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
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF WILLIAM JEFFERSON MCMILLIAN, III, PETITIONER

Petitioner was definitely suspended from the practice of law for three (3) years, retroactive to February 22, 2013. *In the Matter of William Jefferson McMillian, III*, 404 S.C. 117, 744 S.E.2d 579 (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, 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. Comments should be mailed to:

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

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
June 8, 2015

The Supreme Court of South Carolina

In the Matter Harry R. Easterling, Respondent

Appellate Case No. 2015-001191

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition seeking to appoint the Receiver or a Special Receiver to protect the interests of respondent and his clients pursuant to Rule 31, RLDE, of Rule 413, SCACR. The request is based on respondent's current medical condition.

IT IS ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that the Receiver, Peyre T. Lumpkin, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may have maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may have maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow, operating accounts and/or any other law office accounts of respondent shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin 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 the Receiver, Peyre T. Lumpkin, Esquire, has been duly

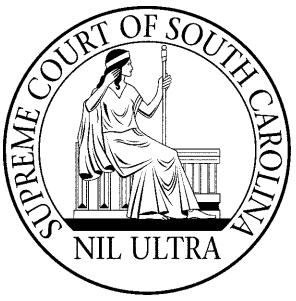
appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

June 5, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 10, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27502 - The State of SC v. Ortho-McNeil-Janssen	Pending
27507 - Ann Dreher v. DHEC	Pending
27510 - The State v. Richard Bill Niles, Jr.	Denied 6/10/2015
27516 - Ricky Rhame v. Charleston County School	Denied 6/4/2015
27517 - The State v. Anthony Clark Odom	Denied 6/5/2015
27519 - Gregory Collins v. Seko Charlotte	Pending
2015-MO-005 - The State v. Henry Haygood	Pending
2015-MO-009 - The State v. Tavario Dormell Brunson	Pending
2015-MO-027 - Kamell D. Evans v. State	Pending
2015-MO-028 - Jonathan Kyle Binney v. State	Pending
2015-MO-029 - John Kennedy Hughey v. State	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5317-Michael Gonzales v. State	Pending
2015-UP-031-Blue Ridge Electric Cooperative, Inc. v. Gresham	Pending
2015-UP-065-Glenda R. Couram v. Lula N. Davis	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-152-Capital Bank v. Charles A. Moore	Pending
2015-UP-155-Ashley Outing v. Velmetria Chante Weeks	Pending
2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-169-Hollander v. The Irrevocable Trust Est. by James Brown	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth H. Rainey v. Charlotte-Mecklenburg Hosp.	Pending
2015-UP-212-State v. Jabari Linnen	Pending
2015-UP-217-State v. Venancio Perez	Denied 06/08/15
2015-UP-223-Shou Martin v. Wilmer (John) Rife	Pending
2015-UP-228-State v. John Edward Haynes	Pending
2015-UP-233-Walters Construction v. Stanley J. Sledziona	Pending
2015-UP-248-SCE&G v. Anson	Pending
2015-UP-256-State v. John F. Kennedy	Pending
2015-UP-262-State v. Erick Arroyo	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5231-Centennial Casualty v. Western Surety	Pending

5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann	Pending
5270-56 Leinbach Investors v. Magnolia Paradigm	Pending
5275-Mitul Enterprises v. Beaufort Cty. Assessor	Denied 06/03/15
5278-State v. Daniel D'Angelo Jackson	Pending
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5281-Greens of Rock Hill v. Rizon Commercial	Pending
5282-Joseph McMaster v. John Dewitt	Pending
5283-State v. Arthur Smith	Pending
5286-State v. Graham F. Douglas	Pending
5288-State v. Damon T. Brown	Pending
5291-Samuel Rose v. JJS Trucking	Pending
5298-George Thomas v. 5 Star	Pending
5299-SC Public Interest Foundation v. SCDOT	Pending
5300-Joseph E. Mason, Jr. v. Catherine L. Mason	Pending
5302-State v. Marvin B. Green	Pending
5303-State v. Conrad Lamont Slocumb	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending

2014-UP-143-State v. Jeffrey Dodd Thomas	Pending	
2014-UP-304-State v. Tawanda Allen	Granted	06/04/15
2014-UP-365-Fatima Karriem v. Sumter Cty. Disabilities	Pending	
2014-UP-366-State v. Darrell L. Birch	Pending	
2014-UP-367-State v. Shondre L. Williams	Pending	
2014-UP-387-Alan Sheppard v. William O. Higgins	Pending	
2014-UP-410-State v. Dominique J. Shumate	Pending	
2014-UP-430-Cashman Properties v. WNL Properties	Pending	
2014-UP-435-SCBT, N.A. v. Sand Dollar 31 (Meisner)	Pending	
2014-UP-444-State v. Eric VanCleave	Pending	
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending	
2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending	
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending	
2015-UP-014-State v. Melvin P. Stukes	Pending	
2015-UP-015-State v. Albert Brandeberry	Pending	
2015-UP-042-Yancey Env. v. Richardson Plowden	Pending	
2015-UP-050-Puniyani v. Avni Grocers	Pending	
2015-UP-051-Chaudhari v. S.C. Uninsured Employer's Fund	Pending	
2015-UP-055-Alexander Guice v. Pamela Lee	Pending	
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending	
2015-UP-066-State v. James Scofield	Pending	

2015-UP-067-Ex parte: Tony Megna	Pending
2015-UP-068-Joseph Mickle v. Boyd Brothers	Pending
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-102-SCDCA v. Entera Holdings	Pending
2015-UP-107-Roger R. Riemann v. Palmetto Gems	Pending
2015-UP-110-Deutsche Bank v. Cora B. Wilks	Pending
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-119-Denica Powell v. Petsmart	Pending
2015-UP-127-T.B. Patterson v. Justo Ortega	Pending
2015-UP-138-Kennedy Funding, Inc. v. Pawleys Island North	Pending
2015-UP-139-Jane Doe v. Boy Scout Troop 292	Pending
2015-UP-141-Gregory Ulbrich v. Richard Ulbrich	Pending
2015-UP-146-Joseph Sun v. Olesya Matyushevsky	Pending
2015-UP-150-State v. Jabarrie Brown	Pending

The Supreme Court of South Carolina

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

ORDER

The petition for rehearing is granted with respect to the request that footnote 11 be deleted. All other grounds for rehearing raised in the petition for rehearing are denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

I would grant the petition for rehearing in its entirety.

s/ Costa M. Pleicones J.

Columbia, South Carolina
June 10, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Richard Bill Niles, Jr., Respondent.

Appellate Case No. 2012-213592

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27510
Heard June 25, 2014 – Refiled June 10, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and Solicitor Jimmy A. Richardson II, of Conway, for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, and Reid T. Sherard, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Richard Bill Niles, Jr. was convicted of murder, armed robbery, and possession of a weapon during the commission of a violent crime. The court of appeals reversed Respondent's murder conviction and remanded for a new trial, finding the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *State v. Niles*, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012).[1] We reverse.

FACTS/PROCEDURAL BACKGROUND

This case arises from the shooting death of James Salter (the victim) in a Best Buy parking lot in Myrtle Beach. It is undisputed that Niles, his fiancé, Mokeia Hammond, and Ervin Moore met the victim at the parking lot to purchase marijuana from him.[2] Niles and Moore testified at trial,[3] and Niles's version of events matched Moore's version, except as to whose idea it was to rob the victim and whether Niles or the victim fired the first shots.[4] Thus, the evidence at trial focused on whether Niles was the aggressor in the deadly encounter.

