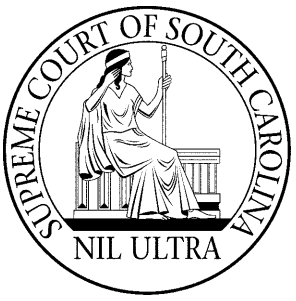

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 3, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-520-Johnson v. Mew	Pending
2012-UP-526-State v. Christopher Ryan Whitehead	Pending
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-670-Burgess v. Burgess	Pending
2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G.	Pending
2012-UP-676-G. Gottschlich v. D. McNeil	Pending
2012-UP-678-State v. Darrin D. Holston	Pending
2012-UP-688-L. Brown v. Dick Smith Nissan	Pending
2013-UP-001-R. Coleman v. State	Pending
2013-UP-010-N. Mitchell v. Juan P. Marruffo et al.	Pending
2013-UP-014-D. Keller v. ING Financial Partners et al.	Pending
2013-UP-034-Clark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-William Lippincott v. S.C. Dept. of Employment	Pending
2013-UP-070-Loretta Springs v. Clemson University	Denied 03/27/13
2013-UP-081-LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum et al.	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending

2013-UP-094-David A. Babb v. Jerry Lee Mundy et al. Pending

2013-UP-110-State v. Demetrius Goodwin Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4832-Crystal Pines v. Phillips Pending

4833-State v. L. Phillips Pending

4851-Davis v. KB Home of S.C. Pending

4859-State v. B. Garris Pending

4862-5 Star v. Ford Motor Company Pending

4863-White Oak v. Lexington Insurance Pending

4867-State v. Jonathan Hill Pending

4872-State v. Kenneth Morris Pending

4879-Stephen Wise v. Richard Wise Pending

4880-Gordon v. Busbee Pending

4888-Pope v. Heritage Communities Pending

4890-Potter v. Spartanburg School Pending

4892-Katie Green Buist v. Michael Scott Buist Pending

4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending

5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5033-State v. Derrick McDonald	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending
5052-State v. Michael Donahue	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-Larry Bradley Brayboy v. State	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending

2011-UP-328-Davison v. Scaffe	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending

2011-UP-588-State v. Lorenzo R. Nicholson	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending

2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending

2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-481-State v. John B. Campbell	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending
2012-UP-561-State v. Joseph Lathan Kelly	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-585-State v. Rushan Counts	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-647-State v. Danny Ryant	Pending

2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2012-UP-674-SCDSS v. Devin B.	Pending
2013-UP-007-Hoang Berry v. Stokes Import	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Serria Dawson, Appellant.

Appellate Case No. 2011-193926

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 27238

Heard January 9, 2013 - Filed April 3, 2013

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Scarlett A. Wilson, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Serria Dawson (Appellant) pled guilty to breach of trust with fraudulent intent, valued at more than $1,000 but less than $5,000, in violation of Section 16-13-230(B)(2) (2003) (amended 2010) of the South Carolina Code. She was sentenced under the Youthful Offender Act to a term not to exceed six years, suspended upon five years' probation and payment of restitution. Appellant appeals, arguing the circuit court erred in denying her motion to be sentenced under the Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts No. 273 (the Act), which became effective after Appellant committed the crime but before she was sentenced. This Court certified this case for review pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL HISTORY

In October 2009, Appellant was observed making false refunds to an accomplice while working as a cashier at Walmart. Appellant later confessed to making false refunds on multiple occasions, and with the assistance of two accomplices, defrauding Walmart of approximately $5,000. Appellant indicated she accepted $1,171.55 of the misappropriated funds. An arrest warrant was issued on January 14, 2010, and police ultimately arrested Appellant on January 22, 2010. On June 8, 2010, the grand jury indicted Appellant for breach of trust with fraudulent intent involving an amount between $1,000 and $5,000.

On June 2, 2011, Appellant entered a guilty plea. Prior to the sentencing hearing, Appellant filed a motion to be sentenced pursuant to the Act, which lowered the penalties for breach of trust under section 16-13-230. At the time Appellant committed the crime, section 16-13-230(B)(2) imposed a maximum sentence of five years' imprisonment for a breach of trust involving an amount between $1,000 and $5,000. The Act, which became effective June 2, 2010, amended section 16-13-230 to impose a maximum sentence of thirty days' imprisonment for a breach of trust involving less than $2,000. Appellant argued that although the Act was not in effect at the time she committed the crime, she was nevertheless entitled to be sentenced under its provisions because it took effect prior to sentencing. The circuit court denied Appellant's motion.

ISSUE PRESENTED

Whether the circuit court erred in denying Appellant's motion to be sentenced under the Act.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. *Id.*

LAW/ANALYSIS

Appellant argues the circuit court erred in denying her motion to be sentenced under the Act. Citing *State v. Varner*, 310 S.C. 264, 265, 423 S.E.2d 133, 134 (1992), Appellant argues a criminal defendant receives the benefit of punishment mitigated by legislative amendment when the amendment becomes effective prior to sentencing. Appellant further contends that although the Act contains a savings clause, it is not clear whether it applies to an amendment that simply substitutes one penalty for another, and thus, the rules of statutory construction require the savings clause be strictly construed against the State. Finally, Appellant asserts legislative intent supports her being sentenced under the Act because the General Assembly intended the Act to reduce recidivism, provide fair and effective sentencing options, and use correctional resources most effectively. We disagree.

The Act's savings clause provides the following:

> The repeal or amendment by the provisions of this [A]ct or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this [A]ct, all laws repealed or amended by this [A]ct must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this [A]ct, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended

laws.

