The Supreme Court of South Carolina

In the Matter of Karl P. Jacobsen, Respondent.

ORDER

By order dated March 18, 2004, respondent was placed on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and C. Jennalyn Dalrymple, Esquire, was appointed attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. By order dated March 25, 2004, Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, Esquire, were also appointed attorneys to protect clients' interests pursuant to Rule 31, RLDE. The Office of Disciplinary Counsel (ODC) has now filed a petition for appointment of an additional attorney to protect clients' interests. We grant the petition.

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

escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Linda K. Barr, Esquire, has been duly appointed by this Court.

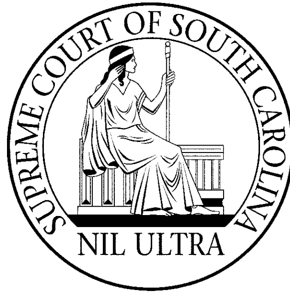
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that, Linda K. Barr, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Barr's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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

March 31, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 5, 2004

ADVANCE SHEET NO. 13

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Page

25798 - Robert H. Koon v. State 16

25799 - State v. Eric Wayne Cochran, In Re: All Out Bonding Company, Surety, et al. 25

UNPUBLISHED OPINIONS

2004-MO-010 - Mark B. Brown v. George Zamias, d/b/a Rock Hill Galleria
(York County - Judge Paul E. Short, Jr.)

2004-MO-011 - State v. Brian Patrick McMillian
(Richland County - Judge J. Ernest Kinard, Jr.)

2004-MO-012 - Michael Alakhwan v. Beth Simmons
(Greenville County - Judge John C. Few)

2004-MO-013 - Sharon Brown, as Personal Representative of the Estate of Ronnie Lee Brown v. Sally Calhoun
(Greenville County - Judge John W. Kittredge)

PETITIONS - UNITED STATES SUPREME COURT

25720 - John Rogers v. Norfolk Southern Pending

25758 - Doris Stieglitz Ward v. State Pending

PETITIONS FOR REHEARING

25784 - In the Matter of Kenneth B. Massey Pending

25789 - Antonio Tisdale v. State Pending

2004-MO-007 - James L. Williams v. State Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

2004-MO-007 - James L. Williams v. State Granted 03/25/04

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

3547-Doug Mathis, as trustee of the Firemen's Insurance and Inspection Fund for the City of Sumter Fire Department v. Elizabeth C. Hair, Sumter County Treasurer, and Elizabeth C. Hair, Joe Floyd, and Wayne Hunter, as trustees for the Sumter County Firemen's Insurance and Inspection Fund—Opinion Withdrawn, Substituted and Re-filed. 29

3725-In the interest of Christopher H., a minor under the age of seventeen--Opinion Withdrawn, Substituted and Re-filed. 36

3769-Fred Moosally, Joseph Miceli, John Morse and Robert D. Finney v. W.W. Norton & Company, Inc., Charles C. Thompson, II, and Daniel Meyer and Dale E. Mortensen v. W.W. Norton & Company, Inc., Charles C. Thompson, II, and Daniel Meyer 44

3770-Robert Andrew Hinds and William Henry Hinds v. Peggy Long Elms 59

3771-Ray B. Burton, III and East Coast Newspapers, Inc. v. York County Sheriff's Department and Bruce Bryant, York County Sheriff 64

3772-The State v. Helen Marie Douglas 82

UNPUBLISHED OPINIONS

2004-UP-213-The State v. Gary J. Moody
(Horry, Judge J. Michael Baxley)

2004-UP-214-The State v. Andre Martin
(Aiken, Judge James C. Williams, Jr.)

2004-UP-215-The State v. James Lee Jones
(Cherokee, Judge J. Derham Cole)

2004-UP-216-Janet Elgin Arthurs, personal representative of the Estate of Betty B. Stephens, Deceased v. Sue H. Brown

(Greenville, Judge John C. Few)

2004-UP-217-The State v. Charles Mitchell Finley, Sr.
(Greenville, Judge C. Victor Pyle, Jr. and Judge Larry R. Patterson)

2004-UP-218-The State v. Raymond Robert Berggrum
(Pickens, Judge Henry F. Floyd)

2004-UP-219-The State v. Johnny Brewer
(Lexington, Judge Marc H. Westbrook)

2004-UP-220-The State v. Vashon Louis Clifton
(York, Judge Lee S. Alford)

2004-UP-221-Joseph N. Grate v. Helen Bone
(Horry, Judge John L. Breeden)

2004-UP-222-The State v. Stoney Burrows
(Williamsburg, Judge Howard P. King)

2004-UP-223-The State v. Keith B. Bruce
(Oconee, Judge Alexander S. Macauley)

2004-UP-224-The State v. Fredrick Jermaine Harris
(Greenville, Judge John W. Kittredge)

2004-UP-225-In the interest of Charles Steven B.
(Greenwood, Judge Billy A. Tunstall)

2004-UP-226-The State v. Albert Scruggs
(Richland, Judge G. Thomas Cooper)

2004-UP-227-The State v. Paul E. Medlin
(Lexington, Judge James R. Barber)

2004-UP-228-Marlboro Park Hospital and Chesterfield General Hospital v. South Carolina Department of Health and Environmental Control and Doctor's Outpatient Surgical Clinic, LLC
(Richland, Judge Kenneth G. Goode)

2004-UP-229-The State v. Gary S. Scott
(Dillon, Judge James E. Lockemy)

2004-UP-230-The State v. Clarence D. Speaks, Jr.
(Greenville, Judge John W. Kittredge)

2004-UP-231-The State v. Heath Stokes
(Aiken, Judge John W. Kittredge)

2004-UP-232-The State v. David Scott Phillips
(York, Judge John C. Hayes, III)

2004-UP-233-The State v. Eddie Eugene Rhodes
(Union, Judge Lee S. Alford)

2004-UP-234-The State v. Linbert Rhames
(Clarendon, Judge Thomas W. Cooper, Jr.)

2004-UP-235-In the interest of David W.S., a minor under the age of seventeen
(Cherokee, Judge Wesley L. Brown)

2004-UP-236-The State v. Andre D. Skanes
(Beaufort, Judge Jackson V. Gregory)

PETITIONS FOR REHEARING

3714-State v. Burgess	Pending
3730-State v. Anderson	Denied 4/1/04
3741-Ellie, Inc. v. Miccichi	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3748-Ellis v. Davidson	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending

3751-State v. Barnett	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-736-State v. Ward	Pending
2004-UP-024-State v. Foster	Pending
2004-UP-086-State v. Rice	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-102-State v. Boan	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-111-Phillips v. Cassidy	Pending
2004-UP-114-State v. Bailey	Pending
2004-UP-118-State v. Watkins	Pending
2004-UP-119-Williams v. Pioneer Machine	Pending
2004-UP-122-State v. Aiken	Pending
2004-UP-125-State v. Chronister	Pending
2004-UP-131-Ford v. Georgetown County	Pending

2004-UP-134-Herridge v. Herridge (Ginsberg)	Pending
2004-UP-135-Phillips v. Brown	Pending
2004-UP-137-State v. Drayton	Pending
2004-UP-138-State v. Ceasar	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v. Walters	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3602-State v. Al-Amin	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3627-Pendergast v. Pendergast	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3640-State v. Adams	Pending

3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3649-State v. Chisolm	Pending
3650-Cole v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3671-White v. MUSC et al.	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending

3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barners v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending

2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending

2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending

2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston’s Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending

2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-038-State v. Toney	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert H. Koon, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25798
Submitted February 19, 2004 - Filed April 5, 2004

AFFIRMED IN PART; VACATED IN PART

Andrew David Grimes, of Summerville, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief Capital & Collateral Litigation Donald Zelenka, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for Respondent.

JUSTICE WALLER: Petitioner filed this petition for a writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991),

addressing the questions petitioner sought to have reviewed from the order denying his 1987 PCR application. We affirm the denial of relief in part, but vacate one of petitioner's convictions because we find that the trial court lacked subject matter jurisdiction to accept a guilty plea to one of the second-degree burglary charges.

FACTS

Petitioner pled guilty to four counts of second-degree burglary in 1986. He was sentenced to ten years imprisonment, concurrent, on each count. No direct appeal was taken. Petitioner filed a PCR application in 1987. That application was denied following a hearing, and petitioner did not seek certiorari.[1]

In 1997, petitioner filed a PCR application related to other charges. At that hearing, petitioner sought to amend his application to include an allegation that the circuit court did not have subject matter jurisdiction to accept his 1986 guilty pleas. The PCR judge ordered that the subject matter jurisdiction issue be addressed in a separate PCR application.

In March 2001, a hearing was held in the circuit court on the subject matter jurisdiction issue and petitioner's Austin claim. The PCR judge denied relief as to the subject matter jurisdiction claim. As to petitioner's Austin claim, the PCR judge found petitioner knowingly and voluntarily waived his right to appellate review of the denial of his first PCR application.

Petitioner filed a petition for a writ of certiorari, and this Court found there was no evidence to support the PCR judge's finding that petitioner knowingly and voluntarily waived his right to seek appellate review of the denial of his 1987 PCR application. Accordingly, the Court ordered petitioner to serve and file a petition, pursuant to Austin, addressing the questions petitioner sought to have reviewed from the order denying his 1987 PCR application.

---

[1] Petitioner has filed multiple PCR and habeas corpus petitions. Most of the procedural history is irrelevant to the issues currently before the Court.

ISSUES

1. Did the circuit court have jurisdiction to accept petitioner's pleas to second-degree burglary?

2. Would petitioner's due process rights be violated if the Court fails to remand the matter to the circuit court to have the 1987 PCR hearing record reconstructed?

1. SUBJECT MATTER JURISDICTION

Petitioner claims the circuit court lacked subject matter jurisdiction over three of his second-degree burglary indictments because the indictments allege petitioner broke into a "dwelling" instead of a "building." We disagree.

Three of petitioner's four indictments specifically allege that: (1) petitioner was charged with second-degree burglary; (2) petitioner entered without consent; (3) petitioner entered with the intent to commit a crime therein; and, (4) petitioner entered during the nighttime. However, the indictments each allege, respectively, that petitioner entered the "dwelling of Cudd-Lovelace Insurance Company," the "dwelling of Bill Willard," and the "dwelling of P&G Motors." The only evidence presented at the plea hearing was that the "dwellings" were actually businesses, including evidence that the "dwelling of Bill Willard" was actually an office adjacent to P&G Motors. None of the indictments specify whether petitioner was indicted under S.C. Code Ann. § 16-11-312(A) or (B) (2003).

Section 16-11-312(A) states that a person is guilty of burglary in the second degree if that person enters a dwelling without consent and with the intent to commit a crime therein. Section 16-11-312(B) states that a person is guilty of burglary in the second degree if that person enters a building without consent and with the intent to commit a crime therein, and one or more aggravating factors is present. One of the aggravating factors is that the burglary occurred in the nighttime.[2]

[2] Section 16-11-312 (2003) remains unchanged from § 16-11-312 (Supp. 1986).

Petitioner argues the second-degree burglary indictments for the dwellings of Cudd-Lovelace, P&G Motors, and Bill Willard do not allege the essential elements of second-degree burglary under §16-11-312(A) because the indictments allege petitioner entered "dwellings" at night rather than during the day. Petitioner also contends the indictments do not allege the essential elements of second-degree burglary under § 16-11-312(B) because the indictments fail to allege that petitioner entered a building, and that a dwelling is not necessarily a building.

Initially, it must be noted that petitioner argued at the 2001 PCR hearing that the trial court lacked subject matter jurisdiction over the 1986 second-degree burglary indictments. In his order denying relief on the subject matter jurisdiction issue, the PCR judge took judicial notice of an unpublished Court of Appeals decision involving petitioner's direct appeal of a separate conviction. In that case, petitioner was appealing his 1997 convictions for second-degree burglary and grand larceny, for which he was sentenced to life without parole (LWOP) because the 1986 second-degree burglary convictions were serious offenses.[3] The Court of Appeals rejected petitioner's argument that the indictments could not be used as predicate offenses under the recidivist statute because the indictments alleged petitioner entered a "dwelling" instead of a "building." State v. Koon, Op. No. 2000-UP-291 (S.C. Ct. App. filed April 18, 2000). The Court of Appeals found that three of the four 1986 indictments were correctly used as predicate offenses to sentence petitioner to LWOP as a recidivist because the indictments were sufficient to identify which subsection of the second-degree burglary statute petitioner pled guilty to. This Court denied the subsequent petition for a writ of certiorari to the Court of Appeals. Accordingly, the PCR judge denied petitioner's subject matter jurisdiction allegation because the Court of Appeals and this Court had already rejected the claim.

---

[3] Upon conviction for a serious offense, a person must be sentenced to a term of imprisonment for LWOP if that person has two or more prior convictions for a serious offense. S.C. Code Ann. § 17-25-45(B)(1) (2003). A second-degree burglary conviction pursuant to § 16-11-312(B) qualifies as a serious offense for the purpose of enhancement under the recidivist statute, while a second-degree burglary conviction pursuant to § 16-11-312(A) does not qualify as a serious offense. S.C. Code Ann. § 17-25-45(C)(2)(b).

Because petitioner previously litigated and lost this argument before the Court of Appeals and on certiorari to this Court, petitioner should be precluded from making the same argument in his Austin brief. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003) (collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action); Doe v. State, 294 S.C. 125, 363 S.E.2d 106 (1987). However, because the precise issue litigated did not involve subject matter jurisdiction, and because the State failed to raise collateral estoppel as an affirmative defense in its brief, we have addressed the issue on the merits.

