The Supreme Court of South Carolina

In the Matter of
Fred Smith Reynolds, Jr., Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Fred Smith Reynolds, Jr., passed away on October 18, 2006, and requesting appointment of an attorney to protect Mr. Reynolds' clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

account(s), and any other law office account(s) Mr. Reynolds maintained 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 Mr. Reynolds, shall serve as notice to the bank or other financial institution that Martin Foster, 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 Martin Foster, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Reynolds' mail and the authority to direct that Mr. Reynolds' mail be delivered to Mr. Foster'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

December 10, 2007

The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2006) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2007, the first edition after January 1, 2007, listed the prime rate as 8.25%. Therefore, for the period January 15, 2007, through January 14, 2008, the legal rate of interest for judgments and money decrees is 12.25% compounded annually.

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

Columbia, South Carolina
January 11, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF THOMAS D. BROADWATER, PETITIONER

On June 12, 2000, Petitioner was definitely suspended from the practice of law for two years. In the Matter of Broadwater, 341 S.C. 101, 533 S.E.2d 589 (2000). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than March 13, 2007.

Columbia, South Carolina

January 12, 2007

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2

January 16, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Rhoad, Appellant,

v.

The State, Respondent.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4195
Submitted November 1, 2006 – Filed January 16, 2007

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

BEATTY, J.: David Rhoad appeals the post-conviction relief (PCR) judge's decision to hold him in contempt. We affirm.[1]

FACTS

Rhoad was convicted of DUI and criminal domestic violence of a high and aggravated nature (CDVHAN) and sentenced to five years imprisonment. Rhoad filed a PCR application, but he informed the PCR judge on the day of the hearing that he wished to withdraw his application. After the judge accepted his withdrawal, Rhoad made an obscene gesture to his trial counsel before leaving the courtroom.

Rhoad was brought back into the courtroom and questioned about his actions. Rhoad first admitted he "might have flipped [trial counsel] off," but then he denied that he did it. The judge took testimony from witnesses in the courtroom to confirm that Rhoad had in fact made an obscene gesture. Rhoad then informed the judge of his frustration with his trial counsel, and he apologized to trial counsel and the judge. The judge held Rhoad in contempt and sentenced him to one year imprisonment consecutive to his current sentence. Rhoad then exclaimed to the judge, "F**k you, you bastard." The judge held Rhoad in contempt for that statement and sentenced him to another year consecutive to Rhoad's current sentence.

On his way out of the courtroom, Rhoad apparently fought with the deputies, and he was brought back in to be chastised by the judge. Although Rhoad denied that he was fighting with the deputies, the judge warned him that he would receive "another year" if Rhoad raised his voice again. Despite ordering two consecutive, one-year sentences for contempt at the hearing, the orders signed by the judge imposed two, six-month sentences for contempt

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

on Rhoad to be served consecutively to his prior sentences and consecutively to each other. This appeal followed.

STANDARD OF REVIEW

A determination of contempt ordinarily resides in the sound discretion of the trial court. Whetstone v. Whetstone, 309 S.C. 227, 233, 420 S.E.2d 877, 880-81 (Ct. App. 1992). "This court will reverse a trial court's decision regarding contempt only if it is without evidentiary support or is an abuse of discretion. An abuse of discretion can occur where the trial court's ruling is based on an error of law." First Union Nat'l Bank v. First Citizens Bank & Trust Co. of South Carolina, 346 S.C. 462, 466, 551 S.E.2d 301, 303 (Ct. App. 2001) (citations omitted).

LAW/ANALYSIS

I. Finding of Contempt

Rhoad argues the judge erred in holding him in contempt for "gesturing" at trial counsel as he walked out of the courtroom because: he apologized; his "juvenile" conduct was not disruptive; the gesture was not directed at the court; and he was not previously warned that such conduct would be considered contemptuous.[2] We disagree.

Inherent in all courts is the power to punish for contempt to preserve order and maintain decorum in judicial proceedings. In re Diggs, 344 S.C. 434, 434, 544 S.E.2d 632, 632 (2001); Stone v. Reddix-Smalls, 295 S.C. 514,

[2] Rhoad does not complain about the finding of contempt for his profane outburst and admits in his brief that the outburst constituted classic contempt. It is interesting to note that the gesture Rhoad used is commonly understood to have the same meaning as the words he used in his profane outburst. In any event, because Rhoad failed to appeal the finding of contempt for the profane outburst, it is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

516, 369 S.E.2d 840, 841 (1988) ("The court's power includes the ability to maintain order and decorum."). Contemptuous conduct in the presence of the court is direct contempt. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006); State v. Kennerly, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). "A person may be found guilty of direct contempt if his conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers parties or witnesses." State v. Havelka, 285 S.C. 388, 389, 330 S.E.2d 288, 288 (1985). "Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily." Brandt, 368 S.C. at 628, 630 S.E.2d at 264. South Carolina courts have taken an expansive view of the "presence" and "court" requirements to encompass all elements of the judicial system, not just the mere physical presence of the judge or courtroom. Kennerly, 337 S.C. at 620, 524 S.E.2d at 838.

There is sufficient evidence in the record to support the judge's finding of contempt for Rhoad's gesture. Regardless of whether Rhoad's hearing had concluded, Rhoad failed to show proper decorum in the courtroom and exhibited a disrespect for the court so inherent that no warning of possible contempt was necessary. It is irrelevant that the obscene gesture was not directed at the judge. Despite Rhoad's argument that the "juvenile" gesture was not disruptive, the gesture interrupted courtroom proceedings and necessitated a hearing to address his actions. Further, Rhoad's post-gesture apology did not change the fact that he failed to act with proper decorum in the presence of the judge. Because there was sufficient evidence to support the judge's finding of contempt for Rhoad's use of an obscene gesture, we find the judge did not abuse his discretion.

II. Entitlement to a Jury Trial

Rhoad argues that his two, one-year consecutive sentences for contempt should be vacated because he was entitled to a jury trial pursuant to Codispoti v. Pennsylvania, 418 U.S. 506 (1974). We disagree.

An accused is guaranteed the right of a speedy trial via the Sixth and Fourteenth Amendments to the Constitution. Codispoti, 418 U.S. at 511. Petty crimes can generally be tried without a jury trial, but serious crimes

require a jury trial if the accused requests one. Id.; Bloom v. Illinois, 391 U.S. 194, 209-10 (1968). Courts normally look to the maximum punishment assigned by the legislature in determining whether a sentence is serious or petty. Lewis v. United States, 518 U.S. 322, 326 (1996). Crimes with punishments of six months or less are presumably "petty," while crimes with punishments greater than six months are presumably "serious." Id.

Where the legislature fails to assign a maximum penalty, courts look to the "severity of the penalty actually imposed as the measure of the character of the particular offense." Lewis, 518 U.S. at 328; Codispoti, 418 U.S. at 511. In noting the special concerns raised by criminal contempt matters, the Supreme Court has further noted that a jury trial is favorable in order to avoid the likelihood of arbitrary action by a judge in the potentially heated contempt context. Lewis, 518 U.S. at 329. Nevertheless, a contemnor may be tried without a jury under certain circumstances, as long as the sentence imposed is no longer than six months. Codispoti, 418 U.S. at 514 ("Undoubtedly, where the necessity of circumstances warrants, a contemnor may be summarily tried for an act of contempt during trial and punished by a term of no more than six months.").