2010 S.C. Acts No. 273, § 65. Section 66 of the Act, titled, "Time effective," further provides, "Cases and appeals arising or pending under the law as it existed prior to the effective date of this [A]ct are saved." 2010 S.C. Acts No. 273, § 66.

In *Varner*, this Court held that "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." *See Varner*, 310 S.C. at 265, 423 S.E.2d at 133. Notably, in citing *Varner*, Appellant omits its qualifying language which states this common-law rule applies only "*[i]n the absence of a controlling statute*." *See id.*

As the Court explained in *State v. Gay*, 343 S.C. 543, 553, 541 S.E.2d 541, 546 (2001) (citing *Varner*, 310 S.C. at 266 n.3, 423 S.E.2d at 134 n.3), *abrogated on other grounds*, *Holmes v. South Carolina*, 547 U.S. 319 (2006), "the *Varner* Court indicated that the Legislature could state its intent for new, lesser penalties to take effect based on the date of the crime rather than the date of sentencing."[1] In *Gay*, the defendant was convicted of murder and sentenced to life imprisonment. *Id.* at 545, 541 S.E.2d at 542. At the time the defendant committed the crime, murder carried a mandatory sentence of death or life imprisonment. *Id.* at 552–53, 541 S.E.2d at 546. However, before the defendant was sentenced, the legislature amended the statute to allow for a mandatory minimum thirty-year term of imprisonment as another sentencing option. *Id.* This Court held the defendant was properly sentenced under the law in effect at the time he committed the murder because the legislature expressly stated the sentencing amendment applied prospectively to all crimes committed on or after the date of its enactment. *Id.*

In the instant case, we find the circuit court properly denied Appellant's motion to be sentenced under the Act because she was prosecuted under the former version of section 16-13-230, and the Act unambiguously states its sentencing amendments do not apply to actions arising under the amended laws. Specifically, the Act's savings clause states the Act "does not affect pending actions" founded on an amended or repealed law "or alter, discharge, release, or extinguish any penalty

[1] The following cases are overruled to the extent they hold a criminal defendant must be sentenced under the law in effect at the time of sentencing regardless of a controlling statutory provision stating otherwise: *State v. Mansel*, 52 S.C. 468, 468, 30 S.E. 481, 481 (1898); *State v. Cooler*, 30 S.C. 105, 111, 8 S.E. 692, 695 (1889).

. . . incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide." *See* 2010 S.C. Acts No. 273, § 65. The savings clause further provides that "all laws repealed or amended by [the] [A]ct must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, . . . criminal prosecution, or appeal existing as of the effective date of [the] [A]ct, and for the enforcement of . . . penalties . . . as they stood under the repealed or amended laws." *Id.* Section 66 of the Act clarifies that all "[c]ases and appeals arising or pending under the law as it existed prior to the effective date of this [A]ct are saved." *Id.* § 66.

Because Appellant committed breach of trust in October 2009—prior to the Act's effective date—her criminal prosecution arose from, and her penalty was incurred under, the former version of section 16-13-230. *See Dorsey v. United States*, 132 S. Ct. 2321, 2330–31 (2012) ("[P]enalties are 'incurred' under the older statute when an offender becomes subject to them, *i.e.,* commits the underlying conduct that makes the offender liable.") (citing *Great N. Ry. Co. v. United States,* 208 U.S. 452, 464–70 (1908)); *see also State v. Dickey*, 380 S.C. 384, 405, 669 S.E.2d 917, 928 (Ct. App. 2008) (finding an action is "pending" for purposes of a savings clause where the crime occurred before the effective date of the new legislation), *overruled on other grounds*, 394 S.C. 491, 716 S.E.2d 97 (2011). This is made clear by Appellant's arrest warrant, supporting affidavit, and indictment, all of which indicate Appellant was charged with committing a breach of trust involving an amount between $1,000 and $5,000—a monetary range recognized by the former version of section 16-13-230 but not the Act's amended version.

Accordingly, Appellant's reliance on *Varner* is misplaced because the Act states its sentencing amendments do not apply to criminal prosecutions arising under the amended laws. Like the defendant in *Gay*, Appellant was properly sentenced under the law in effect at the time she committed the crime. *See Gay*, 343 S.C. at 552–53, 541 S.E.2d at 546. Moreover, because the savings clause and section 66 unambiguously detail the Act's prospective application, Appellant may not invoke the rules of statutory construction to imply another meaning. *See State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

CONCLUSION

We affirm the circuit court's denial of Appellant's motion to be sentenced under the Act because the Act unambiguously states its sentencing amendments do not apply to criminal prosecutions arising under the amended laws.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mario Tynes, Appellant.

Appellate Case No. 2010-162946

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5109
Heard October 31, 2012 – Filed April 3, 2013

AFFIRMED

Tommy A. Thomas, of Irmo, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia, for Respondent.

THOMAS, J.: Mario Tynes appeals his convictions for first-degree burglary, armed robbery, possession of marijuana with intent to distribute, and unlawful carrying of a pistol. We affirm.

FACTS/PROCEDURAL HISTORY

On October 13, 2007, the Horry County Police Department received a radio dispatch to be on the lookout for a white older model four-door Ford Crown Victoria without hubcaps. According to the dispatch, the vehicle was travelling on Arrowhead Boulevard and was occupied by several black males who were waving guns in the air.

About one to two minutes later, Horry County Police Officer Justin Cole saw a vehicle matching the description given in the dispatch. Cole initiated a traffic stop on the car and directed the occupants to pull over to a gas station about two miles from Flint Lake Apartments, where the vehicle was first sighted. Cole saw five black males in the vehicle, most of whom were wearing black clothing. Officer Larry Graham, who was on duty in the vicinity, heard the dispatch and went to assist Cole in the traffic stop.