A circuit court has subject matter jurisdiction if: (1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser-included offense of the crime charged in the indictment. Locke v. State, 341 S.C. 54, 56, 533 S.E.2d 324, 325 (2000); State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999). An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Granger v. State, 333 S.C. 2, 4, 507 S.E.2d 322, 323 (1998) (citing State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996)). An indictment phrased substantially in the language of the statute that creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981). Subject matter jurisdiction may be raised at any time, including for the first time on appeal. Weinhauer v. State, 334 S.C. 327, 330, 513 S.E.2d 840, 841 (1999); Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

We find that the three indictments petitioner questions sufficiently set forth the elements of second-degree burglary under § 16-11-312(B), despite the fact that the indictments initially refer to the "buildings" as "dwellings." The indictments specify which structure petitioner was charged with entering, that petitioner entered each structure without consent, that petitioner intended to commit a crime therein, and that petitioner entered in the nighttime, which is one of the aggravating factors. Further, it is clear from the record that petitioner was charged with second-degree burglary for entering buildings, that petitioner pled guilty to second-degree burglary for entering buildings,

and that petitioner did not plead guilty to second-degree burglary as a lesser-included offense of first-degree burglary. We hold the indictments sufficiently apprised petitioner of the offense charged and the circumstances he should have been prepared to defend. Granger, id. at 4, 507 S.E.2d at 323.

Petitioner also contends the trial court lacked subject matter jurisdiction in regard to the Stylette burglary indictment. Petitioner argues the Stylette indictment contains a fatal inconsistency because the indictment was issued eight days before the crime was alleged to have occurred.[4] Petitioner contends that, because there is no evidence the incorrect date was a scrivener's error, the Court should vacate petitioner's second-degree burglary conviction for the Stylette burglary.

In State v. Lark, 64 S.C. 350, 42 S.E. 175 (1902), a murder indictment showed on its face that it was found before the murder was committed. In refusing to arrest the judgment, the Court found that it would be absurd to charge a crime before it was committed, and noted that the indictment indicated the murder was a past offense, obviously committed before the finding of the indictment. Lark, id. at 352-53, 42 S.E. at 176.

As noted in Lark, it would have been absurd for the grand jury to indict petitioner for an offense that had yet to be committed. The Stylette indictment, like the murder indictment in Lark, indicates the crime was committed in the past.

However, though petitioner failed to raise this issue, the Stylette indictment fails to allege any aggravating factor, such as whether the burglary occurred at nighttime, as required by § 16-11-312(B). Further, all the

---

[4] The Stylette indictments charges that:

> At a court of General Sessions, convened on the **21st day of April, 1986**, the Grand Jurors of Cherokee County Present upon their oath:
> That [petitioner] did in Cherokee County **on or about the 29th day of April, 1986**, did [sic] enter the dwelling of Stylette without consent and with the intent to commit a crime therein.

(emphasis added).

evidence in the record indicates Stylette was a business, not a dwelling. Therefore, we hold that the Stylette indictment fails to sufficiently allege the elements of second-degree burglary pursuant to § 16-11-312(A) or (B), and only alleges the elements of third-degree burglary. S.C. Code Ann. § 16-11-313(A) (2003) (a person is guilty of burglary in the third degree if the person enters a building without consent and with the intent to commit a crime therein). Accordingly, the circuit court did not have jurisdiction to accept petitioner's guilty plea to second-degree burglary on the Stylette indictment, and that conviction is vacated.[5]

2. RECONSTRUCTION HEARING

Petitioner contends the Court must remand this matter to the circuit court to have the record of his 1987 PCR hearing reconstructed because there is no transcript of that proceeding.

Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (trial judge reconstructed the record where court reporter records were unavailable).

Petitioner contends he has non-frivolous issues that cannot be reviewed absent a full development of the record. Petitioner claims that, during the 1987 evidentiary hearing, the chief issue was whether his guilty pleas were knowingly, intelligently, and voluntarily entered, and that there is some indication they were not so entered because petitioner was not advised of his right to confront the witnesses against him.

Petitioner also contends it is impossible to assess the merits of his claim that the State withheld Brady[6] material without a transcript of the 1987 PCR

[5] While petitioner failed to raise this issue in his brief, subject matter jurisdiction may be raised at any time by the parties or sua sponte by the court. City of Columbia v. South Carolina Pub. Serv. Commn., 242 S.C. 528, 533, 131 S.E.2d 705, 707 (1963); State v. Wright, 354 S.C. 48, 52, 579 S.E.2d 538, 540 (Ct. App. 2003).

[6] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

hearing. The alleged Brady violation seems to involve "mud samples" that petitioner claims police collected in connection with the investigation. However, in his brief, petitioner failed to allege any specifics regarding the allegation and failed to state whether the PCR judge ruled on the issue in the 1987 order denying relief.[7]

At his 1986 plea, petitioner admitted that he committed all the burglaries. Petitioner admitted he entered P&G Motors and Bill Willard's office, but did not find anything to steal. Petitioner also admitted he entered Cudd-Lovelace through the side door. However, later in the plea, petitioner claimed he was innocent and had witnesses who would testify he was not at the scene of the crime. Petitioner also stated he was only agreeing to plead guilty because he was facing a lot of prison time.

Petitioner further stated at the plea that no one had promised him anything in exchange for his pleas, other than a ten-year sentence, and that no one had threatened him or coerced him to plead guilty. The plea judge informed petitioner that he was entitled to a jury trial; that the State would have to prove him guilty beyond a reasonable doubt if he went to trial; that petitioner did not have to testify; that if petitioner chose not to testify, his decision would not be held against him; and, that if petitioner had any witnesses who would tend to prove him innocent, the State would be required to bring them to trial. Petitioner also stated that he was satisfied with counsel and that counsel had done everything petitioner asked. The plea judge ruled that petitioner's pleas were voluntarily and intelligently made.

Petitioner has presented no evidence his pleas were not knowingly, intelligently, and voluntarily entered. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985), cert denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.E.2d 908 (1986) (the burden is on the applicant in a post-conviction proceeding to prove the allegations in his application). In regard to the alleged Brady violation, petitioner has provided no specifics regarding how counsel was

---

[7] Petitioner failed to include a copy of the 1987 order denying relief, and has provided no reason why the order could not be included in the appendix.

ineffective and whether this allegation is even preserved for review. Therefore, we deny petitioner's request to remand for a reconstruction hearing.

CONCLUSION

Petitioner's subject matter jurisdiction claims concerning the Cudd-Lovelace, P&G Motors, and Bill Willard indictments for second-degree burglary are denied. The Stylette conviction is vacated because the indictment fails to allege the necessary elements of second-degree burglary. Finally, petitioner's request to remand for a reconstruction hearing is denied.

AFFIRMED IN PART AND VACATED IN PART.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. BURNETT, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,	Respondent,
v.	
Eric Wayne Cochran,	Defendant,
In Re: All Out Bonding Company, Surety,	Appellant.
The State,	Respondent,
v.	
Jarrid R. Luther McInnis,	Defendant,
In Re: All Out Bonding Company, Surety,	Appellant.
The State,	Respondent,
v.	
Corey Phillip Spicer,	Defendant,
In Re: All Out Bonding Company, Surety,	Appellant.

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

Opinion No. 25799
Heard February 4, 2004 - Filed April 5, 2004

AFFIRMED

James W. Bannister, of Greenville, for Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Charles H. Richardson, and
Senior Assistant Attorney General Norman Mark Rapoport, all of
Columbia, and Solicitor Robert M. Ariail, of Greenville, for
Respondent.

PER CURIAM: All Out Bonding Company (appellant) appeals three circuit court orders, which have been consolidated for this appeal, holding appellant liable for the estreatment of three separate bonds. We affirm the circuit court orders.

ISSUE

Did the circuit court err in finding appellant liable for bonds written for the defendants' failure to appear in court?

ANALYSIS

Appellant is a licensed insurance agency which has been appointed by Frontier Insurance Company (Frontier) to act as its agent. Mike Curlee, the owner of appellant, is licensed by the Department of Insurance as a surety bondsman. Frontier acts as a surety and it posts the required collateral necessary to enable appellant to write bonds.

Appellant issued bail bonds to three defendants. When appellant issued the bonds, the "Order Specifying Methods and Conditions of Release" forms were signed "All Out Bail Bonding" and attached to the forms were Powers

of Attorney executed by Frontier.[1] Subsequent to appellant issuing the bonds, Frontier determined that it would no longer be licensing agents in South Carolina due to the Superintendent of Insurance of the State of New York declaring Frontier insolvent and placing Frontier on rehabilitated status. The South Carolina Department of Insurance has determined to honor the New York Order.

After the defendants failed to appear as required by the bonds, an estreatment hearing was held in March 2002 for all three bonds. Appellant asserted it had been acting as Frontier's agent, and therefore could not be held liable for its acts on behalf of the principal. Appellant asked that the estreatments be stayed pursuant to the New York Order of Rehabilitation. The court allowed the State to estreat the bonds.

Appellant asserts that it is not liable on the bonds at issue because it signed the bonds only in its capacity as an agent for Frontier. We disagree. Proceedings to estreat bonds are governed by statute. Surety is defined as "one who, with the defendant, is liable for the amount of the bail bond upon forfeiture of bail." S.C. Code Ann. § 38-53-10 (11) (2002). When a bond is violated by the defendant's failure to appear, the State has a right to full estreatment. S.C. Code Ann. § 17-15-170 (2003).

The State's right to estreatment is governed by contract. State v. Boatwright, 310 S.C. 281, 423 S.E.2d 139 (1992). In the case at hand, each bond was signed "All Out Bail Bonding" on the line marked "Name of Surety." There was no indication on the actual bond that Appellant was signing as Power of Attorney for Frontier. When a contract is clear and unequivocal, its meaning must be determined by its contents alone. Dibble v.

---

[1] The Power of Attorney form that is attached to the release forms says "[Frontier] does make, constitute and appoint the named agent its true and lawful Attorney-in-Fact for it and in its name, place and stead, to execute seal and deliver for and on its behalf and as its act and deed, as surety, a bail bond only…The obligation of the company shall not exceed the sum of [amount of bond] and provided this Power-of-Attorney is filed with the bond and retained as part of the court records."

Dibble, 248 S.C. 165, 181, 149 S.E.2d 355, 364 (1966). Looking at the four corners of the document, appellant alone was listed as the surety. The documents attached to the bond demonstrate only that Frontier agreed to underwrite the bonds signed by appellant.

CONCLUSION

The circuit court judge properly estreated the bonds against appellant. The estreatment orders are affirmed.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justices Alexander S. Macaulay and Daniel F. Pieper, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Doug Mathis, as trustee of the Firemen's Insurance and Inspection Fund for the City of Sumter Fire Department,

Appellant,

v.

Elizabeth C. Hair, Sumter County Treasurer, and Elizabeth C. Hair, Joe Floyd, and Wayne Hunter, as trustees for the Sumter County Firemen's Insurance and Inspection Fund,

Respondents.

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

Opinion No. 3547
Heard June 4, 2002-Filed September 9, 2002
Withdrawn, Substituted, and Re-filed-January 17, 2003

REVERSED AND REMANDED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, of Columbia; and Jack W. Erter, Jr., and David C. Holler, of Sumter, for appellant.

Andrew F. Lindemann, of Columbia, for respondents.

STILWELL, J.: Doug Mathis, as a trustee of the Fireman's Insurance and Inspection Fund for the City of Sumter Fire Department, brought this action against the Sumter County Treasurer and others seeking disbursement of $84,500 to the City's Fireman's Insurance and Inspection Fund. The circuit court denied the request for relief and the City appeals. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

The South Carolina Fireman's Insurance and Inspection Fund (the fund) is a unique fund established for the benefit and enjoyment of firefighters throughout the State. See S.C. Code Ann. § 23-9-410 (1989). Fund monies must be used solely "for the betterment and maintenance of skilled and efficient fire departments within the county." Id. Fund monies may not be used to purchase items for which the governmental unit the fire department serves is legally liable, such as fire trucks or equipment. S.C. Code Ann § 23-9-460 (1989).

The fund is financed by a percentage of fire insurance premiums. Every fire insurer in South Carolina is required to pay one percent of its premiums to the state treasurer and to file a report allocating the collected premiums to the county in which the insured property is located. S.C. Code Ann. §§ 38-7-40 (pay one percent), -70 (report) (2002). The state treasurer forwards the allocated funds to the treasurers of each county. § 23-9-410. The county treasurers then make disbursements to the trustees of the local fire departments based on the "assessed value of improvements to real estate within the service areas of the fire department. . . ." S.C. Code Ann. § 23-9-420 (1989) (emphasis added). The controversy in this case focuses on the meaning of "service area" as used in the statute.

There are 72 full-time firefighters and some part-time firefighters with the City fire department. The County fire department consists of 240 volunteer firefighters who have the option of responding to fires after being notified. Mathis is the chief of both the City and County fire departments, as well as a trustee of the fund for the city.

Sumter County has seven tax districts, all of which are served by either the City or County fire departments. Five of the districts are in unincorporated areas of Sumter County. The two remaining districts are within the City limits and receive fire protection services from the City's fire department. Additionally, the City provides primary fire protection to some areas outside its corporate boundaries in exchange for payment from the County. The value of the property Mathis contends is primarily served by the City's fire department accounts for approximately 69% of the total assessed value of real property in Sumter County.

Sumter County's treasurer historically distributed the fund money to the department that provided primary services or "first response" to a fire within a particular district. Using this approach, the treasurer historically awarded the City fire department 65% and the County fire department 35% of the proceeds. In July 1999, the state treasurer distributed approximately $130,000 to Sumter County Treasurer Elizabeth Hair for distribution to the local fire departments. The City sought 65% of the funds, or $84,500. However, Hair chose to distribute the funds according to geographic boundaries rather than the primary service area. Based upon the assessed property values within the City's limits, she proposed the City receive 43% of the funds, or $58,167.90, and the County receive the remainder.

Mathis initially sought a writ of mandamus but later amended this action to seek a declaratory judgment. Mathis sought disbursement of $84,500 of the total $130,000 to the City fire department. Hair and the trustees of the County's fund answered, alleging the City's department was only entitled to 43% of the fund.