On the afternoon of April 9, 2007, Niles and Hammond encountered Moore at a convenience store in Trio, South Carolina, and invited Moore to accompany

---

[1] Niles did not appeal his convictions for the remaining offenses. *Niles*, 400 S.C. at 531 n.1, 735 S.E.2d at 242 n.1.

[2] Hammond and Moore were also charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State, whereby he pleaded guilty to voluntary manslaughter, armed robbery, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond at their joint trial.

[3] Hammond chose not to testify in her defense.

[4] Niles admitted he shot the victim and that Moore and Hammond were unarmed.

them to Myrtle Beach. Niles and Moore were acquaintances, having known each other through various family members. On the way to Myrtle Beach, the trio smoked all of the marijuana that they had brought with them.

Therefore, Niles contacted the victim[5] via telephone and arranged to meet him at the Best Buy parking lot to purchase marijuana. Niles testified that his conversation with the victim had a dual purpose. Not only was he meeting with the victim so that Moore could purchase a pound of marijuana from him, but he claimed that the victim owed him $5,000 as payment for other drug transactions. According to Moore, however, Niles subsequently decided to rob the victim instead.[6]

Once in Myrtle Beach, the trio made several stops at various motels so that Niles could sell crack cocaine before meeting the victim at the designated meeting spot at approximately 7:00 p.m. Hammond was driving Niles's rental vehicle, with Niles riding in the front passenger's seat and Moore riding in the back seat. Hammond parked the rental vehicle next to the victim's vehicle. Moore testified that his role in the robbery was "to identify the weed" for Niles. Therefore, Moore approached the victim's vehicle first. Moore joined the victim in the victim's vehicle, and the victim produced the bag of marijuana for Moore to inspect.

Moore testified that as he returned to Niles's vehicle, Niles had already exited his vehicle, and Moore told Niles that the victim had the drugs. Moore testified that as he returned to his place in Niles's vehicle, Niles was leaning inside the passenger-side door of the victim's vehicle and was speaking to the victim.[7]

---

[5] While Niles testified that he and the victim did not know each other personally, they had engaged in drug transactions for the past six to nine months. Niles testified he knew the victim by his nickname, "Spice," and that the victim knew him by his nickname, "Rich Boy." Niles testified that he and the victim were "in the business of selling drugs."

[6] Niles, on the other hand, testified that it was Moore's decision to rob the victim, and he did so without warning Niles beforehand.

[7] Niles's fingerprints were found on the victim's vehicle near where Niles was allegedly standing, corroborating Moore's testimony.

Moore testified he heard two shots and saw Niles leap into the back seat of his vehicle behind Hammond.[8] Moore then heard the victim fire a weapon in response. Niles and the victim shot back and forth multiple times. Niles had the drugs with him that Niles had stolen from the victim.

In contrast, Niles testified that Moore acted alone. Niles stated he merely set up the meeting, but Moore went over to the victim's vehicle to purchase the drugs while Niles and Hammond sat in the car and discussed their upcoming wedding. Niles said he then saw Moore and the victim fighting in the victim's vehicle, and realized that Moore was robbing the victim. Niles testified that Moore exited the victim's vehicle with the stolen drugs, and as Moore dove back into Niles's vehicle, Niles saw the victim draw his gun and shoot at them, knocking out the rear windows of Niles's vehicle. Therefore, Niles grabbed his gun, and returned fire. According to Niles, he was concerned with stopping the shooter and for Hammond's safety:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

After the shooting, Niles instructed Hammond to drive away from the scene, and the trio abandoned the vehicle at a nearby trailer park. Niles then called a taxicab to transport him and Hammond to a local motel. At that point, he and Hammond parted ways with Moore, and Moore kept the marijuana. The victim died at the scene from a gunshot wound.

On these facts, the trial court instructed the jury on the law of murder and self-defense, but refused Niles's request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.

---

[8] Other witnesses to the shooting testified that they saw a "heavyset" black male running from the victim's car back to a dark sedan, which the State argued closely matched Niles's description, as Moore had a much smaller build than Niles.