The occupants were ordered to exit the car to be patted down for weapons. Cole and Graham searched the vehicle and found two firearms and three large plastic baggies, each filled with a green leafy substance. All the occupants were then arrested and given *Miranda* warnings. Videotape evidence showed that Tynes was in the vehicle, and Cole also identified Tynes as one of the occupants.

The following day, Horry County Police Officer John Stewart received a telephone call from a woman inquiring about her son (Victim), a college student living at Flint Lake Apartments who had recently been hospitalized for injuries he sustained during a home invasion. Victim recently purchased three pounds of marijuana and allowed a classmate to come to his apartment to buy two pounds of it. While Victim was counting the cash for the transaction, several men with guns suddenly ran up the stairs of his building into his apartment. They took the cash and most of the drugs, beat Victim with the butt of a gun, and threw him around.

Although police had talked with Victim while he was in the hospital, no one had yet contacted him after his release, prompting his mother's call. Stewart then called on Victim, who gave him a white baseball cap and a cartridge that were found in his apartment after the incident.

On January 4, 2008, the Horry County Grand Jury indicted Tynes on one count of unlawful carrying of a pistol, one count of possession of marijuana with intent to distribute, one count of first-degree burglary, and one count of armed robbery. He

was scheduled to be tried with co-defendants Michael Jerrod Lackey and Joshua Readon in May 2010, both of whom were charged with the same offenses.

Before jury selection, Joshua Readon requested to enter an *Alford* plea on the charges of armed robbery and possession with intent to distribute marijuana. The trial court accepted the pleas, but delayed sentencing to allow the State to decide whether or not to make a recommendation based on Readon's cooperation in prosecuting the other two defendants. The jury found both Tynes and Lackey guilty as charged, and Tynes appeals.

ISSUES

I. Should the trial court have suppressed the evidence found during the search of the Crown Victoria based on (1) the inconsistency and unreliability of the officers' testimony and (2) improper bolstering by a witness who allegedly was not properly sequestered?

II. Did the trial court commit reversible error in refusing to admit evidence that a witness's agreement to testify for the State included a condition that the State could require the witness to submit to a polygraph examination?

III. Did the trial court err in allowing the State's DNA expert to testify that Tynes could not be excluded as a contributor of DNA found on a gun used in the crime?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* An appellate court "will only reverse the circuit court's decision on a motion to suppress when there is clear error." *Narciso v. State*, 397 S.C. 24, 32, 723 S.E.2d 369, 373 (2012). "A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error." *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or commission of legal error that results in prejudice to the

defendant." *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 73 (Ct. App. 2003).

LAW/ANALYSIS

I. Vehicle Search

Tynes first argues the trial court should have suppressed the evidence recovered during the search of the Crown Victoria because (1) the testimony of the officers and the police report contained inconsistent and unreliable statements concerning when and where drugs were found in the car and thus could not support a finding of probable cause and (2) one of the officers was not properly sequestered during the suppression hearing. We disagree.

"[I]f there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." *State v. Weaver*, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007).

Officer Cole testified that he stopped the car because it matched a description of a vehicle involved in possible criminal activity in the vicinity where he was working at the time, and Tynes does not challenge the propriety of the traffic stop. Officer Graham testified that after he arrived at the scene and the occupants were ordered from the car, he spotted marijuana in plain view on the front floorboard of the vehicle, and as the trial court found, videotape evidence played outside the jury's presence corroborated Graham's testimony. In addition, Officer Cole testified that once the occupants were outside the car, he saw a magazine clip in plain view on the back seat. The officers' observation of the magazine clip, when considered with the report of suspicious activity and videotape evidence, was sufficient to establish exigent circumstances to justify searching the vehicle. *See State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995) (upholding a warrantless search of a vehicle in which police agents observed a handgun on the floor before arresting the occupants and stating the standard for a warrantless search as "a justifiable determination, based on the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved"); *id*. ("[U]nder the automobile exception, if probable cause exists to justify the

warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its content that may conceal the object of the search.").

We further hold the alleged inconsistencies between the police report and the officers' testimony do not necessarily warrant reversal of the trial court's finding that the search of the vehicle was lawful. *See State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law."); *State v. Morris*, 395 S.C. 600, 608, 720 S.E.2d 468, 471 (Ct. App. 2011) ("The appellate court's task in reviewing the trial court's factual findings on a Fourth Amendment issue is simply to determine whether *any* evidence supports the trial court's findings." (emphasis added)).

Tynes further suggests that Graham's testimony was "tainted" because Graham, who testified after Cole during the suppression hearing, was close enough to the courtroom to hear Cole testify and thus alter his version so that it would be consistent with Cole's statements and reconcile any discrepancies between Cole's testimony and the police report. Tynes maintains that given these circumstances, the trial court should have allowed him to explore whether Graham was within earshot of Cole's testimony or made a finding that probable cause to search the car was lacking. We reject this argument.

The trial court never made any order as to where the witnesses were to wait before they were called; thus, there was no violation of any sequestration order. Furthermore, at trial, Tynes never asked the trial court to allow him to question Graham or any other witnesses regarding whether Graham was able to hear Cole testify. *See State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (stating the defendant's failure to raise an issue to the trial court precluded him from raising it on appeal).

II. Polygraph Agreement

Tynes next argues that he should have been allowed to present evidence that a witness for the State had to undergo polygraph testing at the State's request as part of his agreement with the State. We disagree.

The witness, Craig Collins, admitted during direct examination that he had been arrested and charged with armed robbery in connection with the incident leading to

the charges against Tynes and Lackey. After consulting a lawyer, Collins decided to cooperate with the State and signed an agreement to this effect.