In a deposition presented at trial, Robert Colvin, Executive Director of the South Carolina State Fireman's Association, explained the association considers the "service area" of a fire department to be where the department provides first response fire services rather than strict geographic boundaries. Colvin stated that where two fire departments share a coverage area, the association believes the departments should equally share the monies collected from that area. Colvin testified that every other county in South Carolina distributes the fund based on which particular fire department provides services in the particular area.

Hair testified that although the funds were historically distributed to the fire departments according to which department was responsible for the first response services in a particular district, she determined upon review of the statute that the funds had been wrongly distributed in the past. She determined that the phrase "service areas of the fire department" referred to the City fire department for the areas within, or incorporated into, the City limits and to the County fire department for the unincorporated areas outside the City limits. Although the City fire department exclusively served District 1 located in an unincorporated area of the county, Hair decided to treat the district as the County fire department's service area because it was outside the City limits. Hair acknowledged the County's oral contract with the City fire department to provide services to some of the unincorporated areas of the County. She testified that the County paid the City $955,000 in exchange for the City providing firemen to a station in an unincorporated area, with the County government providing the equipment. Hair believed the contract did not affect which fire department received the funds because it was silent on that issue and absent an agreement to the contrary the funds were "a benefit for the firemen."

Sumter's city manager testified the longstanding contract between the City and the County was oral because of the good working relationship between the entities. Importantly, the contract called for the City fire department to be primarily responsible for certain unincorporated areas so those areas could receive more favorable insurance ratings, and thus attract

industry. Because the governments relied upon the first response formula in place for many years, they never discussed the allocation of the fund.

The circuit court found the phrase "service areas of the fire department" in the statute to be ambiguous, and further found there was no contract for the County fire department to give up a portion of its service area or the 1% premiums attributable to those areas. The court agreed with Hair that the City's "service area" was limited to its corporate limits absent an agreement to the contrary, and thus the City was only entitled to the portion of the funds representing the assessed property values within the City's geographical limits. As those property values represented only 43% of the total assessed property values in Sumter County, the circuit court found Hair correctly awarded the City fire department only 43% of the fund.

DISCUSSION

Mathis argues the circuit court's interpretation conflicts with the plain meaning of the statute, ignores the purpose and legislative intent of the statute, and ignores the traditional use of "first response" area to mean the "service area" of the fire department. We agree.

The primary purpose in construing a statute is to ascertain legislative intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). The legislature intends to accomplish something by its choice of words, and not do a futile thing. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

Although the term "service area" has not been defined in the statute creating and governing the fund, it has been defined in other statutes. Section 5-7-60 provides in part that any municipality may provide its services outside

its corporate limits by contract, and the statute defines a designated "service area" to mean the area in which a particular service is being provided. S.C. Code § 5-7-60 (1977); see also City of Darlington v. Kilgo, 302 S.C. 40, 43, 393 S.E.2d 376, 378 (1990) (area outside cities' boundaries that cities provided limited fire protection to pursuant to contract was a "service area" of the cities and thus could not be included in the county fire district plan without prior agreement with the city). Further, counties can cede responsibility for the fire protection services of certain areas to cities via contract. Section 4-19-10(b) provides that counties have the power to

> designate, subject to the provisions of § 4-19-20, the areas of the county where fire protection service may be furnished by the county under the provisions of this chapter (referred to in this chapter as service areas); provided, however, that these service areas shall exclude those areas where fire protection is then being furnished by some other political subdivision unless an agreement be entered into between the county and such other political subdivision for the joint exercise of fire protection powers within the service area of such political subdivision and the sharing of costs thereof.

S.C. Code Ann. § 4-19-10(b) (1986) (emphasis added).

It is apparent the legislature intended the 1% premiums collected in a particular location to benefit the fire fighters risking their lives in that particular "service area." Although "service area" is not defined in the statute, its plain and ordinary meaning is the area where the fire department provides services. This definition is bolstered by the legislature's use of the same definition in other fire protection statutes and by common usage in the industry.

Because the circuit court concluded Hair correctly distributed the funds by geographic boundaries, it made no findings regarding which department provides service to any particular area. The parties dispute which department or departments provide service to any particular area. Therefore we remand for a factual determination as to which department or departments, if more than one, provide service to each area, and a ruling disbursing the fund consistent with this opinion.

REVERSED AND REMANDED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the interest of: Christopher H.,
a minor under the age of
seventeen, Appellant.

Appeal From Darlington County
J.L. Murdock, Jr., Family Court Judge
William J. McLeod, Family Court Judge
James A. Spruill, III, Family Court Judge

Opinion No. 3725
Heard December 10, 2003 – Filed January 20, 2004
Withdrawn, Substituted and Refiled March 22, 2004

REVERSED and REMANDED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; and

Solicitor Jay E. Hodge, Jr., of Darlington; for Respondent.

HEARN, C.J.: Christopher H. pled guilty to grand larceny and second-degree burglary and was committed to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday. He was not represented by counsel at any of his juvenile hearings. Christopher argues on appeal that: (1) he did not validly waive his right to counsel pursuant to Faretta v. California, 422 U.S. 806 (1975); and, (2) his guilty plea was not knowingly, voluntarily, and intelligently entered. We reverse and remand for a new trial.

FACTS

Christopher H. was charged in Darlington County with the following five offenses that occurred between March and September of 2001: (1) grand larceny of a Yamaha four-wheeler, (2) assault and battery, (3) first-degree burglary, (4) grand larceny of a Honda four-wheeler, and (5) second-degree burglary. At his 48-hour detention hearing, the assistant solicitor told the judge that the clerk's office had screened Christopher and his legal guardian and determined they did not qualify for a public defender. Although Christopher did not have counsel, the public defender sat in on the detention hearing. The judge ordered detention until a hearing the following Tuesday. At the conclusion of the detention hearing, the solicitor noted that he had advised Christopher's legal guardian that she needed to retain counsel for him. The judge responded: "Yes. You would need – If you don't qualify for the Public Defender, you do need to go ahead and retain private counsel. These offenses are of a very serious nature, so, you know, he needs some representation in this case."

Christopher's ten-day detention hearing was held at the same time as five other juveniles' detention hearings. Several of the juveniles were represented by the public defender. When Christopher's turn came, the public defender stated: "Your Honor, on the [Christopher H.] child, I remember that I stood with him last week but he did not qualify. His parents made too much money. That's why

we're not representing him." The judge responded "Okay," and asked if Christopher had anything to tell him. Christopher stated in response, "I don't have nothing really to say. I did all the crimes and I committed them and I did them and that's my fault." When the judge asked what he was charged with, the solicitor initially listed all five charges. Later, however, the solicitor stated that Christopher was charged with only two offenses, second-degree burglary and grand larceny of a Yamaha four-wheeler. The solicitor further noted:

> He is not represented. The parents do not qualify for the Public Defender. I told them, approached them and talked with them and told them that if he was guilty, it would be in his interest to go ahead and plead today and the recommendation would be that he'd be committed to Midlands for an evaluation . . . .

The judge questioned Christopher directly:

THE COURT: Now you've heard the Solicitor and you heard what he said. Do you feel like you're threatened or coerced in any way by anyone?
CHRISTOPHER: No, sir.
THE COURT: Did you do the things you're accused of?
CHRISTOPHER: Yes, sir.
THE COURT: Do you understand that we'd give you a trial if you'd like it and put up witnesses and that kind of thing?
CHRISTOPHER: Yes, sir.
THE COURT: Understanding that, do you still wish to plead delinquent?
CHRISTOPHER: Yes, sir.
THE COURT: Are you delinquent?
CHRISTOPHER: Yes, sir.
THE COURT: Did you break in the church?
CHRISTOPHER: Yes, sir.
THE COURT: Did you steal the four-wheeler?
CHRISTOPHER: Yes, sir.

THE COURT: And no one has forced you to plead this way? You understand that we can send you away for a while?
CHRISTOPHER: Yes, sir.
THE COURT: Understanding that, do you still wish to plead delinquent?
CHRISTOPHER: Yes, sir.

Thereafter, the family court judge ordered that Christopher be committed to the Department of Juvenile Justice for evaluation for a period not to exceed forty-five days.[1]

At Christopher's dispositional hearing, the State presented its report recommending commitment. Christopher was not represented by an attorney and the judge was advised that he had never had an attorney. After hearing briefly from the solicitor and from Christopher's legal guardian, the judge committed him for an indeterminate period of time not to exceed his twenty-first birthday. Christopher appeals.

DISCUSSION

1. Did Christopher validly waive his right to counsel?

The right to counsel is guaranteed by the Sixth Amendment of the United States Constitution and extends to juvenile proceedings.

---

[1] While this appeal was pending, Christopher petitioned this court for supersedeas, habeas corpus, or other relief, arguing he was not advised of the right to counsel and risks of proceeding *pro se*. This court denied the request for habeas corpus and remanded the petition for supersedeas to the family court. Because this court remanded the petition for supersedeas only, the issue concerning Christopher's right to counsel remained before us. On remand, however, the family court granted Christopher's motion for supersedeas. While both the adjudicatory and dispositional orders originally stated that Christopher pleaded guilty to all five charges, the orders were amended following the remand to reflect Christopher's plea to only two of the five charges.

See e.g. In re Winship, 397 U.S. 358 (1970). "A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

Christopher argues that he did not waive his right to counsel because the family court judge did not comply with the procedures set forth in Faretta v. California, 422 U.S. 806 (1975). A valid waiver of counsel, either by affirmative, verbal request or by conduct, requires compliance with Faretta. See Thompson, 355 S.C. at 263, 584 S.E.2d at 135 ("'[T]o the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings.' Any subsequent misconduct will be treated as a 'waiver by conduct.'")(citations omitted).

Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990). Furthermore, "[i]n the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Id. (citation omitted). To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

(1) the accused's age, educational background, and physical and mental health;
(2) whether the accused was previously involved in criminal trials;
(3) whether the accused knew the nature of the charge(s) and of the possible penalties;
(4) whether the accused was represented by counsel before trial and whether that attorney

explained to him the dangers of self-representation;

(5) whether the accused was attempting to delay or manipulate the proceedings;

(6) whether the court appointed stand-by counsel;

(7) whether the accused knew he would be required to comply with the rules of procedure at trial;

(8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;

(9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

The record in this case reveals that that neither the judge at the adjudicatory hearing nor the judge at the dispositional hearing complied with the procedures in Faretta. Initially, Christopher was never adequately advised of his right to an attorney. At Christopher's 48-hour detention hearing, the judge urged Christopher's legal guardian to find representation because of the serious nature of the charges. At Christopher's adjudicatory hearing, the judge merely asked him if he understood that the court would "give [him] a trial if [he'd] like it and put up witnesses and that kind of thing." Although the solicitor stated he had spoken with Christopher's legal guardian about acquiring representation, that by itself does not meet the requirements of Faretta. See Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001) (finding the plea judge ineffectively warned of the dangers of appearing *pro se* when, among other things, he "permitted *the solicitor* to relate the circumstances of Petitioner's release of his appointed attorney") (emphasis in original). Additionally, the record does not indicate Christopher ever elected to proceed *pro se*. See State v. Reed, 332 S.C.

35, 41, 503 S.E.2d 747, 750 ("The right to proceed *pro se* must be clearly asserted by the defendant prior to trial.").

Moreover, both family court judges failed to comply with Faretta because Christopher was never adequately warned of the dangers of self-representation. In addition, the record reflects that Christopher has an insufficient background to comprehend the dangers of self-representation based on an application of the Gardner factors: (1) Christopher was sixteen years old at the time of the proceedings, but his psychosocial report states that he "appears emotionally and physically younger than his stated age." Christopher has a full scale IQ of seventy-four (borderline range) and his last year in school was the tenth grade. (2) It appears from the record that Christopher had been to family court before, but it is unclear as to the nature of his family court experience. (3) Nothing in the record indicates that Christopher had any knowledge of the nature of the charges or the possible penalties. Instead, Christopher merely indicated his willingness to accept responsibility for certain acts he had committed. (4) Christopher never appeared represented by counsel. While the public defender sat through Christopher's initial detention hearing, it is unclear whether he had any active involvement or communication with Christopher. (5) There is nothing in the record to indicate Christopher was attempting to delay or manipulate the proceedings. (6) The court did not appoint stand-by counsel. (7) The record does not indicate Christopher had any knowledge that he needed to comply with any rules of procedure or (8) any of the legal challenges he could raise in his defense. (9) The exchange between Christopher and the family court judges amounted to little more than *pro forma* questions and answers. (10) Notwithstanding, the record does not suggest that Christopher's appearance without counsel was a result of coercion or mistreatment. **[R. 13, 19].** See Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

We find the record in this case does not show that Christopher knowingly and intelligently waived his right to counsel. Furthermore, nothing in the record suggests Christopher forfeited his right to counsel. See Thompson, 355 S.C. at 267, 584 S.E.2d at 137 (stating that forfeiture requires extremely dilatory conduct and

situations involving forfeiture are unusual, typically involving a manipulative or disruptive defendant).

The typical remedy for failing to show a knowing and intelligent waiver of counsel is to remand to the trial court for an evidentiary hearing to determine whether the waiver was, in fact, knowingly and intelligently made. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977). However, this court can grant an appellant a new trial without an evidentiary hearing if it is clear that a hearing on remand would serve no useful purpose. State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991). Because we find the record clearly reflects that the family court failed to adequately advise Christopher of the right to counsel, failed to make a specific inquiry as to Christopher's knowledge of the dangers of self-representation, and demonstrated that Christopher has an insufficient background to comprehend the dangers of self-representation, we find that remanding this case for a factual determination as to whether the waiver was knowingly and intelligently made would serve no useful purpose. Instead, we reverse and remand for a new trial.

2. Did Christopher knowingly, voluntarily, and intelligently enter a plea of guilty?

Because we reverse and remand for a new trial on the right to counsel issue, we need not reach the issue concerning the voluntariness of his guilty plea. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues are dispositive).

Accordingly, we reverse and remand for a new trial.

REVERSED and REMANDED.

ANDERSON and CURETON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fred Moosally, Joseph Miceli, John Morse and Robert D. Finney,

Appellants,

v.