The South Carolina General Assembly has not assigned a maximum penalty for contempt in circuit court cases. See S.C. Code Ann. § 14-5-320 (1976) ("The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same."); S.C. Code Ann. § 17-25-30 (2003) ("In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution."). Because the legislature has not imposed a maximum sentence on contempt, we look to the sentence Rhoad actually received to determine whether it could be characterized as "petty" or "serious." Although Rhoad complains about the two, one-year consecutive sentences that were orally pronounced at the contempt hearing, the judge's final order actually imposed two consecutive sentences of six months. The two consecutive six-month sentences are the equivalent of a one-year sentence. Thus, the sentences were such that would normally entitle a defendant to a

jury trial if he or she requested one. See Codispoti, 418 U.S. at 516-17 (looking to the sentence actually imposed, the Supreme Court held that because the defendant's consecutive, six-month sentences on seven counts of contempt amounted to a sentence of greater than three years, he was tried for the equivalent of a serious offense and was entitled to a jury trial).

Nevertheless, we must affirm. Rhoad cites Codispoti in arguing he was entitled to a jury trial. However, the defendant in Codispoti requested, and was denied, a jury trial on his contempt charges. Codispoti, 418 U.S. at 507-08. Rhoad never requested a jury trial, and he never objected to the imposition of the contempt sentences without a jury trial. Because Rhoad failed to request a jury trial and failed to object to the length of his sentence, this issue is not preserved for appellate review. State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (holding that a sentence which exceeds the maximum allowable is not a question of subject matter jurisdiction; thus, unless an objection was made to the sentence at trial, the issue is not preserved for review); State v. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (holding that issues not raised to or ruled upon by the trial judge are not preserved for appellate review).

Thus, although there may be merit to the question of whether Rhoad was entitled to a jury trial, Rhoad was obligated to bring that issue to the attention of the judge. Because he failed to do so, we may not address it. State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 283 (Ct. App. 2005) (holding that despite the fact that the defendant was sentenced to greater than six months for contempt without the benefit of a jury trial, defendant failed to object to the sentence and the issue was not preserved for appellate review), cert. denied (Sept. 7, 2006).[3]

[3] We also note Rhoad complains that the oral sentences of one year on each count of contempt were unconstitutional and that the court erred by reducing them. Judges are not bound by oral rulings and are free to issue written orders in conflict with prior oral rulings. First Union Nat'l Bank of S.C. v. Hitman, Inc., 308 S.C. 421, 422, 418 S.E.2d 545, 545 (1992). Until an order is written and entered, the judge is free to change his mind and amend prior rulings. Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains the discretion to

CONCLUSION

The PCR judge did not abuse his discretion in holding Rhoad in contempt for making an obscene gesture at trial counsel at the end of the PCR hearing. Rhoad did not appeal the finding of contempt for the profane outburst directed at the judge, and it is the law of the case. Although Rhoad was entitled to a jury trial where the aggregate of his sentences for contempt exceeded six months, he did not request a jury trial nor did he object, and thus, that issue is not preserved for our review.

Accordingly, Rhoad's convictions and sentences for contempt are

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

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change his mind and amend his oral ruling accordingly."). Because the final sentence imposed on each count of contempt was six months, there is no factual basis to support Rhoad's complaint regarding the consecutive one-year sentences. Even if Rhoad's argument could be construed as a complaint that the two consecutive six-month sentences were unconstitutional, we have previously found Rhoad's failure to request a jury trial or to object to the sentence rendered this argument not preserved for appellate review. Passmore, 363 S.C. at 586, 611 S.E.2d at 283.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Gary A. White. **Appellant.**

Appeal from Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 4196
Submitted January 1, 2007 – Filed January 16, 2007

AFFIRMED

Assistant Appellant Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: Gary A. White appeals his convictions for kidnapping and two counts of armed robbery on the grounds: (1) the trial court erred in admitting the testimony of State's expert witness, a dog handler, without establishing the underlying scientific reliability of dog tracking; and (2) newly discovered evidence entitles White to a new trial. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of April 19, 2004, two men entered the Circle K Convenience Store on the corner of Garners Ferry Road and Old Woodlands Road in Columbia, South Carolina, where the store manager, Gwen Anthony (Anthony), was working the night shift. One of the men, Gary White (White), wore a mask and carried a gun. White approached Anthony, grasped her around her neck with his arm, and held the gun to her head. The other man removed items from Anthony's purse, emptied cash out of the register, and took lottery tickets along with an eighteen (18)-count case of beer. White held Anthony with the gun to her head the entire time the other man moved through the store taking items. However, at one point, Anthony suspected White had passed out for a few seconds, because his head fell onto her shoulder and the gun dropped. She smelled alcohol on his breath. While White dozed, Anthony had an opportunity to observe his clothes and to see the gun. The other man shouted at him and White awoke. As they exited the store, White forced Anthony outside, still holding her in his grip with the gun to her head.

White released Anthony and fled toward the east side of the store, following the other perpetrator in the direction of Old Woodlands Road. At the same time, Officer Rouppasong drove into the Circle K parking lot, and Anthony alerted him to the fleeing robbers. Officer Rouppasong saw one suspect running from the parking lot, pursued him, and called for back up. Following the suspect around the corner of the store, Rouppasong observed a parked vehicle with the headlights on. The suspect he had seen running from

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

the parking lot exited the car from the passenger side and ran into the neighborhood; the driver remained in the vehicle. When his backup arrived Rouppasong approached the vehicle, apprehended the driver, and secured the car. Items that were stolen from Anthony and the Circle K were found in the vehicle.

Back-up officers, including Officer Gunter of the K9 unit, arrived within several minutes. Gunter began tracking with his dog approximately thirty minutes after the officers set up the perimeter. The tracking started from the location where the suspect ran from the passenger side of the vehicle and ended with the discovery of the suspect lying on the ground under some bushes. The suspect was holding a gun but appeared to be asleep.

The State moved to have Gunter qualified as an expert in K9 tracking. Gunter testified he was a Senior Master K9 Handler, which is the highest level of K9 handling that can be acquired. Aurie, Gunter's dog, is a German shepherd descended from a working bloodline of known police and military dogs. Gunter stated he trained with Aurie weekly, and they had probably run a total of 750 tracks throughout the dog's career. Yearly, they met the standards to qualify with the American Association of K9 Trainers. Gunter had been with the K9 unit for approximately fourteen years, and Aurie had been with Gunter for eight years, since he was a six-month-old puppy. The dog's training was primarily for tracking lost or missing people, rather than for sniffing for drugs or other contraband.

Gunter confirmed he had been qualified previously as an expert witness in Richland County. He professed that Aurie was very reliable. The trial court found Gunter qualified as an expert in the field of K9 tracking and handling and instructed the jury that Gunter could offer opinions in his areas of expertise**.** White objected to admission of dog tracking evidence on the ground it did not meet standards set forth in State v. Jones concerning scientific evidence, and it was not reliable, relevant, and helpful to the jury.

The jury found White guilty of the kidnapping and two armed robbery charges. White then moved for a new trial on the ground the dog tracking testimony did not meet the reliability standard required. The court denied the

motion, finding Gunter's testimony admissible. White was sentenced to concurrent terms of life imprisonment without parole.

During the pendency of this appeal, witness Anthony Morris issued a written statement retracting his trial testimony. Subsequently, White moved for a new trial or, alternatively, for remand to the trial court for a hearing on newly discovered evidence. This court denied White's motion.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 1, 545 S.E.2d at 827; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v.

Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law."). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 363 S.C. at 26, 609 S.E.2d at 509; Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001).

