsay statements because they actually relate to a prior bad act, not an excited utterance involving "the event." However, this objection was not made at trial, and the trial court did not have an opportunity to rule upon the objection. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (noting that, to be preserved for appellate review, issue must be raised and ruled upon in the trial court). Therefore, the issue is not preserved for appeal.

2004). Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). 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).

Prior to the Statens' joint trial, the State stipulated that neither Lucius nor Dushun actually shot Lee. The State declared: "[W]e are proceeding on the theory of accomplice liability . . . . Whoever the shooter is is not relevant." Buff, the girlfriend of Limel Sims, would testify that she took Maurice Sanders to the Benedict College area to look for the gun. In her statement to police, she revealed that, when she took him to the bus station, Sanders confessed to shooting a man at Benedict College because "the guy he shot and some of his friends had jumped him at the mall." She added that Sims confirmed Sanders shot Lee. The trial court ruled the test for trustworthiness of the statement was not met, and the identity of the shooter was unimportant for the State to prove its case for aiding and abetting murder.

Buff's testimony was not relevant. The trial judge did not abuse his discretion in excluding the evidence.

B. Analysis under Rule 804(b)(3), SCRE

Nontestimonial statements against the interest of the declarant at the time when made are admissible as an exception to the hearsay rule if the declarant is unavailable and the circumstances show that a reasonable person would not have made the statement unless believing it to be true. See Crawford v. Washington, 541 U.S. 36 (2004). Rule 804(b)(3), SCRE, provides in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .

> (3) **Statement against interest**. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . . .

The declaration against penal interest exception has been applied to the determination of whether a third party committed the crime charged instead of the defendant in a criminal case. See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). An abuse of discretion standard is applied to a trial judge's ruling on the issue of whether a statement is admissible as a declaration against penal interest. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996).

However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Rule 804(b)(3), SCRE; see also McClain v. Anderson Free Press, 232 S.C. 448, 468, 102 S.E.2d 750, 760 (1958) (Oxner, J., concurring). A defendant seeking to offer a hearsay statement against interest bears the formidable burden of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement. State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001). Exculpatory evidence that is not corroborated with other evidence that clearly shows its trustworthiness is excluded. Forney, 321 S.C. at 359-60, 468 S.E.2d at 645; State v. McKnight, 321 S.C. 230, 467 S.E.2d 919 (1996). Whether a statement has been sufficiently corroborated is a question left to the discretion of the trial judge after considering the totality of the circumstances under which a declaration against penal interest was made. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000).

Rule 804(b)(3) does not require that the information within the statement be clearly corroborated, it means only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement

itself, i.e., that the statement was actually made. Kinloch, 338 S.C. at 389, 526 S.E.2d at 707. The corroboration requirement "goes not to the truth of the statement's contents, but rather to the making of the statement." McDonald, 343 S.C. at 323, 540 S.E.2d at 466. The corroboration requirement is a preliminary determination as to the statement's admissibility, not an ultimate determination about the statement's truth. Kinloch, 338 S.C. at 389, 526 SE.2d at 707.

In State v. McKnight, evidence offered by a witness with a motive to testify against the alleged declarant was held not sufficiently trustworthy:

> First, the declarant in this case, Willie, was available to testify. . . . Moreover, Willie did not exercise any fifth amendment privilege against self-incrimination.
>
> Second, no corroborating evidence existed which clearly indicated the trustworthiness of Willie's statement against penal interest. On the contrary, the evidence presented during the in camera hearing severely undermined that statement's trustworthiness. Belser admitted that he felt Willie had wrongly put the blame on him for crimes actually committed by Willie. This statement suggested that Belser had a possible motive for attributing Chandler's murder to Willie. Belser also stated that when Willie confessed to the murder, he felt Willie was only joking. Indeed, Willie himself admitted telling at least three different versions of his story at one time or another.

Id. at 234-35, 467 S.E.2d at 922.

Sanders was unavailable to testify due to the exercise of his Fifth Amendment rights. Buff would testify that Sanders confessed to the murder, thereby exposing him to possible further criminal charges. The only corroboration was from the eyewitness testimony of Brandon McCants, who testified that he saw Sanders shoot Lee, and Dushun's statement that he and Lucius withdrew. However, McCants did not come forward with his information until two months after the incident, even though he was

questioned by police much earlier; Dushun obviously had motive to lie; and, when arrested shortly after the shooting, Sanders tested negative for gunshot residue. Lastly, but most importantly, Sims, Buff's boyfriend, was charged with the murder as well, and Buff's statement would exculpate him. Therefore, she had motive to make up the story about Sanders' confession.

Based on the totality of the circumstances, and because of the lack of corroboration and Buff's possible motivation to be untruthful, the trial court correctly excluded her testimony. Dushun did not carry his burden of showing circumstances clearly corroborating the making of the statement. See United States v. Salvador, 820 F.2d 558 (2d Cir. 1987) (stating inference of trustworthiness from proffered corroborating circumstances must be strong, not merely allowable, not an insignificant hurdle). Moreover, the circumstances do not indicate that the statement was not fabricated. See United States v. Bagley, 537 F.2d 162 (5th Cir. 1976) (excluding statement on basis of doubt as to whether it was made). We affirm the trial court's reasoning that, because the State conceded neither Staten brother was the shooter, showing Sanders as opposed to Sims was the shooter did nothing to aid the jury in its decision. The trial court did not abuse its discretion in refusing to admit the testimony.

III. Jury Charge

Dushun contends the trial court erred in refusing to charge mere association and mere suspicion. We disagree.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). The judge is required to charge only the current and correct law of South Carolina. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). 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. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Id. at 318, 577 S.E.2d at 464. 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.

Reese, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).

Dushun requested a charge on mere presence and mere association before the charge was given, and then objected to the charge when he believed the trial court insufficiently presented the law on mere association to the jury. Our supreme court, in State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998), held a charge to be sufficient though the trial court failed to charge mere presence and mere association. The court ruled that "the trial court's charge was not misleading. . . . The trial judge extensively instructed the jury on the requisite criminal intent for each of the charged crimes." Id. at 77, 502 S.E.2d at 76-77.

In the instant case, the trial court's charge included the following law: "To be liable as an accomplice, the defendants must have knowledge of the principal's criminal conduct. Now, mere presence at the scene of the crime is not sufficient to establish – to establish guilt as an accomplice." The charge included a detailed instruction on aiding, abetting, or assisting the commission of the crime "through some overt act." We find the trial court's jury charge sufficiently covered the law on mere presence and knowledge. The trial court's charge on the whole, combined with the law on reasonable doubt and mere presence and knowledge, was proper. Therefore, the trial court's refusal to recharge the jury with Dushun's suggested additions was neither erroneous nor prejudicial to Dushun, as required by Burkhart. See Burkhart, 350 S.C. at 263, 565 S.E.2d at 304.

Dushun never requested a charge on mere suspicion before the trial court actually administered the charge. Furthermore, he did not request such an instruction after the trial court had charged the jury with the law. The trial court did not have an opportunity to rule upon the objection. See State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (to preserve objection to jury charge, defendant must raise the issue at trial). In addition, Rule 20(b) of the South Carolina Rules of Criminal Procedure provides:

> Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection.

Therefore, the issue is not preserved for appeal. Furthermore, although Lucius objected to the trial court's alleged failure to include a charge on mere suspicion, an appellant may not preserve an issue for appeal by way of a co-defendant's objection. See State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) ("While appellant's co-defendant did object, the appellant may not utilize the objection of another defendant to gain review.").

CONCLUSION

For the reasons stated herein, Dushun's convictions are

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Light, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3956
Heard January 12, 2005 – Filed March 7, 2005

AFFIRMED

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

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

STILWELL, J.: Michael Light appeals his conviction for murdering his girlfriend, Priscilla Davis. He argues the trial court erred in refusing to charge the jury on involuntary manslaughter and self-defense. We affirm.

BACKGROUND

Texas authorities arrested Light during a traffic stop because he had a gun in his glove compartment and did not have a concealed weapons permit. He was interrogated several times by Texas authorities while in custody. Although Light gave little information and conflicting statements about where he had been and why, Texas authorities discovered a South Carolina missing persons report on Davis that indicated she might be traveling with Light. The arresting officer noticed blood on Light's blue jeans and shoes, and was shocked when Light began to refer to Davis in the past tense.