As the solicitor was preparing to proffer the agreement, the trial court, after conferring off-the-record with counsel, sent the jury from the courtroom. In the jury's absence, the court *sua sponte* expressed concerns about the admissibility of a provision in the agreement that Collins would be subject to polygraph testing at the State's request. Stating that "[p]olygraphs are clearly not admissible in this State and we don't recognize [their] reliability," the court stated it would not allow evidence about the requirement. Both defendants objected to the restriction, arguing that even though polygraph results are inadmissible, they should be allowed to ask Collins if he was ever requested by the State to take a polygraph pursuant to the agreement.

The trial court stated it raised the issue of the admissibility of the polygraph provision because of concerns that the provision would amount to an impermissible bolstering of Collins's credibility as a witness. We hold this concern was justified. Here, the State's decision not to exercise this right would have had the effect of bolstering Collins's credibility.[1] *See State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 846 (2007) (citing the "general rule" "that no mention of a polygraph test should be placed before the jury" and holding the trial court did not abuse its discretion in granting a new trial based on a reference by a state's witness to a polygraph test that she had taken); *State v. McGuire*, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979) (“Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination.").

Furthermore, Tynes also had the opportunity to impeach Collins and did so through eliciting admissions from Collins about (1) inconsistencies between Collins's written statements and his testimony at trial, (2) the fact that Collins cooperated with the State only when he realized that he himself was facing charges from the incident, and (3) Collins's own criminal activity. Considering these circumstances, we hold that whether or not the trial court should have allowed the jury to be informed that Collins's agreement with the State included a condition that he was subject to polygraph testing, Tynes has failed to show prejudice from this ruling

[1] Tynes's co-defendant acknowledged that the State did not make Collins submit to a polygraph.

and is therefore not entitled to a new trial on this ground. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (stating an appellant "must demonstrate more than error in order to qualify for reversal" and "the errors must adversely affect his right to a fair trial").

III. DNA Evidence

Finally, Tynes argues the trial court should not have allowed Katie Coy, the State's DNA expert, to testify that he could not be excluded as a minor contributor of blood found on one of the guns in the car. We disagree.

One of the other participants in the crime identified Tynes as the person who had pistol-whipped Victim during the robbery. Blood was collected from one of the guns found in the Crown Victoria, and DNA testing indicated that (1) Victim was a contributor and (2) except for Tynes, all participants including Lackey were excluded by the test as minor contributors. Although Tynes agreed that Coy could testify that the DNA testing excluded other individuals, he objected to any reference to the determination that he himself could not be excluded as a contributor. Over Tynes's objection, however, the trial court allowed Coy to testify what the DNA test indicated about Tynes as well as about the other participants.

We have concerns that Tynes may have waived any objection to this testimony. The record indicates the trial court engaged both Tynes and the State in lengthy discussion about what statements each would consider acceptable for the jury to hear. Ultimately, it appears Tynes agreed it was fair to include testimony from the expert that he could not be excluded as a minor contributor of the DNA as long as there was testimony that he was not found to be a match.

In any event, we hold the trial court acted within its discretion in permitting Coy to testify that Tynes could not be excluded as a contributor to the DNA found on the gun.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Here, Coy never

said Tynes was a possible contributor. Moreover, when Tynes cross-examined her, she acknowledged that he was not developed as a scientific match for the DNA that she tested. Accordingly, we hold the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice and find no error in the trial court's admission of this evidence.

CONCLUSION

We hold the trial court acted within its discretion in admitting the evidence found during the search of the car and in allowing the State to present testimony that Tynes could not be excluded as a contributor to DNA found on a gun seized during the search. We further affirm the trial court's refusal to allow the jury to be informed that Collins's agreement with the State included a condition that he undergo polygraph testing if the State so requested.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Roger Bruce, Appellant.

Appellate Case No. 2011-197635

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5110
Heard January 9, 2013 – Filed April 3, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan J. McDonald, all of Columbia, for Respondent.

FEW, C.J.: Roger Bruce was convicted of murdering his girlfriend Laura Creel. On appeal, he argues the trial court erred in admitting evidence of the discovery of Creel's body, which police found in the trunk of her car, because he claims the search violated his Fourth Amendment rights. In ruling on the issue at trial, the

court did not make adequate factual findings or legal conclusions. Rather, the court summarily stated, "I'm going to overrule the objection and allow it." We hold the trial court's findings are inadequate for appellate review. We remand to the trial court to determine (1) whether Bruce had a legitimate expectation of privacy in the trunk of Creel's car, (2) whether Bruce consented to the search, and (3) if the police violated Bruce's Fourth Amendment rights, whether the exclusionary rule applies.

I. Facts and Procedural History

Late in the evening on October 12, 2009, Creel's son contacted the Florence police department, requesting the police check on Creel at the apartment she shared with Bruce. He told the police he had not heard from her or seen her in "a couple of days." He also informed them that Creel's "goldish" 1997 Chrysler Concord was parked at the apartment and that Bruce had called him from Creel's cell phone.

As officers Gary Beckett, Charles Hobgood, and Steven Starling approached the apartment on foot, they saw Bruce looking out of the apartment's screen door. The officers explained to Bruce they were there to check on Creel and asked if she was home. When Bruce answered no, the officers asked if they could "take a quick look and make sure that she wasn't inside," and he consented. After briefly scanning the residence, the officers observed a cell phone and keys on a table. The keys were consistent with the vehicle parked outside the apartment, and the vehicle was consistent with the description given by Creel's son. Bruce stated the keys and cell phone belonged to Creel, which prompted Hobgood to pick up the keys and walk toward her car, along with the other officers and Bruce.