LAW/ANALYSIS

I. Admission of Expert Testimony

White contends the trial court erred in admitting the State's expert witness testimony about dog tracking without requiring the State to establish the underlying reliability of dog tracking as a scientific or technical field. We disagree.

A. Qualification of Expert Witness

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Harris, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995); see also Prince v. Associated Petroleum Carriers, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974) ("Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters resting largely in the discretion of the trial judge."). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004); Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); see also Jenkins v. E.L. Long Motor Lines, Inc., 233 S.C. 87, 94, 103

S.E.2d 523, 527 (1958) ("It was for the trial [c]ourt to say whether the inquiry was one upon which expert testimony was proper, and its ruling thereon will not be disturbed unless its [sic] appears that there has been an abuse of discretion.").

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005); Fields, 363 S.C. at 26, 609 S.E.2d at 509; Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

State v. Council inculcates the Bench and Bar as to the law extant in regard to admission of scientific evidence and expert testimony. 335 S.C. 1, 515 S.E.2d 508 (1999). In 1993, the United States Supreme Court adopted new parameters for admissibility of expert testimony under Rules 702 and 703 in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). The Daubert court declared:

> Before scientific evidence is admitted, the trial judge must determine the evidence is relevant, reliable and helpful to the jury. The Court suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique.

Council, 335 S.C. at 19, 515 S.E.2d at 518 (citing Daubert, 509 U.S. at 579, 113 S. Ct. at 2786, 125 L.Ed.2d at 469). If the evidence is reliable and relevant, the trial judge should determine if the probative value of the evidence is outweighed by its prejudicial effect. Id. Accordingly, the South Carolina Supreme Court instructed that "[w]hile this Court does not adopt Daubert, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE." Council, 335 S.C. at 20, 515 S.E.2d at 518.

Rule 702, SCRE, articulates the guidelines for admissibility of expert testimony in South Carolina. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825; Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003); see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be considered competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.' "). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go

to the weight to be accorded the expert's testimony and not to its admissibility. Id.; see also Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) ("Any defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony.").

The admissibility of scientific evidence is dependent on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citing People v. Marx, 54 Cal. App. 3d 100 (1975). This standard is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). In considering the admissibility of scientific evidence under the Jones standard, the court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. at 19, 515 S.E.2d at 517 (citing State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

However, not all expert testimony is subject to a Jones analysis. State v. Douglas, 367 S.C. 498, 510, 626 S.E.2d 59, 65 (Ct. App. 2006) (citing State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). In Whaley, the court distinguished an expert's testimony that explained certain human behaviors from "'scientific' evidence, such as DNA test results, blood spatter interpretation, and bite mark comparisons." Whaley, 305 S.C. at 142, 406 S.E.2d at 371. The expert's testimony in Whaley was not based on a scientific technique, but on his knowledge, skill, experience, and training as a psychologist. The court emphasized: "[w]here the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification, we see no reason to require a greater foundation." Id. at 142, 406 S.E.2d at 371-72. Therefore, "[i]f the expert's opinion does not fall within Jones, questions about the reliability of an expert's methods go only to the weight, but not admissibility,

of the testimony." Morgan, 326 S.C. at 513, 485 S.E.2d at 118. A trial court's threshold inquiry is whether the expert's methods and techniques even fall within Jones' central purpose: to prevent the aura of infallibility which surrounds "scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom" from misleading the fact finders. Id. (citing Jones, 273 S.C. at 731, 259 S.E.2d at 124).

B. Recognized Areas of Expertise in South Carolina

South Carolina recognizes many areas in which an expert "has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." Douglas, 367 S.C. at 510-11, 626 S.E.2d at 65 (quoting State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) and citing Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001); Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)).

The significance of expert testimony in assisting or guiding the trier of fact in criminal cases is well established. See, e.g., Douglas, 367 S.C. at 511, 626 S.E.2d at 66 (citing State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (clarifying that while police officer may testify as expert in crime scene processing and fingerprint identification, he may not testify to ultimate issue as to whether defendant acted in self-defense); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court's decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (finding eyewitness identification expert qualified); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990) (allowing expert in blood spatter interpretation to testify).

South Carolina courts have repeatedly acknowledged dog handling as an area of expertise in the criminal context. "Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into evidence." State v. Johnson, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991). A foundation for the admission of dog tracking evidence is sufficient if it provides evidence as to (1) the extent of the handler's experience and training; (2) the dog's characteristics of scent acuity and power to discriminate between human and other scents; and (3) the handler's assessment of the dog's reliability. See State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) (qualifying a bloodhound handler as an expert witness based on the handler's experience and the scent dog's ability and reliability); see also State v. Jordan, 258 S.C. 340, 346, 188 S.E.2d 780, 784 (1972) ("[A] ppellant concedes that the action of bloodhounds which were placed on the supposed track of the offender is admissible as evidence provided that the dogs are allowed to follow their instincts free and untrampled by their handlers."); State v. Bostick, 253 S.C. 205, 207-08, 169 S.E.2d 608, 609 (1969) (finding challenge to dog handler's testimony on bloodhounds' conduct on the ground it "violated appellant's right to be confronted by the witnesses against him" was without merit; the handler was the witness, not the dog.); State v. Brown, 103 S.C. 437, 88 S.E. 21, (1916) (instructing that the conduct of dogs is only a circumstance to be weighed with other circumstances).

C. Other Jurisdictions

1. Admissibility of Dog Tracking Evidence

The North Carolina Supreme Court articulated the foundational requirements adopted in majority of jurisdictions for the admission of dog tracking evidence in State v. Taylor, 337 N.C. 597 (1994). The court announced evidence of bloodhounds' actions was admissible when:

> (1) they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) . . . they possess these qualities, and have been accustomed and trained to pursue the human track; (3) . . . they have been found by

> experience reliable in such pursuit; [and] (4) . . . they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

Id. at 609. Though foundational requirements vary somewhat among jurisdictions, an overwhelming number allow admission of dog tracking evidence in a criminal case to prove identity. State v. Cole, 695 A.2d 1180 (Me. 1997); accord Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003); Wilkie v. State, 715 P.2d 1199 (Alaska Ct. App. 1986); State v. Coleman, 593 P.2d 684 (Ariz. Ct. App. 1978), aff'd in part, reversed in part by State v. Coleman, 593 P.2d 653 (Ariz. 1979); Fox v. State, 246 S.W. 863 (Ark. 1923); People v. Malgren, 139 Cal. App. 3d 234 (Cal. Ct. App. 1983); Brooks v. People, 975 P.2d 1105 (Colo. 1999), as modified on denial of reh'g, (Apr. 12, 1999); State v. Esposito, 670 A.2d 301 (Conn. 1996); Cook v. State, 374 A.2d 264 (Del. 1977); Starkes v. United States, 427 A.2d 437 (D.C. 1981); McCray v. State, 915 So. 2d 239, (Fla. Dist. Ct. App. 2005); Bogan v. State, 303 S.E.2d 48 (Ga. Ct. App.1983); State v. Streeper, 747 P.2d 71 (Idaho 1987); State v. Buller, 517 N.W.2d 711 (Iowa 1994); State v. Brown, 973 P.2d 773 (Kan. 1999); Brummett v. Commonwealth, 92 S.W.2d 787 (Ky. 1936); State v. King, 80 So. 615 (La. 1919); Roberts v. State, 469 A.2d 442 (Md. 1983); Com. v. Hill, 147, 751 N.E.2d 446 (Mass. App. Ct. 2001); People v. Harper, 204 N.W.2d 263 (Mich. Ct. App. 1972); McDuffie v. State, 482 N.W.2d 234 (Minn. Ct. App. 1992); Byrom v. State, 863 So. 2d 836 (Miss. 2003); State v. Thomas, 536 S.W.2d 529 (Mo. Ct. App. 1976); State v. Taylor, 395 A.2d 505 (N.H. 1978); State v. Parton, 597 A.2d 1088 (N.J. Super. Ct. App. Div. 1991); People v. Roraback, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997); State v. Iverson, 187 N.W.2d 1 (N.D. 1971); State v. Neeley, 758 N.E.2d 745 (Ohio Ct. App. 2001); Buck v. State, 138 P.2d 115 (Okla. Crim. App. 1943); State v. Harris, 547 P.2d 1394 (Or. Ct. App. 1976) overruled on other grounds; Com. v. Patterson, 572 A.2d 1258 (Pa. Super. Ct. 1990); State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995); Johnson v. State, 673 S.W.2d 203 (Tex. App. 1984); State v. Bourassa, 399 A.2d 507 (Vt. 1979); Pelletier v. Com., 592 S.E.2d 382 (Va. Ct. App. 2004); State v. Nicholas, 663 P.2d 1356 (Wash. Ct. App. 1983); State v. Broughton, 470 S.E.2d 413 (W. Va. 1996).