During a tape-recorded interview conducted by a Texas Ranger, Light said he and Davis went to a local club and then spent the night at his home in Pelion after a "little squabble." The next morning, Light went out to buy breakfast. When he returned home, Davis confronted him, holding a long brown hair in one hand and a .22 rifle in the other. Light said Davis accused him of having another woman in the house because she found the hair on a lubricant bottle in Light's bedroom. Light said he denied the accusation but Davis

> went to acting a fool and called me a liar. And the only thing I could think of, I was - - I tried to distract her. I remember swinging my left arm, I think it was, to get the rifle out of her hand. When I did, all I can tell you, it went off. Honestly, I didn't even think it hit her.
>
> Then she fell. I thought it might have just grazed her shoulder. So I ran out the back door to get help because I don't have a telephone. I ran back to her and she wasn't breathing, and I just panicked. I

> didn't think nobody would believe me. So the only thing I did, I just put her in the trunk of the car; and I just took off. I just drove and kept driving."

Later in the same interview, Light stated:

> [I]n spite of the fact that it, the gun, the rifle, was in my hand when it went off. I will not deny that. I took it from her. It was either her or me. I could have run, like I told them; but I really didn't think about it.

Light explained he "knew deep down" it was not all his fault but did not think anyone would believe him, so he put Davis' body in the trunk of her car and started driving with no destination in mind. He threw the rifle off a bridge and into a river, stopped to put Davis' body out, and kept driving.

With Light's help, police found Davis' body in a wooded area off the interstate in Alabama. Although the body was in an advanced state of decomposition, her shirt had a hole in the chest area. At trial, a firearms expert testified he found no gunshot residue around the hole and this indicated a distant shot of 30 to 40 inches as opposed to a close-up shot. The pathologist testified the angle of the shot revealed it was "extremely unlikely" the shooter stood face to face with the victim. The more likely scenario, he explained, was that Davis was sitting or kneeling and the shooter was standing with the rifle on his shoulder. Additionally, he testified the wound was inconsistent with an accidental shooting and consistent with a purposeful shooting.

At trial, Light recounted the shooting as follows:

> Q. What happened?
>
> A. She was pointing [the rifle] at me and screaming and hollering and accusing me as usual. I asked her,

"What the heck is wrong with you, you know? There has not been another woman in this house."

She just kept on and on, screaming and screaming at me. I was afraid she was going to shoot me. So during the screaming - - and my living room is very small. Y'all have seen that. Between two couches is where this happened.

The only thing I remember, I did try - - I took my left hand to knock it away, try to push it away from me. Than [sic] after I jerked it away from her, I did stumble back several feet, you know after jerking it. The weapon discharged but it was not intentionally.

Q. Was that in your hands?

A. It was in my hands. I do not deny that.

Q. And you pulled the trigger?

A. Not intentionally but I had to.

. . . .

Q. No one else pulled the trigger?

A. There was nobody else holding the gun. I mean, let's be logical. It was just me and her there. But after I jerked the weapon out of her hand, it . . .

Q. And there has been testimony about whether y'all were standing erect, that is, straight up, flat footed face to face. I take it you were not?

A. Not in the heat of the moment. There is nobody, when you are arguing like that, nobody is going to be

> standing there just standing there. There is a lot of movement going on.
>
> Q. Did she back away from you? Did you back away from her?
>
> A. I went back from her after we was tussling with the rifle.

During cross-examination, the following exchange occurred:

> Q. You told the Texas Ranger this gun was in your hands exclusively when it went off, when you pulled the trigger.
>
> A. After we fought for the rifle and I got it out of her hands, it did discharge; and it was in my hands. I don't deny that.

Light's attorney requested jury instructions on involuntary manslaughter and self-defense. At the conclusion of the evidence, the trial court denied the request and charged the jury on the law of murder, voluntary manslaughter, and accident. The jury found Light guilty of murder.

STANDARD OF REVIEW

The evidence presented at trial determines the law to be charged. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). The trial court's refusal to give a requested jury instruction must be both erroneous and prejudicial to warrant reversal. State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).

DISCUSSION

I. Involuntary Manslaughter

Light argues the trial court erred in failing to charge the jury on the law of involuntary manslaughter. We disagree.

"A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense." State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). Involuntary manslaughter is the unintentional killing of another without malice while (1) engaged in an unlawful activity that is not a felony and does not naturally tend to cause death or great bodily harm or (2) engaged in a lawful activity with a reckless disregard for the safety of others. Bozeman v. State, 307 S.C. 172, 176, 414 S.E.2d 144, 146-47 (1992).

According to Light's statements and testimony, he was in his home when confronted by Davis, who was armed, accusatory, and angry. Thus according to his version of events he was engaged in a lawful activity when he took the rifle from her, arming himself in self-defense while disarming her.[1] Because there is evidence he was engaged in a lawful activity, an involuntary manslaughter charge was proper only if he lacked malice and if he engaged in the lawful activity with reckless disregard for the safety of others. The trial court refused to so charge the jury, concluding the testimony did not support involuntary manslaughter because no evidence indicated recklessness. We agree the evidence did not warrant a charge on involuntary manslaughter. Although Light gave conflicting statements and testimony, none of his statements suggest he handled the gun with reckless disregard for the safety of others. Instead, he maintained the discharge was merely an accident.

However, Light cites State v. Burris and State v. Crosby to support his argument that an involuntary manslaughter charge is warranted where the

[1] The State presented evidence the shooting was not accidental. However, that evidence would have not supported an involuntary manslaughter charge because it tended to show the shooting was intentional.

accused is armed in self-defense and the gun discharges accidentally. Both cases are distinguishable.

In Burriss, the appellant appealed his murder conviction, arguing the trial court erred in refusing to charge accident and involuntary manslaughter to the jury. Viewed in the light most favorable to Burriss, the evidence showed two men attacked him, knocking him down and attempting to rob him. Burriss drew a gun from his pocket and shot twice into the ground, causing both men to back away from him. While he was attempting to get off the ground, he saw one of the attackers reappear and the other begin advancing toward him. He picked up his gun again, but this time it "went off," killing one of the attackers. State v. Burriss, 334 S.C. 256, 258-59, 513 S.E.2d 104, 106 (1999). The trial court refused Burriss' requests for charges on accident and involuntary manslaughter, and on appeal our supreme court reversed, concluding Burriss was entitled to both requests.

As to accident, the court noted the excuse of accident is only available where the accused was acting lawfully and thus the primary question was whether Burriss was acting lawfully at the time of the shooting. Id. at 259, 513 S.E.2d at 106. The court found that notwithstanding his unlawful possession of a weapon, on which the trial court based its refusal to charge accident, evidence in the record supported Burris' claim that he armed himself in self-defense at the time of the shooting. Id. at 262-63, 513 S.E.2d at 108.

On the issue of involuntary manslaughter, the court stated "[a]gain the pivotal issue is whether [Burriss] was engaged in a lawful activity at the time of the killing." Id. at 265, 513 S.E.2d at 109. Although the court noted it had previously held "the negligent handling of a loaded gun will support a finding of involuntary manslaughter," the court focused on the lawfulness of the activity and made no mention of the level of care Burriss used in handling the weapon. Id. Here, although Light's statements support a finding he was lawfully armed in self-defense at the time of the shooting, there is no evidence he mishandled the gun and thus no evidence of recklessness as is required to warrant an involuntary manslaughter charge.

Crosby is equally unavailing to Light. Although Crosby also alleged the shooting occurred while he was armed in self-defense, this court affirmed the trial court's refusal to charge involuntary manslaughter, citing Crosby's testimony that he had pulled the trigger and concluding the shooting was intentional. Our supreme court reversed, noting immediately after he testified he had pulled the trigger, Crosby added he did not even know he had pulled the trigger, suggesting he did not intentionally discharge the weapon. State v. Crosby, 355 S.C. 47, 52-53, 584 S.E.2d 110, 112 (2003). Light contends his case has identical evidence and inferences. However, Crosby testified he closed his eyes while handling the loaded weapon. Id. at 53, 584 S.E.2d at 112. That testimony constituted evidence of recklessness, which is altogether absent in Light's case. Because there was no evidence to support a finding of recklessness, the trial court properly refused to charge involuntary manslaughter.

In his statement of issues on appeal, Light contends the evidence reveals that he and the victim were struggling over the gun, "and that the gun discharged," making this a classic case of involuntary manslaughter. Indeed, a charge on involuntary manslaughter would be appropriate if there was evidence that a weapon discharged during the struggle between the victim and Light. See Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). However, Light fails to argue elsewhere in his brief that the weapon discharged during the course of the struggle, concentrating his argument instead on the contention that he was acting lawfully but with reckless disregard for the safety of the victim. As a consequence, we consider this issue to have been abandoned on appeal. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

II. Self-defense

Light argues the trial court erred in failing to charge the jury on self-defense. We disagree.

In order to warrant a self-defense charge in a case involving the use of deadly force, the evidence must show:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998).

Although Light vacillates in his various accounts, he stated he had disarmed Davis and taken possession of the rifle when the shot was fired. Under those facts, Davis, then unarmed, no longer posed a threat to the armed Light and he could not have reasonably believed she did. Therefore, the evidence demonstrates he did not have the right to use deadly force in self-defense and the trial court properly refused to so charge the jury.