W.W. Norton & Company, Inc., Charles C. Thompson, II, and Daniel Meyer,

Respondents.

Dale E. Mortensen,

Appellant,

v.

W.W. Norton & Company, Inc., Charles C. Thompson, II, and Daniel Meyer,

Respondents.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3769
Heard March 11, 2004 – Filed April 5, 2004

AFFIRMED AS TO THOMPSON AND MEYER; REVERSED AND REMANDED AS TO W.W. NORTON

Stephen F. DeAntonio, of Charleston, for Appellants.

John J. Kerr and David B. McCormack, both of Charleston, for Respondents W.W. Norton & Company, Inc., and Charles C. Thompson, II.

Daniel P. Meyer, of Washington, D.C., pro se.

ANDERSON, J.: Fred Moosally, Joseph Miceli, John Morse, Robert D. Finney and Dale E. Mortensen (collectively referred to as "Appellants") appeal from the trial court's grant of motions to dismiss for lack of personal jurisdiction to W.W. Norton & Company, Inc., Charles C. Thompson, II, and Daniel Meyer (collectively referred to as "Respondents"). Additionally, Appellants appeal from the trial court's grant of Respondent W.W. Norton's motion to dismiss pursuant to S.C. Code Ann. § 15-5-150 (1977), the door closing statute. We affirm as to Thompson and Meyer. We reverse and remand as to W.W. Norton.

FACTUAL/PROCEDURAL BACKGROUND

On the morning of April 19, 1989, the center 16" gun in Gun Turret Two of the battleship USS IOWA exploded, killing 47 sailors. As an event of national concern, the explosion was made the subject of two CBS 60 Minutes programs of which Respondent Thompson, a Virginia resident, was a producer. Subsequently, Respondent W.W. Norton, a New York publishing company, contracted with Thompson to write a book explaining the events leading up to and following the explosion aboard the battleship. In preparing his manuscript, Thompson interviewed over 200 individuals, one of whom was Respondent Meyer, a resident of Maryland. The ensuing book, A

Glimpse of Hell, was first published in March 1999 and distributed throughout the United States, including South Carolina.

In March and April of 2001, Appellants filed suit against Respondents, asserting causes of action for libel, false light privacy, and conspiracy.[1] Specifically, Moosally, Miceli, Morse, and Finney allege the book contains numerous falsities that suggest their actions led to the deaths of the sailors aboard the battleship. Mortensen avers "the book contains numerous falsehoods, inaccuracies and defamatory statements that both libel and slander the Plaintiff."

In April of 2001, Respondents filed motions to dismiss pursuant to Rule 12(b)(2), SCRCP, for lack of personal jurisdiction. Additionally, Respondent W.W. Norton moved to dismiss the complaints pursuant to S.C. Code Ann. § 15-5-150 (1977), commonly known as South Carolina's door closing statute. Following a hearing, the Circuit Court entered separate orders dismissing the claims against all three Respondents.

STANDARD OF REVIEW

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. Engineered Prods. v. Cleveland Crane & Eng'g, 262 S.C. 1, 201 S.E.2d 921 (1974). The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law. Engineered Prods., 262 S.C. at 4, 201 S.E.2d at 922; see also Hammond v. Cummins Engine Co., 287 S.C. 200, 336 S.E.2d 867 (1985) (stating that this Court is bound by Circuit Court's finding that nonresident defendant is subject to its jurisdiction absent determination that Circuit Court's ruling is without evidentiary support or controlled by error of law); Industrial Equip. Co. v. Frank G. Hough Co., 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950) ("[T]his Court has adhered to the rule that a finding by the Circuit Court as to jurisdiction or lack of

---

[1] Appellants Moosally, Miceli, Morse, and Finney filed an amended complaint on March 15, 2001. Thereafter, on April 12, 2001, Appellant Mortensen filed an amended complaint alleging the same causes of action.

jurisdiction will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.").

It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992); Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991); South Carolina Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001). At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993); White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990); International Mariculture Res. v. Grant, 336 S.C. 434, 520 S.E.2d 160 (Ct. App. 1999).

LAW/ANALYSIS

I. JURISDICTION

Appellants argue the Circuit Court erred in dismissing the claims against Meyer, Thompson and W.W. Norton for lack of personal jurisdiction.

The determination of whether a court may exercise personal jurisdiction over a nonresident defendant involves a two-step analysis. Hammond v. Butler, Means, Evins & Brown, 300 S.C. 458, 388 S.E.2d 796 (1990); South Carolina Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001). First, in order for the courts to have statutory authority to exercise jurisdiction, the nonresident defendant's conduct must meet the requirements of South Carolina's long-arm statute. White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990). Second, the exercise of jurisdiction must comport with the requirements of the due process clause. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992). The defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. White, 300 S.C. at 245, 387 S.E.2d at 262; Basnight, 346 S.C. at 246, 551 S.E.2d at

277; International Mariculture Res. v. Grant, 336 S.C. 434, 520 S.E.2d 160 (Ct. App. 1999).

South Carolina's long-arm statute provides:

> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
>
> (a) transacting any business in this State;
> (b) contracting to supply services or things in the State;
> (c) commission of a tortious act in whole or in part in this State;
> (d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or
> (e) having an interest in, using, or possessing real property in this State; or
> (f) contracting to insure any person, property or risk located within this State at the time of contracting; or
> (g) entry into a contract to be performed in whole or in part by either party in this State; or
> (h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.
>
> (2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100 (3).

S.C. Code Ann. § 36-2-803 (2003).

Our long-arm statute, which affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause. Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998); Hammond v. Cummins Engine Co., 287 S.C. 200, 336 S.E.2d 867 (1985); see also Cozi Investments v. Schneider, 272 S.C. 354, 252 S.E.2d 116 (1979) (stating that South Carolina's long-arm statute has been construed as a grant of jurisdiction as broad as constitutionally permissible; hence, parameters of statute are restricted only by due process limitations). Because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process. See Sonoco Products Co. v. Inteplast Corp., 867 F. Supp. 352, 354 (D.S.C. 1994) ("The South Carolina long-arm statute . . . has been interpreted to reach to the limits of due process"; "[t]herefore, the determination of personal jurisdiction in South Carolina compresses into a due process assessment of minimum contacts and fair play."); Ryobi America Corp. v. Peters, 815 F. Supp. 172, 175 (D.S.C. 1993) ("The Long-Arm Statute in South Carolina is construed to extend jurisdiction to the limits of Due Process. Because the extent of the statute and the relevant constitutional tests are the same, the inquiry for this court is simply whether the exercise of jurisdiction over Jerry Peters violates his right to Due Process.") (citation omitted).

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. Asahi Metal Ind. Co. v. Superior Court, 480 U.S. 102 (1987). Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991); see also Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992) ("[W]e have abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State."); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (noting due process clause

requires that maintenance of lawsuit against nonresident must not offend traditional notions of fair play and substantial justice). The due process requirement mandates the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Atlantic Soft Drink Co. v. South Carolina Nat'l Bank, 287 S.C. 228, 336 S.E.2d 876 (1985).

In deciding whether a finding of minimum contacts comports with the due process requirements of traditional notions of fair play and substantial justice, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991); Colite Indus., Inc. v. G.W. Murphy Constr. Co., 297 S.C. 426, 377 S.E.2d 321 (1989); South Carolina Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001). A single transaction is sufficient to confer jurisdiction if these factors are met. Colite Indus., 297 S.C. at 429, 377 S.E.2d at 322; Hammond, 287 S.C. at 203, 336 S.E.2d at 868-69; see also Askins v. Firedoor Corp., 281 S.C. 611, 616, 316 S.E.2d 713, 716 (Ct. App. 1984) ("The cases are legion that a single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration."). Although a single act may support jurisdiction, it must create a "substantial connection" with the forum. Burger King Corp., 471 U.S. at 475 n.18; White v. Stephens, 300 S.C. 241, 247, 387 S.E.2d 260, 263 (1990). A single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

The determination of whether the requirements of due process are satisfied involves a two-prong analysis: (1) the "power" prong, in which minimum contacts provide courts the "power" to adjudicate the action; and (2) the "fairness" prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." Southern Plastics Co., 310 S.C. at 260, 423 S.E.2d at

131. "If either prong fails, the exercise of personal jurisdiction over the [nonresident] defendant fails to comport with the requirements of due process." Id.

Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Burger King Corp., 471 U.S. at 472; Southern Plastics Co., 310 S.C. at 260, 423 S.E.2d at 131. Without minimum contacts, the court does not have the "power" to adjudicate the action. Southern Plastics Co., 310 S.C. at 260, 423 S.E.2d at 131. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235 (1958); Southern Plastics Co., 310 S.C. at 261, 423 S.E.2d at 131; see also Burger King Corp., 471 U.S. at 474 (stating the constitutional touchstone of determination whether exercise of personal jurisdiction comports with due process is whether defendant purposefully established minimum contacts in forum state). The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Burger King Corp., 471 U.S. at 475; Southern Plastics Co., 310 S.C. at 262, 423 S.E.2d at 132. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case. Burger King Corp., 471 U.S. at 485-86; Security Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000).

Under the fairness prong, we examine such factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies. See Southern Plastics Co., 310 S.C. at 263, 423 S.E.2d at 132. While choice of law analysis is separate and distinct from personal jurisdiction analysis, which state's law controls is a factor to be considered under the fairness prong of due process. Burger King Corp., 471 U.S. at 481-82.

Because the due process requirements must be met as to each defendant, we must assess individually each defendant's contacts with South

Carolina. See Rush v. Savchuk, 444 U.S. 320 (1980); Allen v. Columbia Fin. Mgmt., Ltd., 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988).

A. Meyer

Initially, we note Meyer's contacts with South Carolina appear to be limited to this litigation. Appellants aver that Meyer has satisfied the minimum contacts requirement through assistance he gave to Thompson as one of the book's sources and through his work on the movie version of the book. Notably, none of these things were done within South Carolina. One does not "purposefully avail" himself of this State's laws merely by providing information to an author about an event that did not occur in South Carolina. To hold otherwise would be to extend jurisdiction over anyone interviewed by any publication about any event, no matter where it occurred. Indeed, such are the "random" and "fortuitous" contacts the due process clause precludes from serving as the basis for jurisdiction. See Southern Plastics Co., 310 S.C. at 262, 423 S.E.2d at 132.

Because Meyer's contacts with this state are virtually nonexistent, the power prong of the due process analysis is not satisfied. Thus, the Circuit Court correctly determined that it could not properly exercise jurisdiction over Meyer. See Southern Plastics Co., 310 S.C. at 261, 423 S.E.2d at 131 ("If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.").

B. Thompson

Appellants claim the minimum contacts requirement is met as to Thompson. We disagree with this assertion.

Appellants essentially allege that the following activities by Thompson satisfy the minimum contacts requirement: (1) Thompson was a producer on the television show 60 Minutes, which airs in South Carolina; (2) he attended a funeral in South Carolina in 1972 as a reporter for CBS; (3) copies of his book were sold in South Carolina; (4) a movie version of his book was aired in South Carolina on the FX network; and (5) he "made at least one business call to South Carolina for information on the IOWA." Thompson's personal

contacts with South Carolina consisted of one telephone call and attendance at a funeral in 1972. Appellants have cited no authority indicating that involvement with a nationally distributed television program is sufficient to satisfy minimum contacts. Moreover, an individual does not "purposefully avail" himself of the laws of this State merely by virtue of having authored a single literary work on a topic of national interest. See Southern Plastics Co., 310 S.C. at 262, 423 S.E.2d at 132.

Because the subject matter of Thompson's manuscript was an event of national interest that occurred outside South Carolina, it does not follow that his activity of pressing pen to paper was directed to the residents of South Carolina. The fruits of his labor—be it in literary or in cinematic form—arrived in South Carolina not through his efforts, but through the efforts of others, and therefore cannot serve as the basis for jurisdiction. See Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 507, 402 S.E.2d 177, 180 (1991) ("[T]he focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity."); Allen v. Columbia Fin. Mgmt., Ltd., 297 S.C. 481, 490, 377 S.E.2d 352, 377 (Ct. App. 1988) ("Due Process requires us to examine each [defendant's] own contacts with South Carolina. We decline to attribute the contacts of one alleged conspirator to another alleged conspirator.") (citation omitted).

The "power" prong of the due process analysis is not met as to Thompson. Consequently, the trial court correctly ruled that it lacked jurisdiction.

C. W.W. Norton

Appellants contend the Circuit Court had personal jurisdiction over W.W. Norton. We agree.

Initially, W.W. Norton admits that it is "'doing business' in South Carolina for purposes of the long-arm statute."

In analyzing the second step necessary to exercise personal jurisdiction over a nonresident defendant, we examine whether the exercise of personal jurisdiction over W.W. Norton comports with the requirements of the due

process clause. See Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

In support of their argument that the Circuit Court had jurisdiction over W.W. Norton, Appellants cite Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), where the United States Supreme Court applied the minimum contacts analysis to allegations of libel. In Keeton, a New York resident brought a libel suit in a New Hampshire court against a nationally circulated magazine publisher incorporated in Ohio. Holding that the sale of 10,000 to 15,000 copies of the magazine in New Hampshire each month was sufficient to support the assertion of jurisdiction in a libel action based on the magazine's contents, the Court noted that "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Keeton, 465 U.S. at 774; see also Burger King, 471 U.S. at 473 ("[A] publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story.").

Similarly, W.W. Norton has continually endeavored to exploit the South Carolina market. W.W. Norton produced discovery documents and responses including a list of approximately 315 bookstores in South Carolina in which W.W. Norton sold books. Many of these books are sold to educational institutions in South Carolina. Stephen King, Chief Financial Officer of W.W. Norton, affirmed that twenty-five copies of A Glimpse of Hell were sold to bookstores in South Carolina. Furthermore, the book has been purchased by and circulated in libraries in South Carolina. Specifically, the Charleston County Public Library has five copies which have circulated at least forty-one times. It is reasonable to assume that a library will disseminate books in its collection. The check-out process and procedure constitutes a separate and distinct dissemination of the books which is, in actuality, a republication.