Most jurisdictions find a sufficient foundation for the admission of dog-tracking evidence is established if (1) the evidence shows the dog was of a breed characterized by an acute power of scent; (2) the dog was trained to follow a trail by scent; (3) by experience the dog was found to be reliable; (4) the dog was placed on the trail where the defendant was known to have been within a reasonable time; and (5) the trail was not otherwise contaminated. See Jay M. Zitter, Annotation, Evidence of Trailing by Dogs in Criminal Cases, 81 A.L.R.5th 563 (2006). However, many jurisdictions regard dog tracking evidence alone as legally insufficient and require corroborating evidence to prove identification. See, e.g., People v. Gonzales, 267 Cal. Rptr. 138, 142 (Cal. Ct. App. 1990) ("a conviction cannot rest on dog tracking evidence alone"); People v. Stone, 491 N.W.2d 628, 630 (Mich. Ct. App. 1992) ("Tracking-dog evidence is admissible only after certain foundational requirements are met. In addition, there must be other corroborating evidence presented before identification based on tracking-dog evidence is sufficient to support a guilty verdict.") State v. Loucks, 656 P.2d 480, 482 (Wash. 1983) ("The dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime."). Additionally, a number of jurisdictions require the trial court to instruct the jury to view dog tracking evidence with caution. See People v. Gangler, 643 N.Y.S.2d 839, 840 (N.Y. App. Div. 1996) ("[T]racking evidence is admissible on the issue of identity if the proper foundation is laid and if the jury is given cautionary instructions."); accord Wilkie v. State, 715 P.2d 1199, n. 3 (Alaska Ct. App. 1986); People v. McMillen, 336 N.W.2d 895 (Mich. 1983); State v. Taylor, 395 A.2d 505 (N.H. 1978).

Several jurisdictions find dog tracking evidence inadmissible under any circumstances. See People v. McDonald, 749 N.E.2d 1066 (Ill. App. Ct. 2001); Brafford v. State, 516 N.E.2d 45 (Ind. 1987); State v. Storm, 238 P.2d 1161 (Mont. 1951); Brott v. State, 97 N.W. 593 (Neb. 1903). These courts object to dog tracking evidence on the following grounds: (1) the actions of the bloodhounds are unreliable; (2) the evidence constitutes hearsay; (3) the defendant is deprived of his constitutional right to confront the witnesses against him; (4) the defendant should not be placed in jeopardy by the actions of an animal; (5) a defendant cannot cross-examine the dogs; and (6) a jury might be awed by such testimony and give it much greater weight and

importance than warranted. People v. Centolella, 305 N.Y.S.2d 279, 281-82 (N.Y. Cty. Cl. 1969). In response to these arguments, the Centolella court explained:

> [S]uch evidence falls into the category of opinion evidence rather than hearsay . . . the animals are not witnesses against a defendant any more than is a microscope or a spectrograph . . . these machines are not subject to cross–examination any more than the animal, and . . . a person is no more placed in jeopardy by the action of an animal than he or she is by a breath analyzer or a blood test.

Id. The court added the alleged undue importance a jury might attribute to the animal evidence can be minimized by cautionary instructions from the trial judge. Id.

2. Scientific Evidence versus Experience-Based Knowledge

In applying standards for admissibility, a number of courts differentiate between a dog handler's expert opinion based on experience-based knowledge and an expert opinion based on scientific evidence that requires a Daubert analysis. The Virginia Appellate Court held empirical evidence provided by a K9 officer sufficiently established a dog's reliability without requiring evidence of a scientific basis for the dog's ability to track a scent. Pelletier v. Com., 592 S.E.2d 382, 388 (Va. Ct. App. 2004). The court emphasized: "An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond common intelligence and ordinary experience." Id. For instance, "the typical police officer qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion." Id.

The Colorado Supreme Court ruled "dog scent trailing evidence" was admissible" if foundational requirements were satisfied, and "neither the Frye nor Daubert standards of general acceptance or scientific reliability applied." Brooks v. People, 975 P.2d 1105, 1111 (Colo. 1999). Distinguishing between scientific knowledge based on the scientific method and experience-

based, specialized knowledge, the court declined to apply factors designed to ascertain scientific validity in analyzing dog tracking evidence. Id. at 1113. "[W]e hold that testimony pertaining to scent tracking by a trained police dog is not readily subjected to standards which were not designed with experience-based specialized knowledge in mind." Id. at 1115. The court further reasoned the proper analysis of reliability in dog tracking cases was based on Rule 702 of the Colorado Rules of Evidence (CRE) admissibility standards.

In State v. Bourassa, 399 A.2d 507 (Vt. 1979), the Vermont Supreme Court dismissed a defendant's contention that dog tracking testimony was inadmissible because the scientific principles underlying such testimony were not established in the record. The court held evidence in the record was sufficient to find that a "well trained dog, supervised by an experienced handler and working under reasonable conditions, is capable of trailing a human being accurately." Id. at 510. Agreeing with the majority of jurisdictions, the court concluded the foundation sufficiently established that: (1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate that the accused had been; and (4) the trail had not become so stale or contaminated that it was beyond the dog's tracking capabilities. Id. at 511; accord Reisch v. State, 628 A.2d 84 (Del. 1993) (deciding scientific testing not required to support evidence obtained by a dog if foundational requirements are met); People v. Roraback, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997) (holding the use of a trained dog is an investigative rather than scientific procedure); Winston v. State, 78 S.W.3d 522, 526 (Tex. Ct. App. 2002) (finding interpretation of a dog's reaction to a scent lineup is based upon training and experience, and not on scientific methodology).

D. The Extant Factual Record

The underlying rationale in Pelletier, Brooks, and Bourassa comports with our Supreme Court's analysis in State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The Whaley court's distinction between scientific evidence requiring a Jones analysis and expert testimony based on specialized knowledge and experience is equally applicable in the instant case.