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard R. Hawley, Appellant,

v.

Fran T. Hawley, Respondent.

Appeal From Florence County
Wylie H. Caldwell, Jr., Family Court Judge

Opinion No. 3956
Heard January 11, 2005 – Filed March 3, 2005

AFFIRMED

Evander G. Jeffords, of Florence and John S. Nichols, of Columbia, for Appellant.

James C. Cox, Jr., of Hartsville, for Respondent.

GOOLSBY, J.: In this divorce action, Richard R. Hawley (Husband) appeals the award of alimony to Fran T. Hawley (Wife). We affirm.

FACTS

The parties married in October 1999. At the time of the marriage, Wife was employed at Certified Laboratories earning approximately $28,000.00 per year. The parties purchased a home in Florence County that served as the marital residence. Wife's son from a prior marriage lived with them at the home. Wife ceased working outside the home; however, she retained ownership of the home in which she lived before the marriage and used it as rental property.

A few years later, the parties separated. On February 7, 2003, Husband filed this action for separate support and maintenance. Wife filed an answer and counterclaim on March 5, 2003, and amended her pleadings on March 13, 2003. On April 4, 2003, the parties consented to a temporary order providing in part that Wife was to have, pendente lite, sole use and possession of the marital residence and Husband was to pay certain obligations associated with the home, including the mortgage, insurance, and real property taxes. In addition, Husband was to pay Wife $650.00 per month to maintain power, water, and essential services for the home.

Husband's financial declarations indicated he had a gross monthly income of $8,835.57 and a net monthly income of $5,516.75. The declaration indicated the mortgage on the marital home was $1,066.06 per month. Wife's financial declaration indicated her main source of income was the $650.00 from Husband pursuant to the temporary order. The parties had significant property, both marital and non-marital, with Husband owning a substantial non-marital retirement account.

The family court granted the divorce based upon Husband's post-separation adultery, divided the marital property, and required the sale of the marital residence.[1] The court also found Wife was unemployed and might need additional training prior to being able to find employment. The court attributed the parties' comfortable lifestyle to Husband's earnings. Finally,

[1] None of these holdings are involved in this appeal.

the court concluded: "A reasonable alimony payment of $1500.00 per month plus her equitable division award should enable her to support herself reasonably, until she finds employment. At that time, upon proper pleadings, the court can adjust the alimony as necessary."

Husband moved to amend the order with respect to the alimony award. He asserted the claim for alimony was not properly or fairly raised in the amended answer and the facts of the case did not justify an alimony award. The family court denied the motion, and this appeal followed.

LAW/ANALYSIS

1. Husband contends the award of alimony was improper because Wife failed to raise the claim in her pleadings and never specifically articulated her request for this relief during the trial. In support of this argument, he notes that Wife's amended answer and counterclaim differed from her initial responsive pleadings only in that it added a claim for divorce on the ground of adultery and requested alimony in the prayer for relief. We find Husband's argument unavailing.

In Harris v. Harris,[2] the South Carolina Supreme Court found a general prayer for alimony was not sufficient notice of a claim to support a default judgment for lump-sum alimony. In so holding, however, the court stated that "ordinarily a family court would have authority to direct payment of alimony . . . under a general prayer for such relief" and further explained that, because the respondent failed to plead special facts and circumstances justifying an award of lump-sum alimony, her general prayer for alimony was insufficient to support such an award upon a default judgment.[3]

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[2] 279 S.C. 148, 303 S.E.2d 97 (1983).

[3] Id. at 152, 303 S.E.2d at 100; see also 61A Am. Jur. 2d Pleading § 152, at 146 (1999) ("The prayer for relief is not an irrelevant portion of the pleading, and, although it does not cure an insufficient pleading, it can be of value to clarify and support the pleading's allegations.").

In the present case, Wife sets forth some basic facts to support a claim of alimony, such as leaving her job and her inability to support herself. Additionally, her prayer for relief includes a request for "support and alimony, both pendente lite and permanently." We agree with Wife the request in her prayer for relief was sufficient to place Husband on notice that she was requesting alimony. In contrast to Harris, this case did not involve a default judgment. Rather, both sides actively participated in the litigation and had the opportunity to present evidence in opposition to each other's claims.

We are aware of Husband's position that much of the evidence presented during the trial supporting Wife's disputed claim for alimony was also relevant to the issue of equitable division and his failure to object to the evidence was therefore not a waiver of his objection to this relief. Nevertheless, the record has evidence that in our view would support Wife's entitlement to spousal support but has no easily discernible connection to the equitable distribution.[4] Furthermore, it is apparent from a settlement offer from Wife's attorney that Wife was seeking support, and the record does not contain anything suggesting Husband intended to object to this request at trial on the ground that it had not been raised in the pleadings. Finally, we find it significant that, while this action was pending, Husband agreed to pay certain expenses that could be considered in the nature of support.[5]

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[4] Husband was questioned regarding Wife's leaving employment. He indicated he had no problem with her leaving. Wife testified it was at his request. Husband was also questioned about an e-mail sent to Wife in which he promised to "provide [Wife] with security and love and a chance to enjoy life."

[5] Although Husband explained at oral argument that he agreed to pay these expenses only to preserve his interest in certain assets, we note that he could have requested that the court order Wife to pay her pro rata share of these expenses or specify that the expenses be paid from marital funds.

We therefore hold Wife's amended answer and counterclaim and the testimony presented at trial were sufficient to support a finding that Husband had sufficient notice of her alimony claim.

2. Husband contends the evidence presented at trial did not justify the award of alimony. We disagree.

"Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage."[6] "When a wife is awarded alimony, it is a substitute for the support which is normally incident to the marital relationship."[7] In setting an alimony award, the family court must consider the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant.[8] No one factor is dispositive.[9]

The family court, in explaining the reason for awarding alimony, explained that Wife was unemployed and would have a difficult time finding an adequate job to support her in the manner in which she became accustomed during the marriage. Additionally, the court reiterated the fact that Husband ended the marriage by leaving and by committing adultery,

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[6] Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

[7] McNaughton v. McNaughton, 258 S.C. 554, 558, 189 S.E.2d 820, 822 (1972).

[8] S.C. Code Ann. § 20-3-130(C) (Supp. 2004).

[9] Allen, 347 S.C. at 184, 554 S.E.2d at 424 (citing Lide v. Lide, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981)).

elaborating that "[s]ince Husband has left [Wife] without legal cause, has income disproportionate to hers, has income sufficient to support himself and her to a reasonable extent, and non-marital assets greatly in excess of hers, he should pay her alimony on a periodic basis." This clearly indicates the court considered the appropriate factors before making the award of alimony. We therefore find no abuse of discretion in awarding Wife periodic alimony.

3. Finally, Husband argues the family court abused its discretion in setting the alimony award at $1,500.00 per month. To the extent this argument has been adequately briefed for appeal, we disagree. [10]

In the divorce decree, the family court stated Wife had only a high school diploma and therefore may need some additional training or education to re-enter the job market. The court further noted the parties had enjoyed a comfortable lifestyle. Based on these factors, the court found that "[Wife] will get a job, but it may take time, and it may not be adequate to support a lifestyle commensurate with her last job or the lifestyle of her marriage." As further support of the alimony award, the court determined that, after the sale of the marital home, in which Wife was permitted to reside while it was on the market, Wife was "entitled to a residence in a safe neighborhood, comparable to the marital home." In addition, the court found that medical insurance alone would cost her $220.00 per month. Finally, in both the divorce decree and in statements from the bench during the hearing on Husband's post-trial motion, the family court indicated that the issue of alimony would be revisited upon proper pleadings and a showing that Wife had the means to secure "reasonable employment," thus allowing for the alimony award to be modified or even terminated at some future time. Under

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[10] Husband fails to cite any supporting authority for his position, and all arguments made are merely conclusory statements. As such, Husband arguably has abandoned the issue on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding the appellant was deemed to have abandoned an issue for which he failed to provide any argument or supporting authority).

these circumstances, we hold the family court acted within its discretion in determining the amount of alimony.[11]

AFFIRMED.

HEARN, C.J., and WILLIAMS, J., concur.

[11] See Smith v. Smith, 264 S.C. 624, 628, 216 S.E.2d 541, 543 (1975) ("The rule in this State is well settled that the amount to be awarded for alimony and child support, as well as a determination of whether the wife is entitled to alimony at all, is within the sound discretion of the trial judge."); Allen, 347 S.C. at 184, 554 S.E.2d at 424 ("It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elfreda J. Fassett, as Personal Representative of the Estate of George W. Crawford, Respondent,

v.

Hugh Allen Evans, Appellant.

Appeal From York County
John Buford Grier, Master-in-Equity

Opinion No. 3958
Submitted December 1, 2004 – Filed March 14, 2005

AFFIRMED

Charles S. Bradford, of York, for Appellant.