Hobgood looked through the car windows with his flashlight, searching for "maybe a pocketbook" or "something that may give us an idea where she may be." Hobgood then attempted to open the trunk but was unsuccessful. Hobgood testified Bruce asked, "well, you want me to show you what key[?]"[1] At that point, Bruce "walked towards" Hobgood "with his arm out like he was going to grab the keys," causing Hobgood to instruct Bruce to tell him which key opened the trunk rather than show him. Hobgood testified he was not sure what Bruce's intent was when he walked toward him. However, both Beckett and Starling testified it

[1] There is conflicting testimony as to whether Hobgood asked Bruce which key opened the trunk or whether Bruce volunteered his help.

appeared Bruce walked toward Hobgood with the intent to help him find the correct key. During Hobgood's exchange with Bruce, Starling "got the keys from Hobgood" and pushed the trunk release button, which opened the trunk and revealed a female body, later identified to be Creel.

At trial, Bruce moved to suppress the discovery of the body, arguing the search violated his Fourth Amendment rights because the officers had no search warrant and he had not consented to the search of the car. The court asked, "What standing would he have to object to a search of a vehicle that was not his?" Counsel responded Bruce could make the challenge based on the fact that the car was on his property and the keys were found inside his apartment. The State argued that Bruce had no expectation of privacy in Creel's car, and that he consented to the search and even offered to help the officers open the trunk.

After the court heard counsels' arguments, it stated,

> It appears that this is inevitable discovery; but for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was gonna open the trunk for them, or at least was providing the keys to do so.

The court then ruled, "I'm going to overrule the objection and allow it." The jury found Bruce guilty and the court imposed a life sentence.

II. The Sufficiency of the Court's Fourth Amendment Ruling

When a criminal defendant moves to suppress evidence on Fourth Amendment grounds, the trial court must first determine whether the defendant has a legitimate expectation of privacy in the searched premises. *See State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988) ("Because appellant cannot make the threshold demonstration of a legitimate expectation of privacy in connection with the searched premises, he is not entitled to launch the constitutional challenge to the search."); *State v. McKnight*, 291 S.C. 110, 114-15, 352 S.E.2d 471, 473 (1987) (stating a defendant who seeks to have evidence suppressed on Fourth Amendment grounds "must establish that his *own* Fourth Amendment rights were violated" by "demonstrat[ing] a legitimate expectation of privacy in connection with the searched premises"). If the trial court finds the defendant had a legitimate

expectation of privacy, it must then determine whether the police violated *his* Fourth Amendment rights. *See, e.g., State v. Missouri*, 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004) (holding defendant had a legitimate expectation of privacy, which entitled him to challenge the search under the Fourth Amendment); *State v. Rivera*, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) ("'Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.'" (quoting *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999))). If the trial court finds the police violated the defendant's own Fourth Amendment rights, it must then determine whether the evidence should be excluded pursuant to the exclusionary rule. *See State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (stating "[s]uppression is appropriate in only a few situations"); *State v. Sachs*, 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975) (stating "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where [the purpose of] deterrence is clearly subserved").

Whether a defendant may challenge a search, whether the police violated a defendant's Fourth Amendment rights, and whether to apply the exclusionary rule are mixed questions of law and fact. *See United States v. Gray*, 491 F.3d 138, 145 (4th Cir. 2007) (stating "the expectation [of privacy] must be one which the law recognizes as legitimate," meaning it "must be objectively reasonable . . . by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (internal quotations and citation omitted)); *State v. Austin*, 306 S.C. 9, 17, 19, 409 S.E.2d 811, 816, 817 (Ct. App. 1991) (stating whether a legitimate expectation of privacy exists "depends on a factual determination" and "is a question of fact"); *State v. Tindall*, 388 S.C. 518, 523 n.5, 698 S.E.2d 203, 206 n.5 (2010) (stating that when addressing a challenge under the Fourth Amendment, an appellate court "must ask first, whether the record supports the trial court's [factual] findings . . . and second, whether these facts support a finding that the officer" did not violate the defendant's Fourth Amendment rights); *United States v. Allen*, 159 F.3d 832, 838 (4th Cir. 1998) (explaining "mixed questions of law and fact are involved" in an inevitable discovery ruling). Unless the trial court makes sufficiently specific factual findings on the record, this court has no basis on which to review those findings or the trial court's legal conclusions. *See generally State v. Blackwell-Selim*, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011) (holding because the trial court failed to make specific findings of fact to support its ruling, "there was nothing for the Court of Appeals to review").

In admitting the evidence of the discovery of Creel's body, the trial court stated, "It appears that this is inevitable discovery." The court's statement suggests it admitted the evidence under the inevitable discovery doctrine, which is an exception to the exclusionary rule. *State v. Jenkins*, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012). However, a trial court has no need to consider whether the exclusionary rule applies until it has first determined the police violated the defendant's Fourth Amendment rights. The record does not indicate the trial court ever made that determination.

Moreover, this does not appear to be a situation in which the inevitable discovery doctrine is properly applied. *See State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (stating evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained *inevitably*" (emphasis added) (quoting *Nix v. Williams*, 467 U.S. 431, 447, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377, 389 (1984))). In this case, the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirements of the doctrine, we may not affirm on that basis. *See Jenkins*, 398 S.C. at 230, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied because State did not present evidence in support of the doctrine and the determination "should not be made by this court on a blank record").

We remand with instructions that the trial court make findings consistent with this opinion. *See Austin*, 306 S.C. at 19, 409 S.E.2d at 817 (remanding for determination of whether the defendant "had a reasonable expectation of privacy" because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); *State v. Richburg*, 250 S.C. 451, 461, 158 S.E.2d 769, 773 (1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); *Jenkins*, 398 S.C. at 230-31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied). If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in

admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

REMANDED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alonza Dennis, Appellant.