The court of appeals reversed Niles's murder conviction and remanded the case for a new trial, finding the evidence compelled a jury instruction on the lesser-included offense of voluntary manslaughter. *Niles*, 400 S.C. at 534, 735 S.E.2d at 244. Specifically, the court of appeals found there was evidence of sufficient legal provocation based on Niles's testimony that he shot at the victim only after the victim began shooting first. *Id.* at 535, 735 S.E.2d at 244. Further, the court of appeals found that there was evidence that Niles acted in a sudden heat of passion based on Niles's testimony that he took Moore to meet the victim to buy marijuana; that Moore, without warning, decided to rob the victim; and that Niles did not fire his gun until after Moore perpetrated the robbery and the victim shot first. *Id.* at 536, 735 S.E.2d at 245. Therefore, the court of appeals concluded that there was evidence that Niles did not have an opportunity for cool reflection, and as such, there was evidence Niles acted in a sudden heat of passion. *Id.*

We granted the State's petition for a writ of certiorari to consider the State's argument that the court of appeals erred in determining Niles was entitled to a jury instruction on voluntary manslaughter because there was no evidence at trial that Niles acted in the sudden heat of passion.[9]

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

ANALYSIS

The State maintains the trial court did not err in refusing Niles's request for an instruction on voluntary manslaughter because Niles failed to present evidence

[9] We note that the State has not challenged the court of appeals' finding that there was evidence of sufficient legal provocation.

that he acted in the sudden heat of passion. We agree with the State that there was no evidence that Niles acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense. *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986); *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005). When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant. *Pittman*, 373 S.C. at 572–73, 647 S.E.2d at 168.

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Smith*, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011). To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

> The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court. *State v. Hernandez*, 386 S.C. 655, 662, 690 S.E.2d 582, 586 (Ct. App. 2010) (citation omitted).

Niles's own testimony does not establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*. Rather, Niles testified that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that

when he shot his gun, he was thinking of Hammond rather than of perpetrating violence upon the victim. *See Cole*, 338 S.C. at 102, 525 S.E.2d at 513 ("[T]here was no evidence presented that Appellant was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.' On the contrary, by Appellant's own testimony, he shot at the men to scare them away. Appellant's testimony appears designed to support a charge of self[-]defense, not heat of passion."). As in *Cole*, the focus of Niles's testimony at trial was on who was the aggressor—Niles or the victim—apparently to support Niles's theory of self-defense. In *State v. Childers*, we explained:

> Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.
>
> If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court . . . . Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.

373 S.C. 367, 375–76, 645 S.E.2d 233, 237 (2007). Because Niles, by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts.[10]

We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction. Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to

[10] Undeniably, murder, self-defense, and voluntary manslaughter may coexist under the right factual circumstances; here, however, Niles's testimony went to the elements of self-defense, not voluntary manslaughter.

accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored. *See Pittman*, 373 S.C. at 575, 647 S.E.2d at 169 ("In determining whether an act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." (citation omitted)). In other words, there was nothing *sudden* about Niles's decision to shoot the victim.[11]

Thus, we hold that the evidence did not warrant a voluntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 412–13 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense.").

CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

[11] Along the same lines, while the State has not challenged the court of appeals' findings with respect to sufficient legal provocation, we note that sufficient legal provocation cannot be found to exist where the victim is defending himself from a crime. *See State v. Knoten*, 347 S.C. 296, 314, 555 S.E.2d 391, 400 (2001) (Burnett, J., dissenting) ("A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001)).

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the court of appeals was correct in its holding that there is evidence in the record entitling Niles to a charge on voluntary manslaughter.

If there is any evidence to support a jury charge, the trial judge should grant the request. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C. 408, 412-413, 706 S.E.2d 12, 14 (2011). The sudden heat of passion needed to justify a voluntary manslaughter charge must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection and produce what may be called an uncontrollable impulse to do violence. *State v. Cole*, 338 S.C. 97, 101-102, 525 S.E.2d 511, 513 (2000).