William Thomas Moody, of York, for Respondent.

BEATTY, J.: Hugh Allen Evans seeks to set aside a default judgment arguing service of process was ineffective because it was not effected at his usual place of abode. Alternately, Evans argues the trial court erred by declining to set aside the judgment under Rule 60(b), SCRCP, on the grounds of mistake, inadvertence, surprise, excusable neglect, or newly discovered evidence. We affirm.[1]

FACTS

Elfreda J. Fassett filed suit against Evans on September 18, 2001, seeking an injunction and damages for conversion, trespass, and non-consensual removal of standing timber from Fassett's property in violation of the timber statute.[2] Fassett also sought an injunction to require Evans to remove a gate obstructing the roadway to her property and to prohibit Evans from entering that property.

On October 4, 2001, a sheriff's deputy effectuated personal service on Evans by leaving a copy of the summons and complaint, notice of motion for temporary injunction, and notice of hearing with Evans' wife at their McSwain Road residence pursuant to Rule 4(d)(1), SCRCP. Evans failed to appear at the October 11, 2001 hearing on the temporary injunction. The trial court issued an order for temporary injunction, and a sheriff's deputy personally served Evans with a copy of the order on December 27, 2001. Evans also failed to answer or otherwise plead to the causes of action

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] At the time this action was instituted, it was a misdemeanor for anyone to "knowingly or willfully cut, destroy or remove any trees or timber . . . without the consent of the owner." S.C. Code Ann. § 16-11-580 (2003). This section has recently been amended to add that the unlawful removal of another's timber with a value in excess of $1,000 is a felony. S.C. Code Ann. § 16-11-580 (Supp. 2004). An aggrieved landowner may seek three times the market value of the timber if it becomes necessary to file a civil action to recover the damages. S.C. Code Ann. § 16-11-615 (2003).

outlined in the complaint, and the trial court entered an order of default in favor of Fassett on November 12, 2001. Fassett served Evans with the order of default and order of reference by mailing them to Evans' McSwain Road address on November 14, 2001. Evans consulted with an attorney on November 19, 2001 regarding the necessary steps to set aside the entry of default, but he failed to retain his services. Evans later attested that he was never served with the summons, complaint, or motion for an injunction because he had moved out of the McSwain Road residence due to marital difficulties in October 2001 and did not return until January 2002.

The trial court scheduled a damages hearing and mailed notice to Evans' McSwain Road address on April 15, 2002. Evans appeared and represented himself at the damages hearing on April 29, 2002. After hearing expert testimony on the damages issue, the trial court awarded judgment to Fassett in the amount of $75,000. The trial court filed an order of judgment and mailed it to Evans' McSwain Road residence on May 3, 2002.

Evans filed and served a notice of motion and a motion for new trial on May 20, 2002. Evans argued the trial court lacked personal jurisdiction over him because he did not receive a copy of the summons and complaint served upon his wife on October 4, 2001.

Additionally, Evans sought to set aside the verdict under Rule 60(b), SCRCP, on the grounds of inadvertence, excusable neglect, newly discovered evidence, and fraud. He asserted that improper service of process created the mistake, inadvertence, or excusable neglect that justified setting aside the verdict under Rule 60(b), SCRCP. He also argued the judgment should be set aside due to newly discovered evidence. Evans submitted affidavits in support of the motion, as proof of "newly discovered evidence," in which witnesses attested: Evans had permission from Fassett to cut timber on her land in 1997, for which she was compensated; Evans purchased property adjacent to Fassett's in 1998 from which he cut timber; Evans thought that Fassett mistakenly believed that the timber cut from Evans' property was hers; and Evans had the permission of Fassett's nephew to put up the gate to prevent illegal dumping on both Evans' and Fassett's properties. The trial court denied the motion. Evans appeals.

LAW/ANALYSIS

I. Personal Jurisdiction

Evans argues the trial court lacked personal jurisdiction over him because he never received the copy of the summons and complaint served on his wife at the McSwain Road residence. Evans attested he moved out of the McSwain Road residence in October 2001 and did not return until January 2002. Thus, he argues, personal service was ineffective because it was not effected at his "dwelling house" or "usual place of abode" as required by Rule 4(d), SCRCP. We disagree.

Under Rule 4(d)(1), SCRCP, personal service may be made upon an individual "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant. Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 148 (Ct. App. 1987). There is a presumption of proper service when the civil rules on service are followed. Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). "Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Id. "Exacting compliance with the rules is not required to effect service of process. Rather, inquiry must be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Id. Further, an officer's return of process creates the legal presumption of proper service that cannot be "impeached by the mere denial of service by the defendant." Richardson Constr. Co. v. Meek Eng'g & Constr., 274 S.C. 307, 311, 262 S.E.2d 913, 916 (1980).

South Carolina has not defined "dwelling house or place of abode." Based on our review of federal caselaw, it appears that one's dwelling or place of abode is determined by the particularized facts of each case. See Karlson v. Rabinowitz, 318 F.2d 666, 668 (4th Cir. 1963) (finding no set definition of dwelling or place of abode and that it must be determined by the

facts of the particular case); 62B Am. Jur. 2d Process § 209 (1990) ("No hard and fast definition can be laid down as to what constitutes a defendant's dwelling house or place of abode. Rather, this determination depends upon the facts of each particular case."). In the case of a married person, the usual place of abode is presumed to be with the family. Thus, the house wherein a married man's wife resides is prima facie his usual place of abode. 62B Am. Jur. 2d Process § 210 (1990).

Although many courts look to the defendant's intention to return as evidence regarding the location considered one's dwelling or abode, the Fourth Circuit Court of Appeals has noted that the defendant's intent is not in and of itself a test but merely an indication "as to whether or not it is likely in a particular case that the one served will actually receive notice of the commencement of the action and thus be advised of the duty to defend." Karlsson, 318 F.2d at 668. A temporary residence is not a person's dwelling or usual place of abode if a more permanent residence is shown to exist. See In re Trexler, 295 B.R. 573, 581 (Bankr. D.S.C. 2003), overruled on other grounds by I.P., L.L.C, v. McCullough, 2004 WL 1474660 (D.S.C. Apr. 15, 2004), (interpreting Bankruptcy Rule 7004 regarding service of process at a person's dwelling place or usual place of abode and noting that a person's dwelling place for purposes of service is not a temporary residence when a more permanent residence is shown to exist); see also Rosa v. Cantrell, 705 F.2d 1208, 1216 (10th Cir. 1982) (noting that the defendant bore the burden of proving he had established a new dwelling place, that mere assertion was not enough, and that evidence that his family still resided at the former marital residence was evidence that it was the usual place of abode); First Nat'l Bank & Trust Co. of Tulsa v. Ingerton, 207 F.2d 793, 794-95 (10th Cir. 1953) (noting that several jurisdictions have held that a place where one temporarily resides is not the usual place of abode for service purposes); Holdings, Inc. v. Fung, 2004 WL 2983845, *5 (E.D.N.Y. 2004) (holding that "temporarily leaving a place of abode, without thereafter establishing a different dwelling place or abode, may result in a finding that the initial place of abode remains so for the purpose of service. . . ."); In re Southern Indus. Banking Corp., 205 B.R. 525, 531 (Bankr. E.D.Tenn. 1996) (noting that cases interpreting Federal Rule of Civil Procedure 4(e)(2) provide that a temporary residence at the time of service is not one's usual place of abode

where a more permanent residence exists); 35A C.J.S. Federal Civil Procedure § 242 (2003) ("The place where one is temporarily residing is not a usual place of abode, and where temporary residence is established away from the normal or usual residence, the 'place of abode' is the usual residence regardless of the fact that defendant may be occupying the temporary residence at the time of service.").

Considering the facts of this case, we find that the McSwain Road home was Evans' dwelling place or usual place of abode such that service by leaving the summons and complaint with his wife was proper. A legal presumption of proper service was created when the sheriff's deputy left the summons and complaint with Evans' wife at their McSwain Road home on October 4, 2001. Although Evans claimed in his affidavit that he separated from his wife in October 2001, the separation was admittedly short, and Evans presented no evidence he established a usual place of abode elsewhere or had no intention to return to the McSwain Road residence. Evans bore the burden of proving he had established a new dwelling place, and his mere assertion that he no longer resided at the McSwain Road residence was not enough to overcome the presumption of proper service. Rosa v. Cantrell, 705 F.2d at 1216. Because Evans failed to present any evidence that contradicted the presumption that he resided with his wife at the McSwain Road address at the time of service, we find the trial court had personal jurisdiction over Evans.[3]

II. Failure to set aside default judgment

Evans next argues the trial court erred by failing to set aside the default judgment under Rule 60(b)(1) and (2), SCRCP. We disagree.