W.W. Norton has published 7,852 titles in the past twenty years and admits "[i]t is fair to assume that at least one copy of each title was distributed in South Carolina." A number of W.W. Norton's employees cover South Carolina as sales representatives and visit college campuses for the purpose of selling books. W.W. Norton has had small book fairs in South

Carolina, a media demo, and has hosted a breakfast for the English Department at the College of Charleston. That the Charleston County Public Library system alone owns 2,900 titles published by W.W. Norton is a testament to the publishing company's commercial presence within South Carolina. In this manner, W.W. Norton has directed its activities at the residents of South Carolina, and it must reasonably anticipate being haled into court here in a libel action based on the contents of one of its publications. See Keeton, 465 U.S. at 775-76. W.W. Norton's continual practice of marketing and distributing books in South Carolina satisfies the power prong of the due process analysis.

With the power prong satisfied, we turn next to the fairness prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." See Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). Under this prong, we look to the following factors to determine whether the exercise of personal jurisdiction is fair:

> "the burden on the defendant[;] . . . the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient solution to controversies; and the shared interest of the several states in furthering fundamental substantive social policies."

Southern Plastics Co., 310 S.C. at 263, 423 S.E.2d at 132 (quoting World-Wide Volkswagen Corp., 444 U.S. 286 (1980)).

We note that the burden on W.W. Norton is negligible because "[n]o unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action." Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976). Moreover, applying the relevant factors to the facts of the present case, we perceive no unconstitutional unfairness in requiring W.W. Norton to litigate this matter in a forum where it has regularly directed its business. Concomitantly, we hold that the trial court erred in concluding it did not have personal jurisdiction over W.W. Norton.

II. DOOR CLOSING STATUTE

Appellants assert the trial court erred in determining they were barred from bringing suit against W.W. Norton by South Carolina's door closing statute. We agree.

South Carolina's door closing statute reads:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:
>
> (1) By any resident of this State for any cause of action; or
>
> (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

S.C. Code Ann. § 15-5-150 (1977). Initially, the parties incorrectly frame the issue of the door closing statute as one of subject matter jurisdiction. Although there has been some confusion on this matter, our Supreme Court recently clarified: "§ 15-5-150 does not involve subject matter jurisdiction but rather determines the capacity of a party to sue." Farmer v. Monsanto Corp., 353 S.C. 553, 557, 579 S.E.2d 325, 327 (2003) (overruling previous holding otherwise).

Because none of the Appellants are residents of South Carolina, our determination of their capacity to sue W.W. Norton turns on whether their cause of action arose within this State. In support of their contention that the libel action arose in South Carolina, Appellants rely on Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). In Keeton, the United States Supreme Court determined the "tort of libel is generally held to occur wherever the offending material is circulated." Id. at 777. The question in Keeton was one of jurisdiction. The issue before us is the applicability of the door closing statute.

In Murphy v. Owens-Corning Fiberglas Corp., 356 S.C. 592, 590 S.E.2d 479 (2003), a latent disease case, the Supreme Court ruled:

> In order for Janet to bring her suit in South Carolina, she must meet the Door Closing Statute's requirement that "the cause of action shall have arisen . . . within this State." § 15-5-150(2). Janet's complaint unequivocally meets the "cause of action" component of this requirement since she alleges that the legal wrong occurred in South Carolina when she was exposed to asbestos fibers and dust on Father's clothing. Ophuls & Hill v. Carolina Ice & Fuel Co., supra. As the Court of Appeals held, the critical inquiry here is whether the cause of action arose within the State. . . .
>
> . . . .
>
> In traditional tort settings, we have held that a cause of action arises in this State for purposes of the Door Closing Statute when the plaintiff has the right to bring suit. See Cornelius v. Atlantic Grey Hound Lines, 177 S.C. 93, 180 S.E. 791 (1935). In construing the statutory requirement that "the cause of action shall have arisen . . . within in this State," the Cornelius court cited with approval to an authority that "stated that 'a cause of action accrues when facts exist which authorize one party to maintain an action against another.'" Id. at 96, 180 S.E. at 792 (emphasis supplied). Cornelius is consistent with our later decision in Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997), where we held "our cases use the verbs 'arise' and 'accrue' interchangeably when discussing the issue of the juncture at which the right to sue came into existence." Id. at footnote 4; see also Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003).
>
> Were we to apply our traditional view of when a tort cause of action arises or accrues, we must conclude that Janet's cause of action did not arise "within the State" because no injury or

> damages occurred while she was in South Carolina. Until the exposure to asbestos resulted in injury or damage, Janet's tort cause of action did not accrue. See e.g., Gray v. Southern Facilities, 256 S.C. 558, 183 S.E.2d 438 (1971) ("It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another").

Id. at ___, 590 S.E.2d at 481-82 (footnotes omitted).

Here, the door closing statute, § 15-5-150, does not bar the Appellants from bringing suit against W.W. Norton. In the instant case, there is a continuing publication of A Glimpse of Hell in South Carolina upon each sale and upon each dissemination. The sale and republication of the book are events taking place in South Carolina. The location of the actual "printing" of the book is not controlling.

As set forth in the previous section, the factual record reveals with clarity the activities and conduct of W.W. Norton in South Carolina. Indubitably, the publication of a libel is a basis for a defamation action. The dissemination of the book in South Carolina is a continuing libel in each and every instance. The tort of libel occurs wherever the offending material is circulated. Apodictically, the causes of action as alleged arose in the state of South Carolina.

CONCLUSION

Based on the foregoing, the trial court's rulings as to Thompson and Meyer are **AFFIRMED**. We **REVERSE** as to W.W. Norton and **REMAND** to the Circuit Court.

HEARN, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Andrew Hinds and
William Henry Hinds, Appellants,

v.

Peggy Long Elms, Respondent.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3770
Submitted January 29, 2004 – Filed April 5, 2004

AFFIRMED

Chalmers Carey Johnson, of Charleston, for Appellants.

Sarah E. Wetmore, of Charleston, for Respondent.

KITTREDGE, J.: This appeal presents the question whether a plaintiff in a personal injury action is entitled as a matter of law to a favorable verdict where the court directs a verdict against the defendant on the issue of negligence and the issues of proximate cause and damages are submitted to

the trier of fact.[1] We hold that a plaintiff's verdict is not mandated under these circumstances.[2] Following a verdict for Respondent Peggy Long Elms, Appellants Robert and William Hinds[3] moved for a new trial "as to damages only," contending that the defense verdict was a result of improper influences since the trial court directed a verdict as to "liability." The Hinds appeal from the denial of their motion for a new trial. We affirm.

FACTS AND PROCEDURAL HISTORY

Robert Hinds was involved in three automobile accidents during the summer of 1995. This case arises from the second accident. Robert was driving his father's truck when it was struck in the rear by the vehicle driven by Elms.

After the July 12 accident, Robert contacted his family doctor, Dr. Skinner, who was unable to schedule him for an immediate appointment. An appointment was scheduled with Dr. Skinner for July 24. In the interim, Robert was involved in a third automobile accident on July 19. Robert did not seek medical treatment immediately following the third accident, but instead waited until the previously scheduled July 24 appointment.

The Hinds initiated the present action in July 1998, alleging Robert suffered "serious, painful and disabling" injuries in the July 12, 1995, automobile accident caused by Elms' negligence.[4] William Hinds sought

---

[1] Negligence was conceded at trial, resulting in a directed verdict on that issue.

[2] We revisit this basic principle in a published opinion in light of the continuing confusion among some members of the bar as to the distinction between the element of a negligent act or omission and the concept of liability.

[3] The primary Appellant is Robert Andrew Hinds. William Henry Hinds is Robert's father and the owner of the 1995 Nissan truck involved in the accident.

[4] Robert filed a negligence action in connection with the July 19 accident, where he claimed "serious, painful and disabling" injuries. In that lawsuit,

compensation associated with the damage to his Nissan truck, including loss of use and diminution in value.

The case was tried to a jury. At the close of the evidence, the following occurred:

> THE COURT: At the conclusion of the defendant's case. Plaintiff, motions, please.
> COUNSEL FOR PLAINTIFFS: Motion for directed verdict, your honor, <u>on the issue of simple negligence</u>.
> THE COURT: Granted.

(emphasis added).

Following a discussion on the defense of comparative negligence, counsel for Elms remarked, "[so] in essence it's now an admitted simple negligence case that proceeds on proximate cause and damages?" The court answered, "Correct." The trial judge then commented:

> The defendant herself obviously throughout the trial has admitted that at the point and time of the collision she was negligent … The proximate causal connection is still there, obviously, and that's the issue I expect to be argued most heavily by the defense, as well as the speculative nature of the damages that I'm sure they intend to argue full-fledged.

The trial court properly charged the jury on the applicable law, including the Hinds' burden, as plaintiffs, to establish that the claimed damages were proximately caused by the admitted negligence. At the conclusion of the charge, the trial court reviewed the verdict form with the jury, noting the options for "plaintiff blank dollars actual damages … [or] for the defendant." Prior to deliberations, the trial court invited the parties to

---

Robert sought to recover the "exact same medical bills … as [he] did in this case."

lodge any exceptions to the charge, to which counsel for the Hinds responded, "Nothing."

LAW/ANALYSIS

Upon receipt of the defense verdict, the Hinds, for the first time, argued that the jury *had* to find in their favor and award damages.[5] In their motion for a new trial, and before this court, the Hinds assert that the trial court directed a verdict "to the plaintiff on the issue of liability." Based on this premise, the Hinds argue they were entitled to an award of damages, and the jury's defense verdict was "inconsistent with the law of the case." We disagree.

The premise of the Hinds' argument is flawed, for the record clearly establishes that the directed verdict was limited to the element of negligence.[6] A determination of negligence, standing alone, is a far cry from a determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence. "To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." Vinson v. Hartley, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996).

In view of the purported error of the trial court in denying the Hinds' motion for a new trial, we have reviewed the evidence. At the time of the July 12, 1995 motor vehicle accident, Robert was recovering from injuries from his first accident that summer. Robert's family physician, Dr. Skinner, had diagnosed Robert with musculoskeletal pain, and prescribed various medications, as a result of a May 30 automobile accident. Following the July 12 accident, Robert drove his father's truck home. He received no medical

---

[5] The Hinds do not attempt to distinguish Robert's personal injury claim from his father's property damage claim.

[6] We do recognize that "when liability is admitted, a plaintiff is entitled to an award unless proof completely fails." Krepps by Krepps v. Ausen, 324 S.C. 597, 609, 479 S.E.2d 290, 296 (Ct. App. 1996).

treatment, other than to schedule an appointment with Dr. Skinner for July 24. Robert's third automobile accident occurred on July 19. Robert's claim for damages resulting from the July 12 accident was contested and, indeed, was the focus of the trial. The suggestion that the defense verdict resulted from improper influences finds no traction in this record. We conclude the trial court acted well within its discretion in denying the Hinds' motion for a new trial. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 113, 512 S.E.2d 510, 519 (1998) ("The grant or denial of a new trial motion rests within the discretion of the trial judge and will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

CONCLUSION

In a personal injury action, a determination of negligence, standing alone, does not entitle a plaintiff to a favorable verdict as a matter of law. Liability encompasses all elements of a negligence claim, including damages proximately caused by the negligence. Since the directed verdict in favor of the Hinds was limited, in their counsel's words, "to the issue of simple negligence," there exists no inconsistency in the defense verdict. Accordingly, there is no error in the trial court's denial of the motion for a new trial.

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ray B. Burton, III and East Coast Newspapers, Inc.,

Respondents/Appellants,

v.

York County Sheriff's Department and Bruce Bryant, York County Sheriff,

Appellants/Respondents.

Appeal From York County
J. Buford Grier, Special Circuit Court Judge

Opinion No. 3771
Heard March 10, 2004 – Filed April 5, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Melvin B. McKeown, Jr. and Elizabeth H. Robinson, both of York, for Appellants/ Respondents.

Jay Bender, of Columbia, for Respondents/ Appellants.

Robert E. Lyon, Jr. and M. Clifton Scott, both of Columbia, for Amicus Curiae South Carolina Association of Counties.

Sandra J. Senn and Stephanie P. McDonald, both of Charleston, for Amici Curiae South Carolina Sheriffs' Association and South Carolina Fraternal Order of Police.

ANDERSON, J.: In this case, we decide whether the Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165 (1991 & Supp. 2003) ("FOIA"), requires the Sheriff of York County ("the Sheriff") and the York County Sheriff's Department (collectively, "the Sheriff's Department") to provide information regarding alleged illegal and unethical conduct of four deputy sheriffs to Ray B. Burton, III and East Coast Newspapers, Inc. (collectively, "Burton").

FACTUAL/PROCEDURAL BACKGROUND

Sometime in early 2000, four York County deputy sheriffs were suspended without pay for "conduct unbecoming an officer." The suspension followed an internal investigation of a complaint lodged against the deputies by Lori Williams, a citizen of York County. After filing her complaint, Williams contacted Burton, a reporter for The Herald newspaper, which is published in Rock Hill. Williams informed Burton that her complaint to the Sheriff's Department included falsification of investigative reports, possession of stolen property, abuse of authority, and sexual activity in patrol cars.

In an effort to obtain more information for a newspaper report, Burton submitted written requests to the Sheriff's Department for access to records it possessed relating to Williams' complaint and the Sheriff's Department's response to the complaint. Burton identified two specific categories of information he wanted:

(1) Crime Reports. Burton requested access to reports of all complaints or allegations of illegal conduct made against the named deputy sheriffs since January 1, 2000, including all complaints made by Williams during that time.

(2) Employment Records. Burton asked to review the employment information for the named deputy sheriffs, including "dates of employment, title, rank, pay-rate schedule, copies of disciplinary letters, records of suspension and all other information as provided by law."