Gunter's testimony established the proper foundation under State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) for admitting his opinion as to the reliability of dog tracking evidence. The officer had been with the Columbia Police Department for nearly fourteen years, working as a K9 handler and trainer. He had attained the rank of Senior Master K9 Handler and assisted with the training of other K9 handlers and dogs in the department. Initially, Gunter trained with the Columbia Police Department in 1991. He holds a membership in the American Association of K9 Trainers and maintains his certification by attending week-long training sessions annually. Additionally, while his dog, Aurie, was in service, he trained weekly with the K9 unit of the Columbia Police Department. Gunter's partnership with Aurie lasted over seven years, the entire duration of the dog's career. During that time the team engaged in approximately 750 tracking excursions.

Gunter opined that Aurie was "very reliable." The dog was a German shepherd, who had descended from a bloodline of known police and military working dogs. He was certified in tracking, article searches, building searches, protection, and obedience. However, Gunter emphasized Aurie's strongest skill was tracking people.

White advanced his objection to the admission of the dog tracking evidence on the ground it was not scientifically reliable and did not meet the standards set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979) concerning scientific evidence. Addressing White's challenge outside of the jury's presence, the trial judge explained:

> The Court: Well, you know, not all expert testimony deals with scientific evidence.
>
> White's Counsel: Yes, sir. We do understand but we do feel that if they are using it, they are qualifying his as an expert if he—the evidence should meet the standards of scientific evidence, your honor.

The Court: Well, even if it's not a scientific evidence that they are offering?

White's Counsel: Your Honor, any evidence he is offering as an expert—

The Court: Well, expert is scientific, technical, or other specialized knowledge. Doesn't have to be scientific or technical.

Accordingly, the trial court ruled Gunter could offer his opinion testimony as to the reliability of what tracking dogs do provided the State laid the proper foundation. Based on testimony about the extent of Gunter's training and experience, Aurie's acuity and skill in tracking human scent, and Gunter's assessment of Aurie's reliability, the trial court instructed the jury:

> I'm going to find the officer qualified as an expert in the field of K9 tracking and handling with respect to his dog and the dogs in general. Ladies and gentlemen, if scientific, technical, or other specialized knowledge will assist you, the trier of fact, in understanding any issue that is—any fact that's in issue or any evidence that may be an issue, then a person who is qualified by virtue of his or her knowledge, skill, experience, training or education may be qualified as an expert in that particular field.
>
> I'm going to find the officer to be qualified as I said in the area of animal or dog tracking and handling, and as such he can offer opinions in his area of expertise.
>
> Now, you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial.

Gunter's testimony verified he had acquired, by training and experience, such knowledge and skill in the area of dog handling and tracking that rendered him better qualified than the jury to form an opinion on the particular subject of dog tracking. Furthermore, Gunter's testimony was

based on his specialized knowledge, skill, and experience in the use of a scent-tracking dog, rather than on the validity of dog tracking as a scientific procedure. The nature of Gunter's testimony is analogous to that offered by a typical police officer who qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion. As such, the evidence Gunter provided complies with Rule 702, SCRE by helping the jury understand the evidence or resolve a factual issue. As the Whaley court indicated, when a proper foundation is established, a Jones analysis is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques. See State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Furthermore, the trial court cautioned the jury that questions about the reliability of Gunter's methods go only to the weight of his testimony, not the admissibility. See State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997).

E. Harmless Error

Though we discern no error in the trial court's qualification of Gunter as an expert witness, the admission of his opinion testimony, if error, was harmless. Pursuant to Rule 103, SCRE, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."

No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004)). Whether an error is harmless depends on the particular facts of each case, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

> otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002) (holding assistant solicitor's improper comment, during closing argument was harmless error, where evidence of guilt was overwhelming) overruled on other grounds; State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this court will not set aside conviction for insubstantial errors not affecting result).

Ample evidence linked White to the crimes charged. The testimonies of the victim, Gwen Anthony, and co-defendant, Anthony Morris, were corroborated by a surveillance videotape that recorded the crime as it unfolded. In addition, Roy Wiggins, the driver of the escape car, testified

against White. Items taken from the crime scene were located in the escape vehicle. Officer Rouppasong witnessed a man carrying something in his hand and wearing dark jeans and a white shirt run from the Circle K parking lot. In pursuit, the officer lost sight of the man briefly and then came upon the escape car. The same man wearing the dark jeans and white shirt ran from the escape car toward the yard of the residence where White was eventually found. Gunter put his tracking dog on the scent at the location where the man exited the vehicle. The area in which the dog began tracking had been secured in order to preserve evidence. The dog's tracks led to the location where White was discovered. He appeared to be asleep and was clutching a gun in his hand. The gun matched Anthony's description of the weapon the robber carried, and both Morris and Wiggins positively identified it as the gun White had in his possession immediately prior to the robbery.

The evidentiary record reflects other substantial evidence of White's guilt without the inclusion of Gunter's testimony. Consequently, the admission of the dog tracking evidence was cumulative and harmless.

II. Newly Discovered Evidence

White claims newly discovered evidence entitles him to a new trial. We disagree.

After White served his notice of appeal, co-defendant Anthony Morris issued a written statement retracting his trial testimony against White. Morris claimed he was not at the scene of the crime. In a motion to this court, White urged that we either remand the case for a new trial or remand the case to the trial court for a hearing on the purported new evidence. The State opposed and this court denied the motion. The State argues this court should not consider Morris' statement because it has not been raised to and ruled on by the trial court and is not properly before this court. We agree.

Rule 29(b), SCRCrimP, governs post trial motions on after discovered evidence. A motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court exercises its discretionary authority, suspends the appeal, and grants leave to proceed in

the circuit court. The lack of a ruling from the trial court presents nothing for this court's review.

Furthermore, a brief must reference the Record on Appeal to support the facts alleged. Rule 207(b)(4), SCACR. "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal.

CONCLUSION

We rule that dog tracking evidence is recognized in South Carolina. We hold that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979). We conclude that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog handling and dog tracking. In the case sub judice, Gunter's specialized knowledge, skill, experience, and training qualified him to offer his opinion in the area of dog handling and dog tracking. Luculently, the testimony of Gunter complies with expert testimony law extant in South Carolina.

There is no error in the trial court's qualification of Gunter as an expert witness and the admission of his opinion testimony. Assumptively concluding that error exists, the error is harmless beyond a reasonable doubt. There is overwhelming evidence in the trial record without the inclusion or consideration of Gunter's testimony to support the convictions of the Appellant.

The Appellant's claim as to the right to a new trial based on newly discovered evidence is dismissed based on procedural grounds.

Accordingly, the trial court's ruling is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David H. Barton, Employee **Claimant,**

v.

William Ian Higgs d/b/a Iyanel Enterprises and Total Home Exteriors, Inc., Employers, and Key Risk Insurance and SC Uninsured Employers' Fund, Carrier **Defendants,**

Of Whom Total Home Exteriors, Inc., Employers and Key Risk Insurance are the **Respondents,**

And SC Uninsured Employers' Fund is the **Appellant.**

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 4197
Submitted January 1, 2007 – Filed January 16, 2007

AFFIRMED

Amy V. Cofield and Terry M. Mauldin, both of Lexington; LaTonya Edwards, of Columbia, for Appellant.

Michael A. Farry, and David A. Wilson, both of Greenville, for Respondents.