[3] Interestingly, Evans actually received notice of the entry of default during the period of separation from his wife at the McSwain Road residence via a letter dated November 14, 2001. Despite receiving notice of entry of default and consulting with an attorney as early as November 19, 2001, Evans failed to take any action until the damages hearing on April 29, 2002.

A default judgment may be set aside on the grounds of: "(1) mistake, inadvertence, surprise, or excusable neglect; or (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(1), (2), SCRCP. However, the power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

Evans contends improper service of process created the mistake, inadvertence, surprise, or excusable neglect under which the default judgment should be set aside. Because we find service was proper under Rule 4(b), SCRCP, we find the trial court did not abuse its discretion in denying the motion for relief from judgment on this basis.[4]

Evans also asserts the trial court erred in not setting aside the judgment because he submitted newly discovered evidence in the form of affidavits. Cumulatively, the affidavits show Evans had an agreement with Fassett to log

[4] Evans essentially argues that he deserved relief from judgment because the improper service constituted mistake, surprise, or excusable neglect pursuant to Rule 60(b)(1). However, the proper ground to set aside a default judgment due to ineffective service of process is a Rule 60(b)(4), SCRCP, motion that the judgment is void for lack of personal jurisdiction. See McDaniel v. U.S. Fidelity & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (noting that a judgment is void for Rule 60(b)(4) purposes where the court failed to provide proper due process or where the court lacked subject matter or personal jurisdiction). Evans does not raise this particular argument on appeal. Further, in light of our finding that Evans was properly served, this argument would have no merit if it were properly before us.

her land in 1997; Evans purchased property in 1998 adjacent to Fassett's property; Evans logged on this property, not Fassett's; and Evans received prior approval to construct the gate across the access road to both properties from Fassett's nephew.

Rule 60(b)(2), SCRCP, clearly states new evidence must be that "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Although the information contained in the affidavits was evidence not previously before the trial court, Evans was personally aware of the information prior to the commencement of the action. Thus, it was not newly discovered evidence, but merely newly presented evidence. Accordingly, we find no abuse of discretion in the denial of relief from the judgment pursuant to Rule 60(b)(2), SCRCP.[5]

CONCLUSION

Evans' mere assertion that he was not properly served with process in this case, without more evidence, will not trump the presumption that Fassett properly served Evans with process in the underlying action by leaving a copy with his wife, a person of suitable age and discretion, at Evans' usual place of abode. Under the facts of this case, we find the trial court properly

[5] The trial court's order also noted that "Rule 60(b)(2) contemplates not only that an actual trial was held, but also that the defendant was diligent in asserting this newly discovered evidence." The trial court based its decision to deny the motion to set aside the judgment on both the fact that the evidence was not newly discovered and the fact that the default judgment was not a trial as contemplated under the rules. Evans' one sentence complaint against this portion of the trial court's order merely notes that the order does not cite any legal authority. To the extent that Evans' one sentence in his brief can be viewed as arguing on appeal that the trial court erred in finding Rule 60(b)(4), SCRCP, only applies to trials, the argument is conclusory and we deem it abandoned on appeal. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (finding that where no authority is cited and argument in brief is conclusory, issue is deemed abandoned).

found he was served. Because Evans failed to prove any mistake, neglect, or inadvertence entitling him to have the judgment set aside and the evidence provided to the court was not newly discovered, we find the trial court did not abuse its discretion in denying the motion to set aside the judgment. Accordingly, the trial court's rulings are

AFFIRMED.

HUFF, and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John R. Chapman and Cynthia S. Chapman, Respondents,

v.

Upstate RV & Marine, d/b/a Holiday Kamper & Boats-Piedmont and Tracker Marine, Inc., Defendants,

Of whom Upstate RV & Marine, d/b/a Holiday Kamper & Boats-Piedmont is, Appellant.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3959
Heard November 10, 2004 – Filed March 14, 2005

AFFIRMED

Donald E. Rothwell, of Irmo, for Appellant.

Robert Scott Dover, of Pickens, for Respondents.

BEATTY, J.: John R. Chapman and his wife, Cynthia S. Chapman, brought this action seeking damages for breach of contract, breach of express and implied warranties, and revocation of acceptance. The Chapmans sought costs and attorney's fees under the Magnuson-Moss Act. Upstate RV & Marine, d/b/a Holiday Kamper & Boats-Piedmont ("Holiday") appeals from the judgment awarding the Chapmans damages, costs, and attorney's fees.[1] We affirm.[2]

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[1] Holiday raised several issues on appeal, arguing the trial court erred in: (1) denying its motion for JNOV because the Chapmans failed to establish liability under warranty, damages caused by Holiday, or the right to revocation; (2) denying its motions for a new trial absolute or a new trial nisi remittitur where there was no evidence of the boat's value under the breach of warranty claim; (3) denying the motion for a new trial where the admission of a 2001 photograph of the boat was prejudicial; and (4) awarding attorney's fees where Holiday is not liable under the Magnuson-Moss warranty act. At oral argument, counsel for Holiday informed the court that Holiday was waiving all issues except the proof of damages on the breach of warranty claim. Accordingly, we address only Holiday's argument that the trial court erred in denying its motion for a new trial or new trial nisi remittitur in light of the Chapmans' failure to prove damages.

[2] The Chapmans argue that Holiday's appeal was untimely because the substance of Holiday's Rule 59(e), SCRCP, motion was identical to its prior post-trial motions for a new trial absolute and new trial nisi remittitur. Thus, the Chapmans argue, the Rule 59(e) motion was actually a successive new trial motion and did not toll the time for filing the appeal. However, in deciding the post-trial motions, the trial court for the first time awarded the Chapmans attorney's fees under the Magnuson-Moss Act. Although Holiday's subsequent Rule 59(e) motion did address some issues it raised in its prior motion, it also raised an objection to the award of attorney's fees. Accordingly, Holiday's Rule 59(e) motion was not successive. Holiday timely filed its appeal after the order on the Rule 59(e) motion. See Rule 203(b)(1), SCACR (holding that the notice of appeal from a civil judgment

FACTS

The Chapmans sought to purchase a thirty-two-foot houseboat of durable quality so that they could spend long weekends with their family camping overnight at the lake. After speaking with a salesman from Holiday and reviewing a pamphlet, they selected a boat manufactured by Tracker Marine, Inc, and purchased it from Holiday for $42,524. The negotiated boat included several features the Chapmans wanted: a rubberized mat on the roof for sunbathing; a cooking area with running water, a stove, grill, and table; a bathroom; sleeping quarters; a generator; a stereo; heating and air conditioning; an upgraded motor; and a three-axle trailer with guide rollers for ease in loading. The Chapmans' boat was delivered from Columbia to Holiday in Seneca on June 29, 1996. Upon inspection, Mr. Chapman noticed that the trailer did not have guide rollers, the boat was dented on the side, the lettering was coming off, the molding around the generator cover was coming off, the rubber mat on the roof had wood sticking through it, the bathroom door was scratched, the fender on the trailer was split, and the grill cover was cracked.

On July 1, 1996, the Chapmans attempted to take the boat to the lake for the first time. They realized the brakes on the trailer did not work properly, so they returned home. After having the brakes repaired, the Chapmans again attempted to use the boat. The Chapmans and their children became stranded on the lake overnight when the generator and battery failed.

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must be served upon all respondents within thirty days after receipt of written notice of entry of judgment, and a timely motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, will toll the time for an appeal until receipt of written notice of entry of order granting or denying the motion); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (holding that a party "usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely").

During that time, the carbon monoxide alarm went off and the children were soaked with rain because the canvas tent over the sleeping quarters leaked. Because the trailer did not have guide rollers, Mr. Chapman had to get into the water behind the boat and maneuver it onto the trailer when they wanted to leave.

The Chapmans also noticed numerous other defects and examples of poor workmanship. Some of the problems included poor sealing in the engine, a missing trim gauge on the motor, a cracked speaker cover, a leak in the sink, missing snaps on the canvas cover, a screen door which fell off, and a malfunctioning horn. The boat was taken to Holiday for repairs. However, when the Chapmans received the boat a month later in mid-August 1996, many of the problems were not fixed. The Chapmans took the boat out just two times after that.

The Chapmans took their boat to Holiday's Seneca store in November or December 1996 for repairs. Because the Seneca store was closing, the Chapmans had to transport the boat to the Greenville store on January 16, 1997. The Chapmans were told the parts were purchased to make the necessary repairs. They checked on the progress of the boat every month thereafter. On June 19, 1997, the Chapmans were informed they could pick up their boat. When they arrived, a Holiday employee informed them that they had been misled, that the boat had not been repaired, and that the parts to repair the boat had been ordered.