Appellate Case No. 2011-192370

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 5111
Heard March 5, 2013 – Filed April 3, 2013

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General Julie Kate Keeney, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: A jury convicted Alonza Dennis of assault and battery with intent to kill (ABWIK) and possession of a firearm during the commission of a violent

crime. He appeals, arguing the trial court erred in (1) admitting testimony that he offered to sell a purportedly stolen gun to buy crack cocaine shortly before the shooting; (2) refusing to charge the jury on assault and battery of a high and aggravated nature (ABHAN); (3) sentencing him to life without parole (LWOP); and (4) admitting his two written statements into evidence. We affirm.

FACTS

On June 22, 2009, Dennis fired five shots at Moses Alford. Three of the bullets struck and injured Alford. Dennis was arrested nearby and charged with trespass. Later, a grand jury indicted him for ABWIK, attempted armed robbery, and possession of a firearm during the commission of a violent crime. He was convicted of ABWIK and the possession charge.

I. The State's Case

The State presented evidence that on the day of the shooting, La Seto "Quan" Gibson, Kaylab Wright, and Trevor Gibbs arranged to meet Alford, a clothing merchant from Georgetown, and buy clothes from him as he traveled through McClellanville. They encountered Dennis at the local Kangaroo convenience store and gave him a ride to Gibson's house. Gibbs testified that although Dennis was quiet when they picked him up, he became angry when they reached Gibson's house. He recalled Dennis producing a revolver and offering to sell it for fifty dollars so he could buy some crack cocaine. After no one agreed to buy the gun, Dennis, overhearing a conversation between Gibson and Alford, suggested robbing Alford.

When Gibson, Wright, and Gibbs departed to meet Alford, they left Dennis behind. However, Gibson's grandfather gave Dennis a ride back to the Kangaroo store. Dennis joined the other men in Gibson's car. After Alford arrived, Gibson suggested they move their meeting to another location in McClellanville. Alford declined. Wright looked through Alford's products, disparaged them, and returned to Gibson's car. While Gibson discussed potential purchases with Alford, Dennis

approached Alford, told him to "give me everything," and shot him. Alford suffered bullet wounds in his arm, leg, and back.[1]

Alford ran toward the store as Wright and Gibbs sped away, leaving Gibson and Dennis behind. Dennis fled on foot across the highway and through the woods to a body shop, then ran through a residential area, chased by a state constable and a K-9 unit until his arrest. Officers detected gunshot residue on his hand and found a gun near where they arrested him. Once in custody, Dennis invoked his right to remain silent. However, he later gave conflicting written statements to the police on June 22 and 29, 2009.

Dennis objected to evidence concerning his statements and testimony purportedly establishing his motive for shooting Alford. He argued Gibbs's testimony was more prejudicial than probative because motive was not an element of the crimes charged, and thus, his motive for shooting Alford was irrelevant. Furthermore, he contended the challenged testimony was irrelevant because no other evidence suggested he was under the influence of drugs, and he was not charged with possessing a stolen gun. Finding Gibbs's testimony established a motive for the shooting and would rebut Dennis's very different account of how he came into possession of the gun, the trial court admitted the testimony into evidence.

II. Dennis's Defense

According to Dennis, on the day of the shooting, he went to the Kangaroo store in the hope of catching a ride to see a friend who lived near Gibson. After arriving at the right road,[2] Dennis began walking toward his destination. As he passed Gibson's house, the men called him over. Gibson and Wright, whom Dennis testified frightened him, were planning a robbery. Despite experiencing misgivings, Dennis did not refuse to participate for fear the men would attack him. After Gibson told Wright "you don't want to use [Dennis]," the men left him at Gibson's house. Dennis then decided to return to the Kangaroo and find a ride home. Gibson's grandfather drove him to the store.

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[1] Alford explained he carried two guns in his car, along with his concealed weapons permit. Suspicious of the men, he had moved one of his guns into the waistband of his pants. He was reaching for his gun when Dennis shot him.

[2] Dennis denied that Gibson, Wright, and Gibbs gave him the ride.

Once at the store, Dennis again saw Gibson and Wright, and they invited him to join them. After he entered their car, he noticed a handgun on the back seat. Gibson and Wright instructed him to pick up the gun. They pulled next to Alford's car, and Dennis, Gibson, and Wright exited the car. With the gun in his pocket, Dennis stood and watched as Gibson and Wright engaged Alford in a discussion about his wares.

Dennis heard Gibson tell Alford, "Give me your clothes and your money." According to Dennis, Alford immediately ran forty to forty-five feet away and pulled up his sweatshirt, exposing his own gun. Seeing Alford reaching for his gun, Dennis stated he "picked up [Gibson's and Wright's gun], took it out, and aimed, pointed, like, with my hand, and fired, to keep him from shooting." Dennis stated he aimed beside Alford and shot in self-defense, intending only to scare Alford. He denied realizing the bullets he had fired had hit Alford.

With regard to the discrepancies between his statements, Dennis explained he had not told the police the whole story at first because he was "scared of being called a snitch," and he knew that snitches got hurt or killed. When he gave the June 29, 2009 statement, he believed the police "kn[e]w everything already," but he was still afraid of Gibson, who by then was in the same jail as Dennis.