In this case, a voluntary manslaughter charge should have been given if there were *any* evidence in the record from which a jury could infer that this killing was the result of sufficient legal provocation which caused Niles to experience an uncontrollable impulse to do violence. In my opinion, there is.

First, as the court of appeals noted, the unprovoked shooting by Salter amounted to evidence sufficient for a jury to infer that there was legal provocation. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held than an overt, threatening act or a physical encounter may constitute sufficient legal provocation."). Second, I agree with the court of appeals that Niles's testimony that he immediately returned fire out of fear for himself and his fiancée provided evidence from which a jury could find that Niles was acting pursuant to an uncontrollable impulse to do violence. *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (holding that the lower court properly charged the jury on voluntary manslaughter where defendant testified he was in fear of the threat of physical assault). Accordingly, I would affirm the court of appeals because I cannot say there is no evidence whatsoever tending to reduce this crime from murder to manslaughter.

Unlike the majority, I am unable to discern Niles' intent and state of mind on April 9, 2007, and to resolve numerous factual issues much as a jury might have done. For example, the majority states with certitude that Niles determined "to arrive at

the scene armed with a deadly weapon," thus demonstrating he "clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery . . . ." In light of this premeditated decision, the majority states "there was nothing *sudden* about Niles' decision to shoot the victim." In my opinion, the majority exceeds our scope of review in this law case by resolving disputed issues of fact in order to deny Niles a new trial. *E.g.*, *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014).

I would affirm the court of appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

MicroClean Technology, Inc., Respondent,

v.

Envirofix, Inc., Petitioner.

Appellate Case No. 2013-001706

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 27526
Heard March 18, 2015 – Filed June 10, 2015

REVERSED AND REMANDED

Trudy Hartzog Robertson and Robert Ernest Sumner, IV, both of Moore & Van Allen, PLLC, of Charleston, for Petitioner.

Terry A. Finger, of Finger & Fraser, PA of Hilton Head Island, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *MicroClean Technology, Inc. v. EnviroFix, Inc.*, 404 S.C. 207, 744 S.E.2d 210 (Ct.

App. 2013). Petitioner argues the court of appeals erred in: (1) reversing the master-in-equity's (the Master) finding that Petitioner provided proper notice of termination of a license agreement; and (2) reversing and remanding Petitioner's claim and delivery action based on the Master's finding that the parties intended a security deposit serve as liquidated damages.

We reverse pursuant to Rule 220(b)(1), SCACR, and the following authority: *Butler Contracting, Inc. v. Court Street, L.L.C.*, 369 S.C. 121, 127, 631 S.E.2d 252, 255–56 (2006) ("[T]he trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law."). We therefore remand to the Master to reinstate his order.

Further, we hereby direct the court of appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In re: Estate of Atn Burns Livingston, Emma Lou Livingston Martin as Personal Representative of the Estate of Atn Burns Livingston and Emma Lou Livingston Martin, Respondents,

v.

Clyde B. Livingston, Miller Communications, Inc., Citibank South Dakota, N.A., Branch Banking and Trust Company of South Carolina, and American First Federal, Inc., Defendants,

Of whom Clyde B. Livingston is, Petitioner.

Appellate Case No. 2013-001505

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Olin Davie Burgdorf, Master-in-Equity

Opinion No. 27527
Heard May 5, 2015 – Filed June 10, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Andrew Sims Radeker, of Harrison & Radeker, P.A., of Columbia, for Petitioner.

Richard B. Ness and Alison Dennis Hood, of Ness & Jett, LLC, of Bamberg, for Respondents.

PER CURIAM: We granted certiorari to review the court of appeals' decision in *Estate of Livingston v. Livingston*, 404 S.C. 137, 744 S.E.2d 203 (Ct. App. 2013). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Curtis J. Simms, Appellant.