The Chapmans intended to return the boat to Holiday at that time. However, Doris Vaughn, the new service manager for Holiday, persuaded them to allow the boat to be fixed and she would make sure it was done no later than the Chapmans' next long weekend, which was July 16, 1997. The Chapmans returned the following day to see if work had begun on the repairs. When they arrived a worker was painting the roof where the rubberized mat had previously been. Mr. Chapman refused to accept a painted surface, instead demanding a new mat so the deck could be used as intended.

Unfortunately, when they arrived on July 16, 1997, the boat was not repaired. The horn was disassembled; the molding was not repaired; the

rubberized mat on the roof was not replaced; the canvas top was not repaired; the door had not been repaired; and there were no rollers on the trailer for loading the boat. The Chapmans informed Holiday of their intention to revoke acceptance of the boat.

In May 1999, the Chapmans instituted this action for breach of express and implied warranties and for revocation of acceptance. At trial, Mr. and Mrs. Chapman testified regarding the boat's numerous defects and their attempts to have them fixed. Mr. Chapman testified that the value of the boat without defects was the purchase price, or $42,524, and he would not have paid that price if he had known about the defects. Mrs. Chapman testified the boat was worth no more than $15,000 at the time of revocation in July 1997. She testified at trial that she would not "give $2,000" for the boat because of the neglect and damage done since it was returned to Holiday's possession.

Charles Long, an employee of Tracker, testified regarding the boat's value. He stated the NADA Guidebook's low retail value for the boat was $15,300, and the average retail value was $19,850. He testified the trailer separately had a low retail value of $3,450 and an average retail value of $4,015. On cross-examination, Long opined the boat was worth $21,585 given its condition in 2001.

The jury returned a verdict in favor of the Chapmans on both their breach of warranty and revocation of acceptance claims. The jury found Holiday was the only defendant liable on either claim. On the breach of warranty claim, the jury awarded $22,324. The jury awarded $48,000 on the revocation of acceptance claim.

Holiday filed post-trial motions for judgment notwithstanding the verdict (JNOV), new trial absolute, new trial nisi remittitur, and to require the Chapmans to elect their remedy. The Chapmans filed to collect attorney's fees under the Magnuson-Moss Act, 15 U.S.C.A. § 2310(d) (1998). The trial judge denied the motions for JNOV and new trial absolute. The judge granted the motion for new trial nisi remittitur as to the revocation of acceptance claim, and reduced the verdict to $45,000. The Chapman's were awarded $20,957.69 in attorney's fees and costs on their breach of warranty

claim under the Magnuson-Moss Act and were required to elect between their remedies.

Holiday filed a motion pursuant to Rule 59(e), SCRCP to alter or amend the judgment. The motion restated the same arguments made in their previous JNOV and new trial motions. Additionally, Holiday sought to further reduce the award under the revocation of acceptance claim and to reverse the award of attorney's fees. The motion was denied. The Chapmans elected to recover under their breach of warranty claim. This appeal follows.

LAW/ANALYSIS

Holiday contends the trial judge erred in failing to grant its motions for a new trial absolute or, in the alternative, for a new trial nisi remittitur. Holiday contends the Chapmans failed to properly prove damages under the breach of warranty claim because they offered no proof of the value of the boat as accepted. We disagree.

Initially, we note this issue is not preserved. Holiday raised the damages issue in its directed verdict motion; however, the issue was raised in the context of causation. Specifically, Holiday argued that it had done nothing wrong and any damages were due to a defective product manufactured by Tracker Marine, Inc., its co-defendant. In its directed verdict motion, Holiday never questioned the existence of damages nor the measure of damages. Failure to raise the issue that is now on appeal in the directed verdict motion bars review on appeal. See In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (noting that since only issues raised in the directed verdict motion may be raised in the JNOV motion, motions newly raised in the JNOV motion were not preserved for review); Roland v. Palmetto Hills, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992) ("A motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict."). Accordingly, this issue is not preserved for appellate review.

In any event, even if the issue were preserved, we find Holiday's appeal to be without merit. "The grant or denial of new trial motions rests

within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

> The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives . . . The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.

Vinson, 324 S.C. at 404-05, 477 S.E.2d at 723. "Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence." Duncan v. Hampton Co. Sch. Dist. No. 2, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999). However, substantial deference should be given to a jury's determination of damages. Knoke v. South Carolina Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

"The trial judge alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. . . ." McCourt by & Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). Compelling reasons, however, must be given to justify invading the jury's province in this manner. Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). Whether to deny a motion for a new trial nisi is a matter within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion amounting to an error of law. Vinson, 324 S.C. at 406, 477 S.E.2d at 723-24.

In a breach of warranty action, the measure of damages is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted,

unless special circumstances show proximate damages of a different amount." S.C. Code Ann. § 36-2-714(2) (2003). The absence of proof of one of these values normally bars recovery and warrants the granting of a new trial. See Ellison v. Heritage Dodge, 283 S.C. 21, 26, 320 S.E.2d 716, 718-19 (Ct. App. 1984) (affirming the trial judge's grant of an involuntary nonsuit in a breach of warranty action where the plaintiff failed to prove the fair market value of a van in its defective condition at the time the plaintiff returned the vehicle to the secured creditor). However, our courts have upheld jury verdicts where evidence existed from which the jury could determine the value of the goods in their defective condition. Draffin v. Chrysler Motors Corp, 252 S.C. 348, 351, 166 S.E.2d 305, 307 (1969) (holding that although there was no direct testimony by the plaintiff regarding the value of the automobile in its defective condition, testimony from the plaintiff, his wife, and his son regarding the defects and evidence regarding the resale value of the automobile were sufficient to enable the jury to arrive at the value in its defective condition); Durant v. Palmetto Chevrolet, Inc., 241 S.C. 508, 515, 129 S.E.2d 323, 326 (1963) (holding that evidence of a trade-in value of a defective car, testimony regarding the numerous defects with the car, and evidence regarding numerous attempts to repair the car, were sufficient to support the jury's verdict in favor of the plaintiff, despite the lack of opinion evidence regarding the car's value on the date of sale).

The basis of Holiday's argument on appeal is that the Chapmans offered insufficient proof of a necessary element of their claim—the value of the boat at the time they received it in the condition it was received. Holiday contends Mrs. Chapman's testimony that the boat was only worth $15,000 one year after the date of receipt was insufficient evidence of the value of the boat when it was received; thus, there was no evidence to support the jury's award.

As in Draffin and Durant, we find the evidence was "sufficient to enable the jury to arrive at the fair market value" of the boat in its defective condition. Ellison, 283 S.C. at 25, 320 S.E.2d at 718. The Chapmans returned the boat to Holiday for repairs from mid-July 1996 to mid-August 1996 and from November or December 1996 until transferring it to the Greenville store in January 1997, where it stayed until the Chapmans revoked

acceptance in July 1997. Thus, at most, the boat was in the Chapmans' possession for only five months, during which time the boat was only used on two occasions. Holiday, by contrast, had possession of the boat approximately eight months prior to revocation. Because the boat was used so infrequently, it was in the Chapman's possession for such a short time, and Holiday failed to make the necessary repairs by the time of revocation, the jury could reasonably have concluded that the valuation from the time of revocation would also apply to the value of the boat at the time of acceptance.

Further, the Chapmans testified at length about the numerous problems caused by the defects, including being stranded on the lake with their young children, and about the numerous times they were promised by Holiday that the boat would be repaired. Mrs. Chapman valued the boat at the time they revoked acceptance at $15,000. Tracker's expert, Long, gave several 2001 NADA values for the boat and trailer combined, ranging from $18,750 to $23,865. Long also testified that it was his opinion that the boat was worth $21,585 in 2001. The jury awarded $22,324 in damages, indicating they believed that was the difference between the value of the boat as warranted and the boat as received in its defective condition. To arrive at that damages figure, the jury had to value the boat in its defective condition at approximately $20,000. The testimony regarding the boat's value at the time of revocation, the numerous defects, and the failed attempts to get it repaired was evidence from which the jury could determine the value of the boat at the time of acceptance. The jury's award is clearly within the range of that evidence.

We cannot say the amount awarded shocks the conscience of this court, nor do we find it merely excessive given the facts and circumstances of this case. Accordingly, we find no abuse of discretion in the trial court's denial of Holiday's motions for a new trial absolute or a new trial nisi remittitur.

CONCLUSION

Evidence was presented at trial from which the jury could determine the value of the boat in its defective condition. Thus, we find the trial judge did not abuse his discretion in denying Holiday's motions for a new trial

absolute or a new trial nisi remittitur as to the damages awarded on the warranty claim. Accordingly, the decision of the trial judge is

AFFIRMED.

HUFF, and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Walter Weimer, Respondent,

v.

Ray Jones a/k/a Raymond Jones, Appellant.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3960
Heard February 8, 2005 – Filed March 14, 2005

AFFIRMED

Michael S. Seekings, of Charleston, for Appellant.