III. Jury Matters

After the close of evidence, Dennis requested that the trial court instruct the jury on ABHAN as a lesser-included offense of ABWIK, arguing the shooting occurred "under a heat of passion and sudden provocation" and without malice. The trial court denied his request, agreeing with the State's contention that the use of a gun implied malice. The trial court charged the jury:

> Malice can be inferred from conduct showing a total disregard for human life. . . . If the facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be considered by you along with other evidence of the case, and you may give it the weight you decide it should receive.

The jury convicted Dennis of ABWIK and possessing a firearm during the commission of a violent crime but found him not guilty of attempted armed robbery and the lesser-included offense of attempted strong-arm robbery. After the trial court dismissed the jury, Dennis moved for a new trial on the basis of the failure to charge ABHAN. The trial court denied his motion. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the circuit court unless clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Gibbs's Testimony

Dennis asserts the trial court erred in admitting Gibbs's testimony that Dennis offered to sell a stolen gun to buy crack cocaine shortly before the shooting. We disagree.

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006).

Evidence of other acts may "be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Under the res gestae theory, "evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Owens*, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005); *see also State v. Gilmore*, 396 S.C. 72, 83 n.9, 719 S.E.2d 688, 694 n.9 (Ct. App. 2011)

(discussing the significance of res gestae in South Carolina law and its relation to Rule 404(b)). Our supreme court has adopted the reasoning set forth by the Fourth Circuit Court of Appeals:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context . . . . And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae. As the Court said in *United States v. Roberts*, (6th Cir. 1977) 548 F.2d 665, 667, cert. denied, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232[,] "(t)he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge."

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (internal citations, some quotation marks, and footnotes omitted); *see, e.g.*, *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996).

Nonetheless, evidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quotation marks and citations omitted). "All evidence is

meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403]." *Lee*, 399 S.C. at 529, 732 S.E.2d at 229 (alteration and emphasis in original; quotation marks and citations omitted).

We affirm, finding the trial court did not abuse its discretion in admitting Gibbs's testimony, which established part of the res gestae of the crime. Despite Dennis's impassioned argument on appeal that his motive for shooting Alford was irrelevant to the charges against him, the question "why" pervades the record on appeal. As a result, the challenged evidence was "needed to aid the fact finder in understanding the context in which the crime occurred." *See Owens*, 346 S.C. at 652, 552 S.E.2d at 753. Both the State and Dennis offered the jury explanations for the shooting in their opening statements. According to the State, "Alonza Dennis want[ed] some money, and Alonza Dennis ha[d] a gun to sell to get that money," but when he was unable to sell the gun, he turned to robbery. On the other hand, Dennis painted a very different picture, of a "simple man" who fell in with a band of thieves, then became too "fearful for his life" to run away from the robbery. The parties threaded their respective explanations through their evidence and their closing arguments.

In this case, the challenged testimony "furnishe[d] part of the context of the crime." *See Masters*, 622 F.2d at 86 (citation and quotation marks omitted). The State argued for the admission of Gibbs's testimony on two bases. First, it pointed out the parties disputed whether Dennis brought the gun along or received it from the other men. Second, the State sought to advance its theory of why the four men would rob Alford, namely, that a hyperactive Dennis spearheaded the robbery as a means to get money to buy crack cocaine. Gibbs answered the key questions "how" and "why" in the State's case, just as Dennis answered those same questions in his defense. Accordingly, the trial court did not err in admitting Gibbs's testimony.

II. ABHAN Charge

Next, Dennis asserts the trial court erred in refusing to charge the jury on ABHAN despite his testimony he intended to scare, not shoot, Alford. We disagree.

Generally, "the trial court is required to charge only the current and correct law of South Carolina." *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). To warrant reversal, a trial court's refusal to give a requested jury

instruction "must be both erroneous and prejudicial to the defendant." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). The evidence presented at trial determines the law to be charged to the jury. *Id.* at 261-62, 607 S.E.2d at 95.

"A trial [court] is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986).

ABWIK is "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied," and "comprises all the elements of murder except the death of the victim." *State v. Wilds*, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003) (citations omitted). ABWIK requires at least a general intent to kill, which the jury may infer from "the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm." *State v. Foust*, 325 S.C. 12, 16 n.4, 479 S.E.2d 50, 52 n.4 (1996), citing 41 C.J.S. *Homicide* § 179. "[T]he manner in which the instrument was used, the purpose to be accomplished, and the resulting injuries may also prove intent." *State v. Coleman*, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000).

Under the common law,[3] ABHAN "requires an unlawful act of violent injury accompanied by circumstances of aggravation," which may include "the use of a deadly weapon, the infliction of serious bodily injury, [or] the intent to commit a felony." *Coleman*, 342 S.C. at 176, 536 S.E.2d at 389. "An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill." *Id.* Our supreme court has recognized "the circumstances that give rise to ABHAN may also give rise to an inference of malice. Thus, a defendant may be convicted of ABHAN regardless of whether malice is present." *State v. Fennell*, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000).

[3] ABHAN was codified in South Carolina Code subsection 16-3-600(B)(1) (Supp. 2012) by the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which became effective after the date of the offense in this case. *See* Act No. 273, 2010 S.C. Acts 1947-48, 2038.

We find no evidence adduced at trial "mitigate[s Dennis's] general intent to kill,"[4] and we affirm. As our courts have recognized, the element that distinguishes ABWIK from ABHAN is not malice but an intent to kill. *Id.* at 275, 531 S.E.2d at 517; *State v. Tyler*, 348 S.C. 526, 530-31, 560 S.E.2d 888, 890 (2002); *Coleman*, 342 S.C. at 176, 536 S.E.2d at 389. In convicting an accused of ABWIK, the jury may infer his intent to kill from evidence concerning his use of a deadly weapon "in a manner reasonably calculated to cause death or great bodily harm," his purpose, and the injuries he caused. *Foust*, 325 S.C. at 16 n.4, 479 S.E.2d at 52 n.4.