The Sheriff's Department's response only provided information as to the date of hire, title/rank, and pay/rate schedule for each of the named deputies. It claimed all other information requested was exempt from disclosure under FOIA because the information was of a personal nature and disclosing it would constitute an unreasonable invasion of personal privacy. The personal privacy exemption is provided under S.C. Code Ann. § 30-4-40(a)(2) (1991). Alternatively, the Sheriff's Department claimed the information requested was exempt under S.C. Code Ann. § 30-4-40(a)(3) (Supp. 2003) (records of law enforcement activities compiled in the process of detecting and investigating a crime the disclosure of which would harm an ongoing or prospective law enforcement action) and § 30-4-40(a)(7) (1991) ("[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships"). Burton initiated this action seeking declaratory and injunctive relief.

After conducting an in camera review of the Sheriff's Department's records that the Department claimed were exempt from disclosure, the trial court concluded the Department had violated the FOIA. The judge "permanently enjoined and restrained" the Sheriff's Department "from asserting exemptions from mandatory disclosure that have no legal or factual justification, and from continuing to refuse to segregate exempt and non-exempt material and make non-exempt public records available for inspection and copying."

The trial court found that a portion of the records submitted for in camera review revealed information that would lead to an unreasonable

invasion of personal privacy if disclosed. In its findings of fact, the court concluded "the Williams' allegations relating to the off-duty sexual practices and activities of the deputies is personal and private, as are the photographs in the record of Williams and Deputy Sullivan." Burton has not appealed or otherwise contested this finding.

STANDARD OF REVIEW

Burton sought injunctive relief and a declaratory judgment pursuant to FOIA.

Declaratory judgments in and of themselves are neither legal nor equitable. See Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. Campbell, 354 S.C. at 279, 580 S.E.2d at 165; see also Goldston v. State Farm Mut. Auto. Ins. Co., Op. No. 3749 (S.C. Ct. App. filed March 1, 2004) (Shearouse Adv. Sh. No. 8 at 52) (stating that because declaratory judgment actions are neither legal nor equitable, standard of review depends on nature of underlying issues); Travelers Indem. Co. v. Auto World, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (noting that suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue).

A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law. See South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994); Campbell, 354 S.C. at 280, 580 S.E.2d at 165. In an action at law tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record

discloses that there is no evidence which reasonably supports the judge's findings. Townes, 266 S.C. at 86, 221 S.E.2d at 775; Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); see also Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (declaring that in actions at law, on appeal of case tried without jury, lower court must be affirmed where there is any evidence which reasonably supports judge's findings).

LAW/ANALYSIS

I. FOIA CLAIMS

The South Carolina Freedom of Information Act is codified as sections 30-4-10 to –165 in the South Carolina Code. See S.C. Code Ann. §§ 30-4-10 to –165 (1991 & Supp. 2003). Upon request, FOIA mandates disclosure of records held by a "public body" unless the documents fall within enumerated exemptions. See S.C. Code Ann. §§ 30-4-30 to -40 (Supp. 2003). As our Legislature explicitly provided in enacting FOIA, disclosure, not secrecy, is the dominant objective of the Act:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (1991).

The essential purpose of the FOIA is to protect the public from secret government activity. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); see also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) ("FOIA was

enacted to prevent the government from acting in secret."); Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 785 n.4 (1998) (noting that "[t]he purpose of the FOIA is to protect the public from secret government activity"). The FOIA meets the demand for open government while preserving workable confidentiality in governmental decisionmaking. Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991); Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

"South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221; Campbell, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. Id. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

The exemptions from disclosure under FOIA do not create a duty of nondisclosure. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221. At most, these exemptions simply allow public agencies the discretion to withhold exempted materials from public disclosure. Id. Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed. See Campbell, 354 S.C. at 281, 580 S.E.2d at 166; see also Quality Towing, 345 S.C. at 161, 547 S.E.2d at 864-65 (stating that FOIA is remedial in nature and should be liberally construed to carry out purpose mandated by legislature). Moreover, the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996); Newberry Publ'g Co. v. Newberry County Comm'n on Alcohol & Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992).

In this appeal, the Sheriff's Department argues the trial court erred in its application of FOIA. First, the Sheriff's Department claims the Department is not a "public body" as defined by FOIA and is therefore not subject to its strictures. Alternatively, the Sheriff's Department maintains the information Burton sought is exempt from disclosure under FOIA because its

release would constitute an unreasonable invasion of privacy. We address these arguments seriatim.

A. "Public Body" under FOIA

1. Sheriff as "public body"

The key operative provision of FOIA provides: "Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a) (1991) (emphasis added). FOIA defines "public body" for the purposes of the Act:

> "Public body" means any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions . . . .

S.C. Code Ann. § 30-4-20(a) (Supp. 2003). This Court does not need to look any further than the language of the statute to find the Sheriff's Department is subject to FOIA. See Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) ("When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted. . . . The statutory terms, therefore, must be applied according to their literal meaning.") (citations omitted).

We first note that the office of the sheriff was created by our state constitution, which grants the General Assembly authority to determine their duties, qualifications, training, and compensation. See S.C. Const. art. V, § 24; see also S.C. Code Ann. § 23-11-110 (Supp. 2003) (prescribing the

qualifications of sheriffs); Botchie v. O'Dowd, 299 S.C. 329, 332 n.3, 384 S.E.2d 727, 729 n.3 (1989) (noting that the South Carolina Constitution "authorizes the election of a sheriff as a county officer"). The Sheriff's Department, therefore, clearly falls within the compass of the plain meaning of "public or governmental body or political subdivision of the State" under section 30-4-20(a).

2. Efficacy of Weston v. Carolina Research

Furthermore, the Sheriff's Department is supported exclusively by public funds. Sheriff Bruce Bryant testified that the Department's annual budget was "approximately thirteen million dollars," all of which was received through York County tax revenue and federal grants.

Our Supreme Court has ruled the fact that an organization, corporation, or agency is supported in whole or in part by public funds or expends public funds is sufficient grounds alone to find the organization is a "public body" under FOIA, regardless of any other factors. See Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401 S.E.2d 161 (1991). The Weston Court explained its reading of the statute:

> The [Defendant's] argument that the FOIA only applies to governmental and quasi-governmental bodies would rewrite the statutory definition of "public body" by deleting the phrase, "or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds." According to the [Defendant's] position, a corporation that cannot be labeled governmental or quasi-governmental would be exempt from the FOIA, regardless of whether it received support from public funds or expended public funds. Such a construction would obliterate both the intent and the clear meaning of the statutory definition.

Id at 403, 401 S.E.2d at 164.

Therefore, based solely on the fact that the Sheriff's Department is supported exclusively by public funds, we are compelled to find the Department is a "public body" subject to the mandates of FOIA.

B. In Camera Review

Under the FOIA, an in camera review of documentary material is mandated where there exists any controversy in regard to the production of contested documents.

In Newberry Publ'g Co. v. Newberry County Comm'n on Alcohol & Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992), the Supreme Court inculcated:

> Section 30-4-40(b) provides that:
>
> > If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.
>
> The Observer contends that the trial judge erred in failing to segregate the nonexempt and exempt portions of the report and to provide the Observer with the nonexempt material, as is mandated by section 30-4-40(b). We agree.
>
> . . . We find that SLED's policy of denying all FOIA requests for criminal investigative reports, without determining whether portions of the report are subject to disclosure, is in direct contravention of the clear language of the FOIA.
>
> . . . [T]he report may not be entirely exempt from disclosure; the statute goes on to state that a public record containing both nonexempt and exempt material must be segregated so that the nonexempt material is made available to the public. As a result, we reject SLED's contention that this, or

> any, criminal investigative report is *per se* exempt from disclosure.
>
> . . . .
>
> In sum, we emphasize that law enforcement agencies do not have carte blanche to deny all FOIA requests for criminal investigative reports. The information contained in these reports can be withheld from disclosure only to the extent that it falls within one or more of the exemptions enumerated in section 30-4-40(a). The determination as to which portions of a report are exempt and which portions must be disclosed should be done on a case-by-case basis.

Id. at 354-56, 417 S.E.2d at 873. Thereafter, the Court, in City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996), explicated: "Before Appellant becomes entitled to the report, the trial court must first examine the report in detail in order to determine whether the report's contents or portions thereof qualify for an exemption under § 30-4-40." Id. at 388-89, 475 S.E.2d at 750.

In the case sub judice, the trial court conducted an in camera review resulting in a fact-specific analysis of producible documents as juxtaposed to protected documents. The actual materials and documents reviewed in an in camera hearing constitute evidence in the case. The sealed documents reviewed by the trial court have been examined by this Court and support the order issued by the trial court.

C. Privacy Exemption

Though the purpose of FOIA is to create an affirmative duty on the part of public bodies to disclose information, the Act enumerates fifteen categories of public records that may be exempt from mandatory disclosure. See S.C. Code Ann. § 30-4-40 (1991 & Supp. 2003). The category relevant to the present case is known as the "privacy exemption." Section 30-4-40(a)(2) exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of

personal privacy." We find the specific information Burton seeks does not fall within the purview of this exemption.

Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure. We must, therefore, resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.

Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, "'one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.'" Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Indeed, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609).

In the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye. The newspaper, in fulfilling its obligation to report on and hold to account those in public service, had a legitimate need to access the records Burton requested. Burton and the newspaper did not seek information regarding the off-duty sexual activities of the deputies involved. Rather, the access to information they sought and the trial court granted was focused on the performance of public duties by the Sheriff and his deputies and the response of the Department to allegations of misconduct by the deputies.

We affirm the trial court's finding that the information requested by Burton was not exempt under section 30-4-40(a)(2) of the Act.

D. Right to Privacy under the United States Constitution

The Sheriff's Department contends that disclosing the information Burton requested would violate the deputies' "right to privacy" guaranteed by the Fourteenth Amendment to the United States Constitution. The Department essentially raises this argument twice: (1) as grounds for exemption under FOIA from disclosure of "[m]atters specifically exempted from disclosure by statute or law," S.C. Code Ann. § 30-4-40(a)(4) (1991 & Supp. 2003); and (2) as a defense entirely separate from the FOIA regime. Either way, we find the argument is without merit.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV, § 1. From this broad language, the United States Supreme Court has extrapolated a number of principles used to evaluate whether laws enacted by the state and federal governments are reasonable, fair, and supported by adequate justification. These Fourteenth Amendment principles are generally grouped together under the label of "substantive due process." Among these substantive due process guarantees exists what the Supreme Court has termed a "right of privacy."

Unlike the privacy rights implicated under section 30-4-40(a)(2) of FOIA or under the common law tort of invasion of privacy, the right of privacy subsumed under the Fourteenth Amendment has been narrowly defined and limited to specific situations:

> [I]n terms of due process and equal protection the "right to privacy" has come to mean a right to engage in certain highly personal activities. More specifically, it currently relates to certain rights of freedom of choice in marital, sexual, and reproductive matters. Even this definition may be too broad, for the Court still has not recognized any general right to engage in sexual activities that are done in private. Instead, the Justices have acknowledged the existence of a "right" and defined it by very specific application to laws relating to reproduction, contraception, abortion, and marriage.

Ronald D. Rotunda & John E. Nowak, 3 Treatise on Constitutional Law: Substance and Procedure § 18.26 (3d ed.) (1999); see also, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (recognizing a "right of privacy" in marriage stemming from the "zone of privacy created by several fundamental constitutional guarantees"); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that right of privacy in matters concerning procreation and family "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating ordinance that barred certain family living arrangements); Lawrence v. Texas, 123 S.Ct. 2472 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the "right of privacy" guaranteed by the Due Process Clause of the Fourteenth Amendment).

By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised. Unless and until the Supreme Court rules otherwise, we will follow its precedent and not expand the "right of privacy" under the Fourteenth Amendment beyond those situations which the Court has ruled bear on the most intimate decisions affecting personal autonomy—namely reproductive rights, familial and marital relations.

II. VALIDITY OF INJUNCTIVE RELIEF

The Sheriff's Department maintains the trial court abused its discretion in issuing an injunction. We disagree.

In order that its mandate of disclosure be enforced, there is a statutory presumption that no adequate remedy at law exists for a violation of FOIA and that injured parties are entitled to appropriate equitable relief:

> Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases . . . . The court may order equitable relief as it considers appropriate,

and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100(a) (1991); see also Business License Opposition Comm. v. Sumter County, 311 S.C. 24, 426 S.E.2d 745 (1992) (upholding trial court's grant of injunction prohibiting a public body from holding future secret meetings in violation of FOIA); Florence Morning News, Inc. v. Building Comm'n of City and County of Florence, 265 S.C. 389, 218 S.E.2d 881 (1975) (upholding trial court's injunction prohibiting defendants from interfering with the plaintiff's right to inspect and copy original records in possession of a public body).

The Sheriff's Department clearly violated the provisions of FOIA by withholding non-exempt documents that were the subject of a legitimate request and failing to segregate exempt and non-exempt materials for disclosure. The award of equitable injunctive relief was therefore entirely appropriate.

The Sheriff's Department alleges the injunction granted by the trial court was overly broad. We disagree.

The injunction issued in the trial court's order provided that "defendants are permanently enjoined and restrained from asserting exemptions from mandatory disclosure that have no legal or factual justification, and from continuing to refuse to segregate exempt and non-exempt material and make non-exempt public records available for inspection and copying." The Sheriff's Department avers this injunction "did not set forth specific reasons for its issuance or describe in reasonable detail the acts to be restrained." The Department argues "the permanent injunction prevents the defendants from asserting statutory and constitutional exemptions under [FOIA]" and "extends beyond the records requested in this case to all information and records in possession of the defendants in perpetuity."

Reading the trial court's order as a whole, the reasons for the injunction and the acts it intends to proscribe are amply clear. The trial court, in its findings of fact and conclusions of law, discussed at length the FOIA violation and the records ultimately subject to disclosure. We do not read the

trial court's order as compelling the production of records which are exempt under FOIA. To the extent that any of the Sheriff's Department's records are exempt under section 30-4-40 of FOIA, the Department is not obligated to disclose them. We find no error with the issuance of the injunction or its scope.