Armand Derfner, Samuel H. Altman, and D. Peters Wilborn, Jr., all of Charleston, for Respondent.

STILWELL, J.: Ray Jones appeals a circuit court order confirming an arbitrator's award of $260,000 to Walter Weimer. Jones argues that by failing to apply the statute of limitations to Weimer's claim, the arbitrator exhibited a manifest disregard for the law. We affirm.

BACKGROUND

Weimer brought this action against Jones, alleging claims for breach of contract and quantum meruit among others. The claims involved trading of cars and car parts. The parties jointly moved to have the case submitted to binding arbitration. The arbitrator agreed with Jones that the applicable statute of limitation barred Weimer's breach of contract claim. Additionally, the arbitrator held part of Weimer's quantum meruit claim was barred by laches but that another part of the claim, concerning Weimer trading a Maserati and Lamborghini for a Bugatti that Jones was building, was not barred. On this claim, the arbitrator found for Weimer and awarded him $260,000. Following additional proceedings, the circuit court confirmed the award.

DISCUSSION

"Arbitration is a favored method of settling disputes in South Carolina." Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75, 488 S.E.2d 335, 337 (1997). "Generally speaking, an arbitration award is conclusive and courts will refuse to review the merits of an award." Batten v. Howell, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (Ct. App. 1990). Judicial review of an arbitrator's award is thus limited. Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct. App. 2002). The Uniform Arbitration Act provides statutory grounds for vacating, modifying, or correcting an arbitrator's award. S.C Code Ann. § 15-48-130 (2005) (providing grounds for vacating arbitrator's award); S.C. Code Ann. § 15-48-140 (2005) (providing grounds for modification or correction of arbitrator's award). Absent one of these grounds, an arbitration award will be vacated only on the non-statutory ground of "manifest disregard or perverse misconstruction of the law." Lauro, 351 S.C. at 516, 570 S.E.2d at 556. "[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), vacated and remanded on other grounds, 539 U.S. 444 (2003).

In this case, Jones does not assert any of the statutory grounds for setting aside or altering the arbitrator's award. Instead, he asserts the arbitrator displayed a manifest disregard for the law. Jones contends Weimer's quantum meruit claim cannot survive because it is based on an express contract. He cites Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002), for the proposition that a plaintiff cannot recover under quantum meruit where the claim is based on an express contract that has not been abandoned or rescinded. However, the arbitrator, in addition to finding the statute of limitations action for any contract action had run, also concluded the purported written contract lacking in elements and details. Because the arbitrator did not find the parties ever had a valid express contract, we conclude his consideration of the alternative claim of quantum meruit did not constitute a manifest disregard of the law.

Jones also argues because Weimer's contract action is barred by the statute of limitations, his quantum meruit claim emanating from the contract is also barred by the statute of limitations. Jones cites to this court as he did to the arbitrator, McConnell v. Crocker, 217 S.C. 334, 60 S.E.2d 673 (1950), for the proposition that the statute of limitations applies to quantum meruit claims. In response, Weimer cites to a more recent case, Anderson v. Purvis, 220 S.C. 259, 262, 67 S.E.2d 80, 81 (1951), in which our supreme court considered McConnell, stated it involved an action at law, and noted a statute of limitations did not bar the equitable action of quantum meruit. The parties' vigorous debate regarding which defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision. Jones simply fails to show the arbitrator knew the applicable law and chose to disregard it.

Because Jones has not shown the arbitrator's award reflected a manifest disregard or perverse misconstruction of the law, we are constrained by the applicable standard of review to affirm.

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Timothy Jones, Appellant.

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

Opinion No. 3961
Submitted February 1, 2005 – Filed March 14, 2005

AFFIRMED

Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

HUFF, J.: Appellant, Timothy Jones, was tried for and convicted of trafficking in crack cocaine. He appeals, asserting the trial judge erred in failing to suppress the drug evidence because it was tainted fruit seized in an illegal detention. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

At the start of the case, Jones made a pretrial motion to suppress the drug evidence in this case arguing it was the result of a prolonged detention that became unlawful. Jones asserted the officer, who pulled Jones over for speeding, exceeded the scope of the stop when he questioned Jones and requested backup for the purpose of searching the vehicle. The court held an in camera hearing, at which time the State presented the testimony of Trooper J. Ryan Elrod.

Trooper Elrod first testified to his normal procedure when pulling a car over for speeding. He stated that he generally calls in the traffic stop to dispatch, approaches the vehicle, speaks to the driver, and then directs the driver to get out of the car and stand at the left front wheel of the patrol car. He then asks "where they're going, if they realize their speed, where they're coming from, . . . why they're in a hurry, is there any reason for their speed . . . ." He requests license, registration, and proof of insurance. On average, with no unusual circumstances, the normal traffic stop takes him five to six minutes.

Trooper Elrod testified that, at approximately 1:30 p.m. on September 25, 2001, he was on I-85 in Spartanburg County patrolling northbound traffic for speeding violations when he observed an automobile traveling the interstate at a high rate of speed. His radar indicated the car was traveling 82 miles an hour in the 70 mile an hour zone. Trooper Elrod pulled the car over, walked up to the driver's side, explained to the driver why he had stopped him, and asked the driver to step back to the patrol vehicle while he issued him a summons for

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

speeding. The driver of the vehicle was Timothy Jones. Trooper Elrod described the weather as mild, breezy, and very cool for that time of year. Jones exited the vehicle and walked back to the trooper's car as requested.

While in the process of issuing the traffic ticket, Trooper Elrod asked Jones where he and the other occupants of the vehicle were coming from, and Jones indicated they had been in Greenville to visit his cousin regarding opening up a barbershop business. He first told the trooper they had stayed in a hotel, but could not tell him the name or location of the hotel. He then told Trooper Elrod they stayed with his cousin, but he could not give the trooper his cousin's name or the location of his cousin's residence.

Jones presented the trooper with a driver's license, but did not produce registration for the vehicle. Jones appeared very nervous. The driver's license came back clear, but since Jones did not have his registration, Trooper Elrod returned to the vehicle, looked at the vehicle identification number, and then went over to the passenger to request assistance in locating the registration. After fumbling through some paperwork, the front seat passenger, Mr. Patterson, produced the registration. During this time, Trooper Elrod asked Patterson where they had been. Patterson responded they had been to Spartanburg for the last two days, but he could not remember where in Spartanburg. As Trooper Elrod spoke to Patterson, the back seat passenger, Mr. Clark, stated something to the trooper which could not be heard due to the noise on the interstate. Trooper Elrod shut the front passenger door, opened up the rear door, and asked Clark what he had said. Clark then stated they had been in Atlanta that morning, not Spartanburg.

At that point, Trooper Elrod closed the door to the car and called for any unit in the area to come to his location. His call for backup occurred approximately seven minutes into the stop. Just prior to requesting backup, Trooper Elrod asked Jones if there were any weapons or anything else in the vehicle he needed to know about and Jones answered there were not. The trooper then asked if Jones had

any problem with him searching the vehicle and Jones responded he had no problem with that.

It took about three to four minutes for the back-up officer, Trooper Earle, to arrive on the scene. During this time, Trooper Elrod continued to fill out the paperwork on Jones' speeding ticket. The trooper was in the process of explaining the ticket to Jones when he observed the front seat passenger, Patterson, jump out of the vehicle with a white towel in his hand. This occurred almost simultaneously with the point at which Trooper Earle arrived on the scene. Trooper Earle began a foot pursuit of Patterson while Trooper Elrod pursued in his car. The officers were able to catch Patterson after he ran into some briars. During the chase, Trooper Elrod observed Patterson throwing objects into the briars. The objects retrieved were bags containing white, powdery substances, which were later determined to be 230.83 grams of crack cocaine.

When asked why he called for back-up, the trooper explained:

> I had three different stories on where they had been. I was by myself. The driver of the vehicle, Mr. Jones, was, in my opinion, was very uneasy. He was sweating profusely. Again, it was a cool day. He acted very nervous. And it was one on three, and regardless of the situation, I felt that I needed back-up at the scene, and - - - I just didn't feel something was right, and in my safety, I called for back-up.

Trooper Elrod admitted that part of the reason he called for backup was that he would need a secondary officer to search the vehicle, but denied that his purpose in talking with Jones was to wait for backup to arrive. Rather, he stated he was in the process of writing the citation and explaining it to Jones when Patterson jumped from the car and ran.

Jones argued to the trial judge that the officer had gone on a "fishing expedition" and prolonged his detention for the purpose of performing a search. He asserted the questioning of the passengers and

the extended conversation the officer had with him about where they had been and what they were doing was merely a "ruse" so he could eventually search the car. Jones maintained "anything this officer did with [him] pursuant to this stop after a reasonable period of time had expired for him to issue him the summons . . . [was] unreasonable" and was therefore an illegal detention.