ANDERSON, J.: In this workers' compensation case, the South Carolina Uninsured Employers' Fund (the Fund) appeals the finding of the Appellate Panel of the Workers' Compensation Commission that the contractor was entitled to transfer liability to the Fund under section 42-1-415 of the South Carolina Code (Supp. 2005) because the contractor collected documentation of its subcontractor's insurance on "a standard form acceptable to the commission." We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

William Higgs, doing business as Iyanel Enterprises (Iyanel), served as the roofing subcontractor for Total Home Exteriors, Inc. (Total Home) for nine years. One of the jobs Iyanel worked on for Total Home was in the Keowee Keys subdivision in Seneca. Iyanel paid for insurance coverage through Jackie Perry Insurance Agency in Anderson and received an unsigned Certificate of Insurance evidencing workers' compensation and employer's liability insurance for September 13, 2003 through September 13, 2004. When Iyanel was initially engaged to perform the work at Keowee Keys, it presented Total Home with the Certificate of Insurance. The record indicates Iyanel paid for the insurance and an employee of the Jackie Perry agency issued Certificates of Insurance without coverage being bound.

David Barton, an employee of Iyanel, was injured when he fell from a roof at the Keowee Keys job and as a result, filed a workers' compensation claim. At the time of the accident, despite Iyanel's belief to the contrary, the business did not have workers' compensation coverage. The single commissioner found Barton had suffered a compensable injury and that Total Home was a statutory employer liable for compensation under section 42-1-410 of the South Carolina Code (1985). The single commissioner further

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

found that under section 42-1-415, Total Home had no ultimate liability because it relied in good faith on Iyanel's Certificate of Insurance and transferred responsibility for the workers' compensation benefits to the Fund.

The Fund appealed to the Appellate Panel, which affirmed the single commissioner's order and incorporated it by reference. On appeal, the circuit court affirmed the Appellate Panel.[2]

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct. App. 2000). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 495 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996).

The substantial evidence rule governs the standard of review in a workers' compensation decision. Frame, 357 S.C. at 527, 593 S.E.2d at 494. The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). An appellate court can reverse or modify the Appellate Panel's decision only if the appellant's substantial

[2] Barton appealed to the Appellate Panel and circuit court. The Appellate Panel affirmed the single commissioner, but the circuit court reversed the Appellate Panel on one of Barton's issues on appeal regarding terminating weekly benefits. The issues that Barton appealed are not involved in this appeal.

rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004).

> "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark, 276 S.C. at 135, 276 S.E.2d at 306; see also Pratt v. Morris Roofing, Inc., 357 S.C. 619, 623, 594 S.E.2d 272, 274 (2004); Jones v. Ga.-Pac. Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679, 681-82 (Ct. App. 2002); Broughton v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999).

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); see also Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 618, 571 S.E.2d 92, 95 (Ct. App. 2002); Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). Where the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681. In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Bass v. Isochem, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005); Muir, 336 S.C. at 282, 519 S.E.2d at 591. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the

Appellate Panel." Frame, 357 S.C. at 528, 593 S.E.2d at 495 (citing Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 48, 515 S.E.2d 532, 533 (1999).

LAW/ANALYSIS

The Fund argues the circuit court erred in affirming the Appellate Panel's finding Total Home was entitled to transfer liability to the Fund under section 42-1-415 of the South Carolina Code (Supp. 2005). The Fund contends that because the certificate Iyanel presented to Total Home was unsigned, Total Home failed to comply with all the statutory provisions. We disagree.

Section 42-1-415 provides:

> (A) Notwithstanding any other provision of law, upon the submission of documentation to the commission that a . . . subcontractor has represented himself to a higher tier . . . contractor . . . as having workers' compensation insurance at the time the . . . subcontractor was engaged to perform work, the higher tier . . . contractor . . . must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier . . . contractor . . . or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier . . . contractor . . . or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the

> Uninsured Employers' Fund. The Uninsured Employers' Fund shall assume responsibility for claims within thirty days of a determination of responsibility made by the commission. The higher tier . . . contractor . . . must be reimbursed from the Uninsured Employers' Fund as created by Section 42-7-200 for compensation and medical benefits as may be determined by the commission. Any disputes arising as a result of claims filed under this section must be determined by the commission.
>
> (B) To qualify for reimbursement under this section, the higher tier . . . contractor . . . must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

"Under subsection 42-1-415(A), a statutory employer . . . may transfer liability to the fund when a subcontractor's employee is injured if the statutory employer submits documentation to the fund that the subcontractor has represented himself as having workers' compensation coverage 'at the time the . . . subcontractor was engaged to perform work.'" S.C. Uninsured Employer's Fund v. House, 360 S.C. 468, 471, 602 S.E.2d 81, 82 (Ct. App. 2004); see also Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 330, 523 S.E.2d 766, 774-75 (1999) (noting that pursuant to section 42-1-415(A), "a statutory employer is no longer directly liable for workers' compensation payments whenever documentation is presented to the commission that a contractor or subcontractor represented himself to the statutory employer as having workers' compensation insurance").

Total Home met all of the statutory requirements to transfer liability: (1) a subcontractor, Iyanel, represented to Total Home, a higher tier contractor, that it had workers' compensation insurance at the time it was

engaged to perform work; and (2) Total Home collected documentation of insurance on a standard form acceptable to the commission at the time Iyanel was engaged to perform work. The Fund's sole contention is that because the Certificate of Insurance was unsigned, Total Home does not meet the statutory requirement for documentation of insurance. However, the statute does not require a signed Certificate of Insurance. It merely states, **"a standard form acceptable to the commission."**

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); see also Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006); Daisy Outdoor Adver. Co. v. S.C. Dep't of Transp., 352 S.C. 113, 120, 572 S.E.2d 462, 466 (Ct. App. 2002). Further, "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)); see also Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("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.").

The statute gives the commission the discretion of determining what is an acceptable form. The Appellate Panel found Iyanel's Certificate of Insurance to be a "form acceptable to the Commission." This finding was not in contravention of the literal meaning of the statute. Accordingly, we give the proper deference to the Appellate Panel in interpreting the statute. There is no compelling reason to differ with this interpretation of an acceptable form.

The Fund argues Regulation 67-415(A) of the South Carolina Code (Supp. 2005) provides the only acceptable document to demonstrate insurance. The Regulation provides:

> For purposes of Section 42-1-415, the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation and as issued by the insurance carrier for the insured, shall serve as documentation of insurance. The Certificate of Insurance must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.

Id. However, the Fund mischaracterizes the Regulation. The Regulation describes a document that is always accepted by the Workers' Compensation Commission but does not prevent the Appellate Panel from finding other documentation acceptable. Additionally, were we only to allow, as documentation of insurance, Certificates of Insurance that are signed, dated, and issued by an authorized representative of the insurance carrier for the insured, the upper-tier contractor could not look at the Certificate and discern whether it would be protected. It would have to verify that the representative that issued the Certificate is authorized by the insurance carrier. The legislature did not intend to put such a burden on contractors.

The Fund acknowledges the legislature created section 42-1-415 to provide relief for misled statutory employers. Iyanel was exploited by its insurance company and, thus, unknowingly victimized Total Home. The record contains no evidence that Total Home did not act in good faith. Therefore, Total Home is exactly whom the legislature intended to protect when it enacted the statute.

CONCLUSION

Total Home met all of the requirements in section 42-1-415 of the South Carolina Code to transfer liability to the Fund. Although the Certificate of Insurance was unsigned, the Appellate Panel found the Certificate of Insurance to be acceptable. Accordingly, the circuit court's portion of the order affirming the Appellate Panel is

AFFIRMED.

HUFF and BEATTY, JJ., concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Vestry and Church Wardens of the Church of the Holy Cross, a South Carolina Corporation, Inc., Appellant,

v.

Orkin Exterminating Company, Inc., Respondent.