III. HEARSAY OBJECTION

The Sheriff's Department contends the trial court erred in allowing certain testimony of Terry Plumb, claiming it was inadmissible hearsay. We disagree.

Terry Plumb, editor of The Herald during the relevant time period, testified about the events leading up to the FOIA request and the present action. Part of Plumb's testimony concerned a conversation he had with Burton regarding the story he was developing relating to the allegations made against the Sheriff's Department. Plumb stated:

> Well, I asked Ray [Burton] what this was all about, and he told me that a woman by the name of Lori Williams had been arrested on public disorderly conduct. This woman further related she had been a complainant against a deputy and that she had had an affair with him, and they had a falling out. She told Ray that [the deputy] had threatened to distribute photographs of her in the nude and that she had reported this to the Sheriff's Department. They had seized his car, found photographs in question of this woman, and that there had been an investigation by the Sheriff's department and that he and several other deputies had been suspended, and that the shift—[t]he 300 shift, I believe, it was called, had been reorganized because of the scandal that emanated from this particular incident.

The Sheriff's Department raised a contemporaneous objection that this testimony was inadmissible hearsay. The trial court overruled the objection and allowed the testimony.

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. "Proof of a statement introduced to show a party heard and acted upon information is not objectionable hearsay." Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 454, 581 S.E.2d 489, 493 (Ct. App. 2003); see also Webb v. Elrod, 308 S.C. 445, 449, 418 S.E.2d 559, 562 (Ct. App. 1992) ("Proof of a statement introduced for the purpose of showing a party relied and acted upon it is not objectionable on the ground of hearsay.").

Plumb's statement is a clear example of showing an action based upon information and is not offered for the truth of the matter asserted. Reviewing Plumb's statement in the context of his testimony as a whole, it is apparent the statement was not offered to prove that Williams had an affair with a deputy, that Williams had filed a complaint, that an investigation had been conducted, or that deputies had been suspended. The testimony was merely offered to show why the newspaper was requesting access to the Sheriff's Department's records.

Because the statement was not hearsay, the trial court did not err in allowing its admission as evidence.

IV. ATTORNEY'S FEES

By way of cross-appeal, Burton appeals the trial court's denial of its request for attorney's fees as the prevailing party. Burton maintains the trial court abused its discretion by failing to enter its findings regarding its denial of the fee request. We agree.

Under FOIA, "[i]f a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation." S.C. Code Ann. § 30-4-100(b) (1991). As a general rule, the amount of attorney's fees to be awarded in a particular case is within the discretion of the trial judge. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); see also Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist., 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that, as § 30-4-100(b) provides attorney's fees *may* be awarded, judge has discretion to

award fees); Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (where one party prevails in his claim for information under FOIA, Circuit Court has discretion to award attorney's fees). The award, however, must be reasonable and supported by adequate findings. Baron Data Systems, 297 S.C. at 384, 377 S.E.2d at 297.

There are six factors for the trial court to consider when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Upon request for attorney's fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors. See Jackson, 326 S.C. at 308, 486 S.E.2d at 760 ("[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor."); Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993) ("When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor.").

In Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), a FOIA case, the appellant urged the Court to reverse the attorney's fee award on grounds that DHEC acted in good faith reliance on its regulation. The Supreme Court declined to do so, holding the "trial judge did not abuse his discretion in awarding fees to encourage agencies to comply with FOIA requests." Id. at 568, 324 S.E.2d at 316.

In its order, the trial court addresses the request for attorney's fees in a wholly conclusory fashion: "The award is discretionary with the Court, and the Court declines to award fees in this case." The court did not consider or enter findings for the factors outlined in Jackson v. Speed as mandated by our Supreme Court. We must, therefore, remand this matter to the trial court for a full and proper consideration of the attorney's fees request.

CONCLUSION

Based on the foregoing, the trial court's order is **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** for further disposition.

HEARN, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Helen Marie Douglas, Appellant.

Appeal From Colleton County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3772
Heard December 10, 2003 – Filed April 5, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and David Michael Pascoe, Jr. and Jonathan S. Gasser, both of Columbia, for Respondent.

CURETON, A.J.: Helen Marie Douglas was convicted of murder and armed robbery. She received concurrent sentences of life imprisonment for

murder and thirty years imprisonment for armed robbery. Douglas appeals. We affirm in part, reverse in part, and remand.

FACTS

Douglas and her husband, Ronnie Douglas, owned two houses in Colleton County. Douglas was in the habit of staying at the river house, and Ronnie usually stayed at the house in town. On the morning of November 3, 1997, Douglas knocked on a neighbor's door across the street from the town house, explaining that something had happened to Ronnie. The neighbor called 911 and went with Douglas to the town house, which she stated appeared to be ransacked. The neighbor also testified that Ronnie's head was surrounded by blood and he did not have a pulse. Douglas and the neighbor then left the house, and the neighbor called Douglas's two sons. Police arrived at the scene and determined there was no evidence of forced entry. A treating paramedic testified that Ronnie was dead and appeared to have a gunshot wound to the head. [1]

Douglas gave two statements to police in the days following Ronnie's murder. On each occasion, officers advised Douglas of her Miranda[2] rights before openly tape-recording her statements. Douglas later called Investigator Stanfield, the investigating officer, and asked him to come speak to her at the river house. The officers decided to send Stanfield out to the house with a hidden tape recorder. When he met with Douglas he did not advise her of her Miranda rights. Though Douglas did not make any incriminating comments about Ronnie's murder, she did admit that she had lied to the police about having an extramarital affair at the time of Ronnie's death. Though finding the secret tape-recording a "very, very, very poor practice," the trial judge allowed admission of a redacted version of the recording at trial.

---

[1] It was subsequently determined by the medical examiner that Ronnie had sustained five gunshot wounds to the head.

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

Douglas's son, Ronald, testified that Douglas gave her house keys to his brother, Tony, when she was arrested. Ronald testified that he made a copy of these keys without informing either Tony or Douglas. Ronald stated he used these keys to enter the river house at least three times – once by himself and twice with his ex-wife. He said he wanted to retrieve his video camera, his daughter's clothing, and some of his father's personal possessions. During one of these searches, Ronald's ex-wife discovered a bag of .25-caliber bullets and an empty box containing a receipt for a .25-caliber pistol. Ronald took several items from the house to the police, explaining he was searching for his father's wallet. Ronald also told police that, in the course of searching the pool pump house, he cut off the lock and threw it into the creek. Investigator Stanfield stated, "we told [Ronald] if anything came up with the investigation that needed our attention, please bring it to our attention."

Approximately eighteen months after Ronnie's murder, some homeowners found a garbage bag in the creek in their backyard. Douglas's river house was located on the nearby river. The bag contained rocks and a brick. A second bag, which was within the first bag, contained surgical gloves, two shirts, and a pair of jeans. One of Douglas's daughters-in-law testified one of the shirts was Douglas's, and that the jeans were in Douglas's size. However, the only hair sample found on the clothing did not match Douglas. After these items were turned over to police, the police conducted an underwater search of the creek. Police found a cinder block used to weigh down Ronnie's wallet and a .25-caliber handgun.[3]

In further support of its theory that Douglas killed her husband, the State presented testimony from an insurance agent, Gary Wayne Walker. Walker testified that he ran into Douglas at the river house in September 1997. Walker stated Douglas was interested in purchasing a life insurance policy on Ronnie's life. Walker advised Douglas that he could not issue such a policy without Ronnie's consent. Walker later discussed prices with Douglas, but did not actually give her the quotes.

---

[3] Forensic tests later identified the .25-caliber handgun as the murder weapon.

At the close of the State's case, Douglas moved for a directed verdict on the murder charge, arguing the State's case was purely circumstantial in nature. The trial judge denied the motion. Douglas also moved for a directed verdict on the armed robbery charge, arguing the State had not proved the essential elements of the offense. The trial judge denied the motion. The jury subsequently found Douglas guilty of both murder and armed robbery. Douglas renewed her motions for a directed verdict after the verdict was handed down. The trial judge denied these post-trial motions. The trial judge levied a life sentence on the murder charge and a concurrent sentence of thirty years imprisonment for armed robbery. Douglas appeals both of her convictions as well as her sentence for murder.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

DISCUSSION

I. Admission of Evidence

Douglas argues the trial judge erred in allowing the admission of several types of evidence. She states the following should not have been admitted at trial: (1) Walker's testimony about Douglas's interest in an insurance policy; (2) the secretly-taped statement given to Investigator Stanfield; (3) the items found by Ronald during his searches of the river house; and (4) the items found in the creek.

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. Relevant evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (stating the admission and exclusion of evidence is largely a matter of the trial judge's discretion, and the judge's rulings will not be overturned on appeal unless the judge committed a manifest abuse of discretion and the defendant suffered prejudice as a result).

A. Insurance Testimony

Douglas contends the trial judge erred in admitting the testimony of Gary Wayne Walker. She asserts the probative value of the testimony was outweighed by the unfairly prejudicial effect.

Walker testified he had known Douglas and her husband since the early 1970's. In September of 1997, approximately two months before the murder, Walker came in contact with Douglas. He stated he was in the area near Douglas's river house looking at property when he saw Douglas near the road. Walker stopped and spoke with Douglas. During the conversation, Douglas inquired whether Walker was still employed at the fire department. Walker told Douglas he had left the fire department and gotten into the insurance business. Walker testified Douglas asked about types of insurance and, then, "from there the conversation led to she was interested in some insurance on Ronnie, asked me if I could get her a quote on some insurance, which I did." Walker acknowledged that in order to issue an insurance policy he would have needed Ronnie's permission. Walker stated that some time after this conversation he again came in contact with Douglas. At that time, Walker informed Douglas that he had the insurance quotes. Walker testified he never gave these quotes to Douglas.

Our Supreme Court has consistently held that evidence of a life insurance policy on the victim in a homicide case may be admissible to establish a defendant's motive. To be admissible, however, the evidence must show that the defendant would derive some benefit from the proceeds of the policy. See, e.g., State v. Needs, 333 S.C. 134, 150, 508 S.E.2d 857, 865 (1998) (holding evidence that defendant carried a life insurance policy on the victim may be admissible to show defendant's motive for the homicide); State v. Williams, 321 S.C. 327, 339, 468 S.E.2d 626, 633 (1996), cert. denied, Williams v. South Carolina, 519 U.S. 891 (1996) (finding evidence that defendant had substantially increased life insurance benefits for wife and son immediately prior to the homicides constituted some circumstantial evidence of defendant's motive); State v. Vermillion, 271 S.C. 99, 100, 245 S.E.2d 128, 129 (1978) (holding "it is not necessary to show that the defendant was the beneficiary under a policy of life insurance on the life of the deceased in order to render it relevant and admissible if there is some showing that the defendant would derive some benefit from the proceeds of the policy").

Here, there was no policy from which Douglas could derive some benefit. Instead, the testimony only established that Douglas inquired about a policy and never followed through with confirming the quotes and obtaining her husband's approval. Motive cannot be established through the non-purchase of an insurance policy. To hold otherwise, we would significantly extend the established precedent that requires the existence of a policy. Moreover, Douglas was clearly prejudiced by the inference that she was attempting to purchase additional insurance on her husband's life without his knowledge just prior to his death. As such, we find the judge erred in admitting Walker's testimony. Accordingly, we reverse and remand for a new trial.[4]

B. Tape-Recorded Statement

Douglas argues the trial judge erred in admitting her statement that was

4 Because issues have been raised which may arise again on re-trial, we address several questions in order to aid the trial court.

surreptitiously recorded by Investigator Stanfield while she spoke with him at her home.

During a pre-trial conference, Douglas's counsel objected to the admission of the taped statement primarily on the ground that the prejudicial value of its admission outweighed the probative value. Counsel contended the investigator believed Douglas was the only suspect and was trying to get her to confess even though she had not done so on two prior occasions when she had given statements. The judge took the motion under advisement, but indicated "the Miranda issue [is] a lot stronger than the one party tape issue."

At trial, Douglas's counsel again asserted Douglas was entitled to a Miranda warning at the time the statement was taped because she was a suspect and had been given her Miranda rights when she gave the earlier two statements. In response, the State argued Miranda was inapplicable given Douglas was not "in custody" at the time the statement was made. The judge continued the discussion, asking counsel to analyze the issue "in terms of Miranda" and "privacy." Ultimately, the judge allowed the tape, in a redacted form, to be played for the jury. The judge indicated he had problems with the privacy aspect, but he did not believe it rose to the level of being inadmissible.

Miranda warnings are required only when a suspect "'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)). "In determining whether a suspect is 'in custody,' the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered." Id. The relevant inquiry is whether a reasonable person in the suspect's position would have believed herself to be in custody. Id. at 128, 489 S.E.2d at 621.

In the instant case, we find Douglas was not in custody when she was secretly tape-recorded by Investigator Stanfield. Several days after receiving Miranda warnings and giving two formal statements to police, Douglas called Stanfield and asked to speak with him at her river house. Stanfield testified

that she stated she "needed to tell [him] something" and asked him to "come alone." While she did not know she was being tape-recorded, Douglas was undoubtedly aware she was speaking to the investigating officer about her husband's murder. As the conversation took place at Douglas's residence, and at her request, she was clearly in control of the conversation. Further, given the circumstances under which the conversation took place, we fail to see why Douglas would not have felt free to leave the scene. Upon examining the totality of the circumstances surrounding the tape-recording incident, it is clear – under the reasonable person standard – that Douglas would not have believed she was in police custody when she had her conversation with Stanfield. Because Douglas invited Investigator Stanfield to her home, she was not in custody and, therefore, Miranda would not be applicable.

Moreover, the fact that Douglas was considered a suspect or that she had previously been apprised of her Miranda rights is not dispositive given she was not in custody. See State v. Neely, 271 S.C. 33, 41, 244 S.E.2d 522, 527 (1978) ("'[A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977))); Id. ("'But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'"); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (finding the fact that an investigation focuses on the suspect does not trigger the Miranda warnings unless he or she is in custody).