We find *Coleman* instructive. Coleman entered a restaurant at closing time, pointed his gun at an employee, and demanded money. 342 S.C. at 174, 536 S.E.2d at 388. When the employee did not comply quickly enough, Coleman raised his gun toward the man's head and shot him. *Id.* Coleman later explained to the police that he "got scared and started to run and heard a shot." *Id.* at 175, 536 S.E.2d at 388. Finding no evidence existed to support a charge of ABHAN, this court affirmed the trial court's decision. *Id.* at 178, 536 S.E.2d at 390.

The accused's actions in shooting the victim and the resulting injuries figured prominently in our decision in *Coleman*. We stated, "Coleman's manner in using the weapon – pointing the gun at Victim and then deliberately raising the gun to aim at Victim's head just before he fired – could have only been reasonably calculated to kill or cause great bodily harm to Victim. Moreover, the resulting wound was near-fatal." *Id.* at 177, 536 S.E.2d at 389-90. The same analysis applies here. Although Dennis did not point his gun at Alford's head, he pointed it at Alford, who had run forty to forty-five feet away. No evidence suggested Alford drew his gun before Dennis shot him. All accounts of the shooting confirmed Dennis pointed his gun at Alford, not in the air. Moreover, Dennis fired five shots, wounding Alford in the arm, leg, and back.

Next, we found Coleman's assertion that he "panicked" could not mitigate the general intent to kill he demonstrated by shooting his victim in the head. *Id.* at 177, 536 S.E.2d at 390. Dennis's explanation that he fired at Alford five times to "scare" him is even less convincing as a mitigating factor, particularly in view of

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[4] *See Coleman*, 342 S.C. at 177, 536 S.E.2d at 390 (finding Coleman's assertion that he "panicked," by itself, could not mitigate the general intent to kill he demonstrated when he voluntarily shot his victim in the head).

the fact that three of the shots hit Alford, one of them in the back. Accordingly, we affirm the trial court's refusal to charge ABHAN.[5]

III. Remaining Issues

We affirm the trial court's decisions on Dennis's remaining issues pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the LWOP sentence: *State v. Tennant*, 394 S.C. 5, 17, 714 S.E.2d 297, 303 (2011) ("Statutory interpretation is a question of law."); *State v. Osborne*, 202 S.C. 473, 480, 25 S.E.2d 561, 564 (1943) (reserving questions of law to the trial judge, not the jury); S.C. Code Ann. §§ 16-3-651(h), -655(A) (2003 & Supp. 2012) (stating a person who engages in sexual intercourse "with a victim who is less than eleven years of age" commits first-degree criminal sexual conduct with a minor); S.C. Code Ann. § 17-25-45 (Supp. 2012) (requiring that a person convicted of a most serious offense receive a sentence of LWOP (1) if he already has one or more prior convictions for a most serious offense or an "out-of-state conviction for an offense that would be classified as a most serious offense" in South Carolina or (2) if he already has two or more prior convictions for serious offenses, and classifying ABWIK and criminal sexual conduct with a minor as most serious offenses).

2. As to the admission of Dennis's June 22, 2009 statement: *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630 (1966) (describing the procedural safeguards law enforcement must employ to ensure an accused receives notice of his rights and to ensure the exercise of his right to remain silent "will be scrupulously honored"); *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 326 (1975) (predicating "the admissibility of statements obtained after the person in

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[5] Complicating both the trial court's and this court's evaluation of this issue is Dennis's improper argument for an ABHAN charge because the shooting "occurred under a heat of passion and sudden provocation." Our courts have repeatedly held the elements of ABHAN do not include action in the heat of passion upon sufficient legal provocation, and to insert that language creates a confusing and improper analogy to voluntary manslaughter. *State v. Heyward*, 350 S.C. 153, 157, 564 S.E.2d 379, 381 (Ct. App. 2002); *accord State v. Pilgrim*, 320 S.C. 409, 416, 465 S.E.2d 108, 112 (Ct. App. 1995), *aff'd as modified*, 326 S.C. 24, 482 S.E.2d 562 (1997).

custody has decided to remain silent . . . under Miranda on whether his right to cut off questioning was scrupulously honored" (quotation marks omitted)); *State v. Benjamin*, 345 S.C. 470, 476-77, 549 S.E.2d 258, 261 (2001) (adopting the five *Mosley* factors for determining whether law enforcement scrupulously honored an accused's right to terminate questioning, and finding those "factors are not exclusively controlling" but, rather, "provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored").

3. As to the admission of Dennis's June 29, 2009 statement, which Dennis claimed was coerced: *State v. Corley*, 318 S.C. 260, 263, 457 S.E.2d 1, 3 (Ct. App. 1995) (noting "an issue raised to but not ruled on by the trial court is not preserved for review" (citing *Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986)).

CONCLUSION

We find Gibbs's testimony provided part of the context of Dennis's shooting of Alford. As a result, we find the testimony was both relevant and admissible under the res gestae theory. Moreover, we find Dennis suffered no unfair prejudice from its admission. Therefore, the trial court did not abuse its discretion in admitting Gibbs's testimony.

Next, we find the evidence shows Dennis demonstrated a general intent to kill when he fired the gun five times at Alford, hitting him three times. We further find Dennis presented no evidence to reduce, mitigate, excuse, or justify the shooting. Consequently, the trial court did not err in refusing to charge ABHAN.

Finally, we affirm the trial court's decisions concerning Dennis's remaining issues in accordance with the authorities identified above.

AFFIRMED.

FEW, C.J., GEATHERS, J., and CURETON, A.J., concur.