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

Opinion No. 4198
Heard December 5, 2006 – Filed January 16, 2007

REVERSED AND REMANDED

Thomas S. Tisdale, Jr. and David J. Parrish, both of Charleston, for Appellant.

Wade R. Marrionneaux, of Atlanta, Georgia; J. Rutledge Young, III and John Massalon, both

of Charleston; and Kenneth R. Young, of Sumter, for Respondent.

GOOLSBY, J.: This action arises out of a termite contract that the Church of the Holy Cross had with Orkin Exterminating Company and the discovery by Holy Cross that a termite infestation had damaged its historic church building. The jury found for Orkin after a long trial involving issues related to the construction of the church building, the adequacy of annual inspections conducted by Orkin, the degree of termite damage sustained by the church building, and the cost of repairing the damage. Holy Cross appeals the denial of its motion for a new trial based on juror misconduct. We reverse and remand for a new trial.

At the start of the trial, the trial judge instructed the jurors that they should not discuss the case among themselves, should not discuss the case with anyone else, and should not attempt to investigate the case on their own. A day after the trial ended in a jury verdict in Orkin's favor, an alternate juror contacted the trial judge and told him that "possible" misconduct by one of the jurors had occurred during the trial of the case. The report prompted the trial judge to meet with the alternate juror to discuss her allegations. Afterward, the trial judge addressed a letter to all counsel apprising them of the alternate juror's allegations, allegations that in no way implicated either party or suggested wrongdoing by either party.

According to the letter, the alleged misconduct, which the alternate juror later confirmed under oath, consisted of the offending juror "early in the trial . . . question[ing] aloud the instructions that she was not to talk about the case . . . because everybody knew what was going on"; commenting to the other jurors "that everyone knew that the historic people 'have money' and are simply trying to get someone else to 'pay their bills' " and "that 'old buildings fall down' simply because of age"; telling the other jurors "that she did not know why she had to hear both sides of the case and that she had discussed it with her mother who reaffirmed that the historic people have money and should clean up their own mess"; remarking to the other jurors that she had talked

with a painter friend who told her that walls could collapse due to hidden termite damage; declaring to the other jurors "that they should tear down the church and bring in a double wide"; indicating to the other jurors "that she had talked with her minister about the situation" but then retracting her statement "to say that she and the minister simply prayed about her service and she had asked for guidance in making a decision"; and disclosing to the other jurors that she had gone out to the church and looked at it and that it "looked fine to her." The jurors reportedly admonished the offending juror about discussing the case, "laughed off" her comments, "[told] her to stop," and "paid her no attention."

Upon learning of the alternate juror's allegations, Holy Cross moved for a new trial based on juror misconduct.

The trial judge later conducted a hearing at which he summoned the jurors to appear. After questioning the jurors in the presence of counsel for both parties regarding the allegations made by the alternate juror, the trial judge held the comments and actions by the offending juror did not prejudice Holy Cross in such a way as to "affect[ ] the impartiality of the verdict" and that "[i]n fact, all other jurors[1] indicated that her actions had no impact on their individual decisions."[2]

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[1] We note the dissent quotes a different portion of the trial judge's order in which the judge states, "All of the jurors indicated that no improper conduct or outside influences tainted their unanimous verdict." As the dissent points out, however, the trial court did not examine the offending juror so the trial judge's reference to "all" applies to the remaining jurors, not to all twelve.

[2] Three jurors, however, indicated at one point in their examination by the trial judge that the offending juror's comments had influenced them. The first juror testified as follows:

> Court: . . . Were you in any way influenced by the things that she said?
> Juror: Yes.

Court: In what way?
Juror: She just kept talking about church, you know, helping churches and . . .
Court: Right.
Juror: And that she talked to her pastor and he was going to pray for us, but he knew that it was the right thing for us to do.
Court: What was the right thing for you to do?
Juror: To just let the church get other churches to help.
Court: And were you convinced by what she said or by what her pastor said that that was the right thing to do?
Juror: No, but I guess, you know, I couldn't help but hear it, I heard it so much.

Although perhaps not "convinced" (the trial judge's word) by anything that the offending juror said, the first juror nonetheless admitted to being "influenced" (again, the trial judge's word) by those comments. Improper influence, however slight, is still improper influence, or as Paul writes in Galatians 5:9 (RSV), "A little leaven leavens the whole lump."

Admittedly, the juror later backed off slightly on her admission of influence. When pressed by the trial judge about whether the offending juror's comments "influenced [her] in making a decision," she indicated they had done so; but then, when pressed further, she qualified her answer, saying that she was "still not sure" and "I don't think I based my decision on anything she said." [Emphasis added.] In other words, she could not tell the trial judge definitively whether the offending juror's comments impacted her decision in the case or not. Suffice it to say, the juror never testified that the comments and actions of the offending juror "had no impact" on her individual decision.

Like the first juror, the other two initially acknowledged the offending juror's comments had indeed influenced them, at least somewhat. One of these said, when asked whether what the offending juror said "ha[d] any bearing on [the juror] making up [her] mind one

Whereupon, the trial judge denied the motion by Holy Cross for a new trial. In a separate order, the trial judge held the offending juror in criminal contempt for "making impermissible comments to other jurors prior to the jury's proper deliberations."

The basic issue here, as we see it, is whether the juror misconduct in question affected Holy Cross' right to fundamental fairness at trial.[3] More to the point, did the juror misconduct at issue in this case so affect the jury's impartiality as to deprive Holy Cross of a fair trial?[4] We recognize that what constitutes improper juror behavior as will warrant a new trial must be determined by the facts and circumstances of each case.[5]

The trial judge here mainly focused, particularly in his questioning of jurors, not upon the offending juror but upon the other eleven and the effect that the offending juror's comments and actions had upon them. The question, however, of whether the offending

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way or the other," replied, "A little. She shouldn't have said nothing, you know, to the jury about it." This juror later testified, however, that what the offending juror said did not cause her to decide the case "one way or another." The other juror, when asked whether what the offending juror told her "ha[d] any bearing on [her] decision," answered, "Well, I can't say that it didn't, you know, come in my mind, you know. . . . But I think – I still made my decision based on the facts."

[3] See Alston v. Black River Elec. Coop., 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001) ("Under South Carolina law, litigants are guaranteed the right to an impartial jury.")

[4] See State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998) ("Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict.")

[5] 66 C.J.S. New Trial § 54, at 143 (1998).

juror's comments and actions had any influence upon the other jurors is not the sole determining factor as to whether the misconduct warrants a new trial. A jury, after all, is composed of twelve, not eleven, jurors, and it acts as a unit[6]; thus, "the misconduct of any juror, actual or implied, which . . . prevents a fair and proper consideration of the case is misconduct of the entire jury, vitiating its verdict and requiring a new trial."[7]

In this case, the offending juror pointedly ignored the trial judge's admonition for the jury to refrain from discussing the case until both sides could be heard from. Aside from engaging in discussions with at least three outsiders about the case, the offending juror made statements to her fellow jurors early on and before the submission of the case about matters that were not based on the evidence, that manifested views openly hostile to Holy Cross, and that, one may reasonably presume, influenced her.[8] Moreover, she undertook her own investigation into the facts when she drove out to the church without the authority of the court or the consent of the parties.

The prohibition against jurors discussing a case until the trial judge submits it to them for deliberation and decision[9] involves, our

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[6] As Winston Churchill once observed, "The scrutiny of 12 honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law . . . ." 2 J. Kendall Few, In Defense of Trial by Jury 395 (American Jury Trial Foundation 1993) (emphasis added).