Finally, we disagree with Douglas's contention that the prejudicial value of the evidence outweighed its probative effect. During the statement, Douglas repeatedly stated that she did not want her affair with Webster to get out to her sons or become public knowledge. In response, Investigator Stanfield indicated there was nothing he could do because Webster had already given a statement in which he admitted to the affair. Douglas asked

Stanfield to say it was just a rumor and have the document "just disappear." Stanfield refused to help hide the affair. Given the State's case was entirely circumstantial, the evidence was clearly probative. A jury could have inferred from the evidence that Douglas wanted Investigator Stanfield to destroy her paramour's statement, which revealed inconsistent statements she made regarding her plans the morning of the murder, her affair with Webster, as well as Ronnie's request for a divorce the night before the murder.

In any event, regardless of whether Douglas was in custody at the time of the interrogation, any error in the failure to suppress her statement was harmless given the substance of the conversation was cumulative in nature. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). The redacted conversation that was read into evidence at trial did not contain any incriminating statements about Ronnie's murder. Rather, the conversation appeared to concern Douglas's initial denial of having engaged in an extramarital affair, and her subsequent fear that news of the affair would be made public.

Our decision should in no way be interpreted that we condone the unethical procedure employed by law enforcement. However, given the facts of this case and the specific arguments raised on appeal, we must affirm the trial judge's decision to admit the redacted version of Douglas's tape recorded statement into evidence.[5]

C. Private Search and Seizure

Douglas asserts the trial judge erred in admitting evidence that was

[5] We note at trial Douglas consistently relied on the Miranda argument as the basis for excluding this evidence. Although at one point Douglas mentions that "[o]ur state constitution sets a higher standard of privacy and entitlement to be free from this kind of conduct by the State," she does not argue in her brief that this evidence should be excluded based on a violation of a constitutional right to privacy.

obtained in a course of illegal searches and seizures. Specifically, Douglas contends that Ronald was acting for the State when he repeatedly searched her home.

"[A]n analysis of whether a private citizen's search and seizure is attributable to the State requires an inquiry into the totality of the circumstances." State v. Cohen, 305 S.C. 432, 436, 409 S.E.2d 383, 386 (1991), cert. denied, Cohen v. South Carolina, 503 U.S. 942 (1992). "Factors to be considered include: the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." Id. "The Fourth Amendment does not bar a search and seizure, even an arbitrary one, effected by a private party on his own initiative." State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000), cert. denied, Brockman v. South Carolina, 530 U.S. 1281 (2000). "It does, however, bar evidence arising from such intrusions if the private party acted as an instrument or agent of the government." Id. "The party challenging admission of evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny." Cohen, 305 S.C. at 434, 409 S.E.2d at 385.

We find the evidence collected by Ronald at the river house and subsequently turned over to the police was the product of private searches. Ronald testified that he went to Douglas's river house several times for general upkeep purposes and in order to retrieve personal items, which included his video camera, his father's tools, and his daughter's clothing. Ronald's ex-wife confirmed that, on the two occasions she accompanied him to the river house, they were picking up personal possessions. When asked whether anyone told him to go out to the river house, Ronald stated he "[d]id it on [his] own." As a result of these three searches, Ronald took insurance papers, plats, deeds, and the bag containing the bullets and receipt for the .25-caliber pistol to Stanfield, the investigating officer. Stanfield testified that he told Ronald "if anything came up with the investigation that needed our attention, please bring it to our attention." In our view, the testimony provided by both Ronald and Stanfield supports the State's proposition that Ronald was not acting as an agent or instrumentality of the State when he

searched Douglas's river house. It is clear that, in visiting the river house to retrieve personal property, Ronald undertook searching his mother's house of his own accord.

Based upon both the totality of the circumstances and the Cohen factors, Ronald's searches of the river house were not State-endorsed and, thus, not barred by the Fourth Amendment. Therefore, the trial judge did not err in admitting items seized by Ronald from the river house.

D. Items Found in the Creek[6]

Douglas argues the trial judge erred in refusing to suppress the items found in the creek near her river house. She asserts the State failed to present any evidence connecting her to these items. As such, she contends the items were not relevant.

Police were informed a plastic bag containing several items was found in a local creek approximately eighteen months after Ronnie's murder. After finding the bag wedged against their dock, the homeowners opened the bag to discover it was weighted down with a brick and some rocks and contained a second bag. The inner bag contained the following: surgical gloves, two shirts, and a pair of jeans. As previously discussed, several of these items were identified as either Douglas's, or similar to an item owned by Douglas. After securing this identification, police divers went to the creek and found a sunken cinder block, with the murder weapon and Ronnie's wallet stuffed into the block's holes.

We find this evidence was relevant and properly admitted by the trial judge. The plastic bag and the cinder block were located in the same vicinity in the creek. Further, the creek was located in the same area as Douglas's river house. Though this evidence was circumstantial, it was substantial in nature. As Douglas's shirt was found in the vicinity of the murder weapon

---

[6] As Douglas does not specify whether she is challenging the items in the plastic bag or the items in the cinder block, we will address all the evidence retrieved from the creek area.

and the victim's wallet, the items found in the creek tended to increase the probability that Douglas was involved in Ronnie's murder. Thus, this evidence was clearly relevant. See Rule 401, SCRE (stating relevant evidence is "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"). Accordingly, the trial judge did not err in admitting into evidence the items found in the creek near Douglas's river house.

II. Directed verdict

A. Murder

Douglas argues the trial judge erred in denying her motion for a directed verdict as to the murder charge. She asserts that, as the State's case was entirely circumstantial in nature, there was insufficient evidence to convict her of murder.

On an appeal from the trial judge's denial of a motion for a directed verdict, the appellate court may only reverse the trial judge if there is no evidence to support the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). When ruling on a motion for a directed verdict in a criminal case, the trial judge is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 411, 319 S.E.2d 335, 336 (1984). In reviewing the denial of a motion for a directed verdict, the evidence is viewed in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit

intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

We find the State presented substantial circumstantial evidence sufficient to allow Douglas's murder charge to go to the jury. While the town house appeared to be ransacked, there was no evidence of forced entry. Aside from Ronnie, Douglas had the only other set of keys to the town house. Further, Douglas was the last person to see Ronnie alive, and she was the person who discovered his body before 7:00 a.m. the next morning. Douglas told police she arrived at the town house at such an early hour because she wanted to go hunting with Ronnie. However, Ronnie's brother testified that Ronnie was not going hunting that morning because the two of them were going to a car sale that day. Douglas contradicted her own statement that she and Ronnie were going hunting, as she told her paramour, Jay Webster, that she planned on working in the yard at the river house that day. Webster also testified that Douglas came to his house the night before Ronnie's murder and told him Ronnie wanted to get a divorce. Douglas repeatedly lied to police about her relationship with Webster before finally admitting they were having an extramarital affair.

Douglas's two sons each testified that Ronnie had purchased a .25-caliber pistol for Douglas's use. While Douglas told police the couple owned a .357 Magnum revolver and a .22 derringer, she did not initially mention the .25-caliber pistol. A .25-caliber pistol, along with Ronnie's wallet, was recovered from the bottom of the creek and subsequently identified as the murder weapon. A plastic bag containing surgical gloves, two shirts, and a pair of jeans was also recovered from the creek. One of Douglas's daughters-in-law identified one of the shirts as Douglas's and stated the jeans were Douglas's size. The daughter-in-law also stated the surgical gloves were similar to those used in Douglas's beauty parlor.

In sum, the evidence presented at trial constituted substantial circumstantial evidence that reasonably tended to prove Douglas's guilt. Thus, the trial judge did not err in denying the motion for a directed verdict as to the murder charge.

B. Armed Robbery

Douglas argues the trial judge erred in denying her motion for a directed verdict as to the armed robbery charge. She asserts the State failed to prove the required elements of armed robbery. Specifically, she contends there was no evidence that the perpetrator took the wallet by force or intimidation or that the victim was alive at the time of the taking. She further asserts there was no evidence that the taking of the wallet and the shooting occurred at the same time by the same person.

"Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Parker, 351 S.C. 567, 570, 571 S.E.2d 288, 289 (2002). "Armed robbery occurs when a person commits robbery while armed with a deadly weapon." Id. at 570, 571 S.E.2d at 290; S.C. Code Ann. § 16-11-330(A) (2003). More specifically, "[r]obbery is the crime of larceny accomplished with force, while larceny is the 'felonious taking and carrying away of the goods of another' against the owner's will or without his consent. Thus, asportation is an element of robbery and armed robbery." State v. Keith, 283 S.C. 597, 598, 325 S.E.2d 325, 325-26 (1985) (quoting State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979)) (citations omitted).

While there is no evidence the wallet was taken before Ronnie's death, it is not essential the victim in an armed robbery must be alive when the robbery occurs. However, in order to be guilty of armed robbery in conjunction with a homicide, the State must prove the victim's death and the taking are part of a continuous chain of events so interconnected as to be inseparable. See 67 Am. Jur. 2d Robbery § 14 (2003) ("[A] taking from the body of one already dead is a taking 'from the person' if the death and the taking are so connected as to form a continuous chain of events."); 77 C.J.S. Robbery § 9 (1994) ("Although, as an abstract principle of law, one ordinarily cannot be guilty of robbery if the victim is a deceased person, this principle does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable. If the taking was made possible by an antecedent assault, the offense is robbery

regardless of whether the victim died before or after the taking of the property."); see, e.g., Jones v. State, 652 So. 2d 346, 350 (Fla. 1995), cert. denied, Jones v. Florida, 516 U.S. 875 (1995) (finding violent murders and taking of victims' property were part of continuous acts and therefore supported robbery convictions); Oglesby v. State, 256 S.E.2d 371, 374 (Ga. 1979) (affirming trial judge's denial of directed verdict for armed robbery where defendant contended the taking of the victim's property did not occur until after the victim either was comatose or dead); State v. Fields, 337 S.E.2d 518, 524-25 (N.C. 1985) (holding, in a case involving convictions for first-degree murder, armed robbery, felony murder, and second-degree burglary, "[a]ll that is required is that the elements of armed robbery occur under circumstances and in a timeframe that can be perceived as a single transaction"); People v. Childs, 615 N.Y.S.2d 972, 975 n.3 (N.Y. Sup. Ct. 1994) (discussing jurisdictions that have upheld robbery convictions concerning dead victims); cf. State v. Damon, 285 S.C. 125, 129, 328 S.E.2d 628, 631 (1985), cert. denied, Damon v. South Carolina, 474 U.S. 865 (1985), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding in a death penalty case that murders were committed "while in the commission of" armed robbery or larceny with the use of a deadly weapon where property belonging to the deceased individuals was stolen in a continuous sequence of criminal acts at the time of the murders).

We find the State presented sufficient evidence to support the armed robbery charge. Ronnie was shot five times in the head. His house appeared to be ransacked and his wallet was missing. The wallet was found in the bottom of the creek with the murder weapon and in the same vicinity as the items identified as belonging to Douglas. Furthermore, given the violent nature of Ronnie's death, it could be inferred that the force used to commit the homicide also facilitated the taking. Thus, there is substantial circumstantial evidence that Ronnie's murder and the taking of the property were part of a single transaction or continuous sequence of events.

Viewing the evidence in the light most favorable to the State, as we are required to do, the evidence reasonably tends to prove Douglas's guilt.

Accordingly, the trial judge properly submitted the armed robbery charge to the jury.

III. Sentencing

Douglas argues the trial judge erred in levying the sentence of life imprisonment for her murder conviction. She states the trial judge made an incorrect statement of law when discussing sentencing options.

During sentencing the trial judge stated, "the sentence of the Court with regard to murder, and I will tell the open courtroom there is [sic] only two choices. It's either thirty years or life, period." While Douglas argues this phrasing omits the option of levying a sentence of less than thirty years imprisonment, there was no contemporaneous objection at trial. As such, this issue is not preserved for our review. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999) (holding an objection to a sentence exceeding the maximum allowable by law does not raise a question of subject matter jurisdiction and cannot be raised for the first time on appeal); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (stating failure to object to sentence at time of its imposition constitutes a waiver of the issue on appeal); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (finding defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him or her from presenting an objection for the first time on appeal).

IV. Motion for a New Trial

Douglas argues the trial judge erred in denying her motion for a new trial. She claims the circumstantial nature of the State's case, coupled with the cumulative effect of the admission of several items into evidence, was highly prejudicial.

We reverse the trial judge's decision to admit testimony concerning Douglas's inquiry about insurance on her husband. Because we remand for a new trial as to the charge of murder and because the charge of armed robbery is so closely intertwined, we also remand for a new trial on the armed robbery

charge.

CONCLUSION

We reverse the trial judge's decision to admit the testimony concerning insurance. We affirm the judge's denial of Douglas's motion for a directed verdict as to the charges of murder and armed robbery, but for the reasons noted above, remand for a new trial on both charges. Because Douglas's remaining issues may arise during the next trial, we affirm the judge's decision to admit the following: (1) the tape-recorded statement; (2) the evidence procured through private searches; and (3) the items found in the creek.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ANDERSON, J., concurs and GOOLSBY, J., dissents in part and concurs in part in a separate opinion.

GOOLSBY, J. (dissenting in part and concurring in part): I respectfully dissent from that portion of Judge Cureton's opinion that holds the admission of insurance agent Gary Wayne Walker's testimony of his discussion with the defendant about her obtaining a quote on life insurance for her husband constituted reversible error. I also dissent from that portion of Judge Cureton's opinion that reverses the defendant's convictions for murder and for armed robbery because of the admission of this evidence. In view of the other evidence against the defendant, I regard any error in the admission of the evidence of an inquiry about an insurance quote as "harmless beyond a reasonable doubt." See State v. Tench, 353 S.C. 531, 536, 579 S.E.2d 314, 317 (2003) (admission of challenged evidence deemed harmless). Moreover, I simply fail to see how her inquiring about the purchase of insurance on her husband proves anything, particularly when the evidence does not show the defendant actually bought the insurance or otherwise benefited from it.

I otherwise concur in Judge Cureton's opinion and would affirm the defendant's sentences and convictions.