The trial judge found the amount of time of this traffic stop was not too long and that it was a legal stop and detention. He determined, because Jones did not initially produce the registration, the officer had the right to check the vehicle identification number and ask the passenger to help him look for the registration. He found no constitutional violation with the casual conversation the officer carried on with the passenger while he looked for the registration. He further determined whether Jones gave consent to search the vehicle was irrelevant inasmuch as there was no search carried out pursuant to the alleged consent since Patterson jumped out of the car and ran, throwing objects to the ground after having been detained for, at most, around eleven minutes. The trial judge therefore denied the motion to suppress.

LAW/ANALYSIS

Jones appeals his conviction arguing the trial judge erred in denying his motion to suppress the crack cocaine recovered in this case because it was tainted fruit seized as the result of an illegal detention. We disagree.

Jones relies largely on the case of State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), asserting when the officer obtained his registration and license and the license check revealed nothing, the investigatory purpose of the speeding ticket was complete. He thus argues his questioning, along with that of the two passengers, as well as the call for backup amounted to an illegal detention exceeding the scope of the traffic stop.

In Williams, a police officer stopped a vehicle for a possible insurance violation and discovered the vehicle's tag had been suspended for lack of insurance. The officer ran a license check on the driver and found, although his driving record was clean at that time, the driver's license had previously been suspended for a controlled substance violation. The officer asked the driver to step outside the vehicle while he issued a citation for the tag violation. The officer wrote and explained the ticket to the driver and returned the license and registration to the driver stating, "Before you leave, let me ask you a few questions." The officer then proceeded to ask the driver a series of questions, including where he was coming from and where he was headed. He also asked the driver the name of his passenger and what their relationship was. As the officer was speaking with the driver, a K-9 officer arrived after a request for backup was made. The officer who made the traffic stop then began to question the passenger, Williams. When Williams gave inconsistent answers to that of the driver, these inconsistencies, along with knowledge of the driver's previous license suspension, led the officer to request consent to search the vehicle. The officers ultimately found a twenty-five pound block of marijuana in a suitcase to which Williams had acknowledged ownership. At a pretrial hearing, the officer admitted he did not follow his normal procedure when issuing a traffic citation of returning the driver's license, explaining the ticket, asking the driver if he has any questions, and allowing the driver to then leave. The officer further agreed his only basis for questioning the driver further was the driver's previous license suspension for a drug violation. Id. at 595-96, 571 S.E.2d at 705-06.

The trial judge in Williams granted the motion to suppress finding the search was illegal because the officer lacked reasonable suspicion to question the driver and Williams beyond the scope of the traffic stop. Id. at 596, 571 S.E.2d at 706. The State appealed, and this court affirmed, finding "[t]he marijuana found in Williams' suitcase was discovered through an illegal detention accompanied by a lack of valid consent." Id. at 605, 571 S.E.2d at 711.

We find Williams to be easily distinguishable from the case at hand. In Williams, the driver and passenger were clearly detained beyond the scope of the traffic stop. There, the officer had written and explained the ticket to the driver and had returned his license and registration before he began questioning the driver. We further noted in Williams that the driver and passenger had been detained between twenty-five and forty minutes as opposed to the officer's normal stop time of nine to eleven minutes, and the officer there did not otherwise follow his normal procedure for a traffic stop. Id. at 602, 571 S.E.2d at 709. In Williams, we held:

> Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). In carrying out the stop, an officer "'may request a driver's license and vehicle registration, run a computer check, and issue a citation.'" United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (citation omitted). However, "[a]ny further detention for questioning is beyond the scope of the [] stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." Id. (emphasis added); see Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); Ferris v. State, 355 Md. 356, 735 A.2d 491, 499 (1999) ("Once the purpose of [the] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The question, then, is whether Blajszczak detained, i.e. "seized" Williams anew, thereby triggering the Fourth Amendment and possibly rendering his consent invalid, or simply initiated a consensual encounter invoking no constitutional scrutiny. See Ferris, 735 A.2d at 500 (stating the difficult question was whether the trooper's questioning

> of Ferris after he issued a citation and returned his driver's license and registration "constituted a detention, and hence raise[d] any Fourth Amendment concerns, or was merely a 'consensual encounter[]' . . . implicating no constitutional overview").

Id. at 598-99, 571 S.E.2d at 707-08.

In the case at hand, there is no question but that the vehicle was detained lawfully for a traffic violation and Trooper Elrod was allowed to request Jones exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. Unlike the Williams case, there was no further detention for questioning beyond the scope of the stop here. Trooper Elrod did not question Jones and his passengers after he had returned Jones' license and registration. To the contrary, Trooper Elrod had not completed the issuance of the traffic ticket, and the purpose of the original stop had not yet been fulfilled when Patterson jumped from the car and ran, throwing objects to the ground. Although Jones alluded in his argument to the trial judge that Trooper Elrod essentially extended the stop beyond a reasonable time by going on a "fishing expedition" prior to the issuance of the ticket, there is evidence to support the trial judge's determination that the detention was not for an unreasonably long time, the extension of time was attributable to the additional time required in obtaining the car registration, and the questions asked of Jones and the passengers did not exceed the scope of the traffic stop such as would convert the stop into an illegal detention.

We find further support for our decision in the recent United States Supreme Court decision Illinois v. Caballes, No. 03-923, 2005 WL 123826 (U.S. Sup. Ct. Jan. 24, 2005). In Caballes, a trooper stopped motorist Caballes for speeding on an interstate. When the officer reported the traffic stop to dispatch, a second trooper overheard the transmission and immediately headed for the scene with his narcotics-detection dog. The first trooper had Caballes in his patrol car and was in the process of writing a warning ticket when the second trooper walked the dog around Caballes' vehicle and the dog alerted at

the trunk. A subsequent search of the trunk resulted in the discovery of marijuana. The trial judge, finding the officers had not unnecessarily prolonged the stop, denied Caballes' motion to suppress the evidence, and Caballes was convicted of a narcotics offense. The Appellate Court affirmed, but the Illinois Supreme Court subsequently reversed the conviction finding the use of the dog unjustifiably enlarged the scope of a routine traffic stop. Id. at *1. The U.S. Supreme Court vacated and remanded, noting they "accept[ed] the state court's conclusion that the duration of the stop . . . was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." Id. at *2.

In the case at hand, there is evidence to support the trial judge's findings and we cannot say his findings are clearly erroneous. We therefore find no abuse of discretion. See State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (holding in a criminal case the appellate court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence unless the findings are clearly erroneous, and its review extends only to determining whether the trial judge abused his discretion); State v. Green, 341 S.C. 214, 219 n.3, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000), (holding "the appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error.").

For the foregoing reasons, Jones' conviction is

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Steele Robinson, Respondent,

v.

George Hassiotis, Appellant.

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

Opinion No. 3962
Submitted February 1, 2005 – Filed March 14, 2005

REVERSED AND REMANDED

George Hassiotis, of Taylors, pro se Appellant.

Steele Robinson, of Greenville, pro se Respondent.

GOOLSBY, J.: George Hassiotis appeals the entry of a default judgment. We reverse.[1]

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

The magistrate's court entered a default judgment against Hassiotis because Hassiotis failed to appear at the time set for his trial. Hassiotis appealed to the circuit court. He argued the "Instructions to Defendant" form that he received from the magistrate's court indicated he would receive notice of trial after he filed an answer. He alleged he filed an answer and awaited notice of his trial date, but never received notice. The circuit court remanded the case to the magistrate's court for a decision on the issue of notice. The magistrate found Hassiotis received proper notice because the magistrate's constable personally advised Hassiotis of the trial date. The circuit court affirmed. Hassiotis appeals.

Hassiotis argues the magistrate's court erred in finding he was properly notified of his trial date. He contends that the South Carolina Rules of the Magistrate's Court require written notice of trial and provide that notice will be delivered after a defendant answers the complaint. We agree. [2]

Rule 9(a), SCRMC, provides "[u]pon the filing of an answer by the defendant, the magistrate shall set the date of trial and serve notice of the same on both parties in a manner provided for in Rule 6." Rule 6(b) SCRMC, requires service to be made "by personal service, or service by publication in a manner provided for in Title 15 of the South Carolina Code of Laws, or by mail . . . ." A suggested form for providing written notice of trial is included in Rule 19, SCRMC.

In this case, Hassiotis received oral notice concerning his trial date prior to the time that he filed his answer. But oral notice is not sufficient under the Magistrate's Court Rules. The rules contemplate

[2] Steele Robinson has not filed a Respondents' Brief. The South Carolina Appellate Court Rules provide that "[u]pon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper." Rule 208(a)(4), SCACR. Such action may include reversal. Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 282 S.E.2d 858 (1981).

written notice of trial and contemplate delivery of the notice after the filing of the answer.

REVERSED AND REMANDED.

HUFF and STILWELL, JJ., concur.