[7] 66 C.J.S. New Trial § 54, at 144.

[8] See id. § 58, at 147 ("According to some decisions a new trial must be granted if a juror joined in a discussion of the case; but according to others it must be shown that statements were made which might reasonably be presumed to have influenced the juror." (footnote omitted)).

[9] As early as in the second day of an extended trial, which lasted from August 8 through August 22, 2005, the offending juror reportedly told one of the other jurors:

supreme court has held, a matter of fundamental fairness.[10] The prohibition is meant to insure that jurors remain impartial throughout the entire trial and that they hear both sides of a controversy before making up their minds and rendering a verdict. There are, after all, at least two sides to every story.

An examination or investigation by a juror conducted without the authority of the court or consent of the parties of a place or object that is the subject of conflicting evidence may provide a basis for a new trial.[11] Although she may not have learned anything from her visit to the site that she did not already know and her report to the other jurors of her actions may not have had any impact on them, the offending juror's attempt to conduct an unsanctioned investigation into the facts of this case, when viewed with her other acts and comments, shows a

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> [T]he second day she said . . . we really don't have to go any further with this because the church should take care of the church. . . . [S]he . . . [s]aid she talked to her preacher that night and he advised her . . . that churches need to stick together and help churches out. . . . . [S]he felt that way from day one.

Another juror testified he recalled the offending juror "maybe at the beginning saying that, you know, she kind of had her mind set [sic] up and again, when I started hearing different things about going, visiting the church."

[10] State v. Aldret, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999); State v. McGuire, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979); cf. Proverbs 18:17 (RSV) ("He who states his case first seems right, until the other comes and examines him.").

[11] 66 C.J.S. New Trial § 61, at 149-50.

juror unconcerned about granting Holy Cross the fair and impartial trial to which it was entitled.[12]

A fair and impartial juror the offending juror clearly was not, particularly since it appears she made up her mind early on in the trial and before presentation of all the evidence.

We therefore hold that under the circumstances of this case, which involves several acts of juror misconduct and where at least one of those acts was deemed so egregious by the trial judge that he punished the offending juror for criminal contempt, the failure of the trial judge to grant a new trial based upon those acts of misconduct amounts to an abuse of discretion.[13] While we recognize the burden our decision places upon Orkin, which bears no responsibility for what occurred, we believe fundamental fairness demands Holy Cross be given a new trial.[14]

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[12] See id., at 150 (stating the question of whether to grant a new trial for misconduct involving an improper site investigation by a juror depends on the circumstances of the particular case).

[13] See 75B Am. Jur. 2d Trial § 1639, at 409 (1992) (stating a trial court's determination regarding juror misconduct is reviewable for an abuse of discretion); see also Bishop v. Nicholson, 146 S.C. 245, 248, 143 S.E. 802, 803 (1928) (Blease, J., concurring) (indicating the standard of review in a juror misconduct case is an abuse of discretion standard); 66 C.J.S. New Trial § 54, at 143 ("Separate acts of misconduct may be sufficient, when combined, to require a new trial, although one of such acts alone would not be sufficient.").

[14] See Bishop, 146 S.C. at 247, 143 S.E. at 802 (affirming a trial judge's grant of a new trial based on the disqualification of one juror where, after the trial, the plaintiff discovered one of the jurors had not disclosed he was employed at a mill where the defendant was president, even though the trial judge had specifically disqualified all persons employed by the mill from serving on the jury); id. at 248, 143 S.E. at 803 (concurring Justice Blease remarking, "[T]he jury box must not

REVERSED and REMANDED.

KITTREDGE, J., concurs. STILWELL, J., dissents in a separate opinion.

STILWELL, J., (dissenting): I respectfully dissent.

The focus of the majority opinion is principally upon the one juror who unquestionably is guilty of misconduct and violated the clear instructions of the court.

However, I believe, as did the trial judge, and as the state supreme court has instructed us, that the focus should be on what influence the miscreant juror's actions had upon the remaining jurors and whether her conduct prejudiced the outcome of the trial to such an extent that the parties did not receive a fair trial. See State v. Grovenstein, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (finding misconduct that does not affect the verdict does not entitle a party to a mistrial). See also State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) (stating "[t]he general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.").

The errant juror's activities were initially reported to the trial judge by an alternate juror, after the jury verdict was received. That juror, being an alternate, was in no position to testify of her own knowledge as to what influence, if any, the misconduct had upon the other jurors during the deliberations that resulted in the verdict, as she would necessarily have been dismissed prior to the court submitting the case to the jury. It is worth noting that none of the jurors who actually took part in the deliberations thought the misconduct egregious enough to report it to the court.

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only be kept pure, but . . . each individual juror ought to be above the least suspicion." (emphasis added)).

The eminent trial court judge, following the procedure described by the state supreme court in State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), held an extensive evidentiary hearing, assembling the jurors, minus the offending juror, and conducting voir dire to ascertain the nature and extent of the alleged misconduct and to determine if any of the misconduct affected the jury's impartiality so as to undermine the verdict.[15]

Without reiterating the testimony of each individual juror and belaboring that issue, suffice it to say that the trial court made specific findings of fact to the effect that "[a]ll of the jurors indicated that no improper conduct or outside influences tainted their unanimous verdict." Continuing, the court stated it had "previously concluded in Order recorded on November 10, 2005 that Ms. Abrams (the miscreant juror) had violated the instructions of the Court by making improper comments to other jurors and she was sanctioned as a result of her actions. However, the Court found at that time, and reaffirms by this Order, that the action of Ms. Abrams did not taint the judicial process or impact improperly on the jury's unanimous verdict."

The remarks made by the trial court judge at the hearing resulting in the contempt citation to the offending juror are illustrative of his factual conclusions:

> The comments that were made in the jury room obviously were not heard by everybody. And many of the jurors

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[15] In Aldret, the supreme court established a review process for juror misconduct that becomes apparent after the jury's verdict. The court authorized the trial court to consider affidavits and conduct an evidentiary hearing. 333 S.C. at 315, 509 S.E.2d at 815. Although this court found Aldret requires a hearing only where the misconduct is premature deliberation, this court did not conclude an Aldret hearing held for other types of misconduct would constitute error. See Long v. Norris & Assocs., Ltd., 342 S.C. 561, 574, 538 S.E.2d 5, 12 (Ct. App. 2000).

> heard nothing at all. And to their credit it appears that the jurors who did hear it did not respond to it in any way and did not act on it in their deliberations. The jurors . . . unanimously said that they did not take those comments into account in their decision in this particular case.
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> . . .
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> I'm convinced that they did not taint the process, but I have only been convinced by doing what we have done, that is to talk with each one of these jurors individually, to inquire about them, to take more of their time away from their jobs as well, to make sure that . . . the process has not been tainted by these improper discussions, deliberations, comments if you will, and actions on behalf of Mrs. Abrams.

These findings of fact were made by an experienced trial court judge who was in a position not only to view the jurors as they testified, but also to have the additional benefit of personally conducting the examination, circumstances that allowed him to better evaluate their responses, both verbal and non-verbal, and thereby judge their credibility. These are findings of fact that are entitled to great deference. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

I fear the majority opinion inadvertently injects into its analysis a "presumption of prejudice," thereby resurrecting a concept already specifically rejected. See Grovenstein, 335 S.C. at 352, 517 S.E.2d at 218 (holding moving party has burden to demonstrate prejudice and adopting a "presumption of prejudice" standard is erroneous).

I would affirm.