Appellate Case No. 2013-001219

Appeal From Richland County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27528
Heard March 5, 2014 – Filed June 10, 2015

AFFIRMED

Jonathan S. Gasser, Chief Appellate Defender Robert Michael Dudek, Appellate Defender Susan Barber Hackett, and Appellate Defender David Alexander, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Curtis Simms (Appellant) appeals his conviction for high and aggravated breach of the peace, and resulting sentence. We affirm.

FACTUAL/PROCEDURAL HISTORY[1]

This case arises out of the tragic death of a young man, Martin Gasque (the victim), outside of Williams-Brice Stadium following the University of South Carolina football game against the University of Alabama in October 2010. Both Appellant and the victim tailgated near the stadium during the football game, and both were intoxicated as they left the area. Appellant, wearing an Alabama jersey, left the tailgate with friends, riding as the front-seat passenger in a green truck driven by a friend, Dustin Lindsey. Lindsey attempted to exit the tailgate parking lot by turning right onto Shop Road.[2] The victim—an avid Gamecock fan—was the front-seat passenger in a black truck driven by his friend Adam Paxton, and was boisterously engaging Gamecock fans through his open window as Paxton inched down Shop Road in the "bumper-to-bumper" traffic.

The two trucks and passengers crossed paths when the black truck blocked the green truck from exiting the parking lot. Lindsey blew his horn. In response, the victim threw up his hands, as if to indicate that he was sorry for blocking Lindsey's entry into the roadway. Appellant exited the green truck and approached the black truck's passenger side, where the victim was sitting. Appellant punched the victim once while he was seated in the truck, and then hit the victim four or five more times as he exited the black truck. The victim was knocked unconscious, and fell into the roadway parallel to the truck on the white line comprising the edge of the lane of traffic. After the victim hit the ground, Paxton began pulling his truck forward to the right in order to move the truck onto the shoulder of Shop Road and out of the roadway. As he did so, he unknowingly began to slowly roll over the victim between his legs, then over his groin, his abdomen, his chest, and finally, his head. Appellant yelled at Paxton to stop, and banged on the truck with his fists, but this only caused Paxton to accelerate.

---

[1] Because this appeal involves Appellant's motion for directed verdict, we view the evidence in the light most favorable to the State. *See, e.g.*, *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

[2] Shop Road is one of several major thoroughfares leading in and out of Williams-Brice Stadium. In addition to providing access to the stadium, thousands of people park their vehicles, tailgate, and walk to and from the stadium along Shop Road during football games.

The victim died at the scene after suffering a hinge fracture, an injury incompatible with life, which was caused by Paxton running over him.

Due to the fact that the death occurred in the roadway, police blocked both lanes of traffic for several hours. One eyewitness testified that the line of traffic was already "bumper-to-bumper," and this incident "just added to it." A responding Sheriff's deputy testified that a large crowd of people were present at the scene and it was "pretty chaotic." Further, "pedestrians were everywhere," and "[c]rowds of people were agitated with traffic problems" and were "just constantly . . . berat[ing] the police." Another Sheriff's deputy testified that due to the "gridlock," "[it] took a while to get things moving."

Appellant was charged with both aggravated breach of the peace and involuntary manslaughter. The jury returned a verdict of not guilty on the involuntary manslaughter charge, but found Appellant guilty of aggravated breach of the peace.

The trial court sentenced Appellant to ten years' imprisonment, suspended upon the service of five years' imprisonment and three years' probation, but later reduced Appellant's sentence to ten years' imprisonment suspended upon the service of three years' imprisonment, plus three years' probation.

Appellant subsequently filed a petition for a writ of habeas corpus, which this Court denied. However, we subsequently certified this appeal from the court of appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the circuit court erred in refusing to direct a verdict of acquittal with respect to the aggravated breach of the peace charge?

II. Whether the trial court imposed an illegal sentence?

III. Whether the circuit court erred in refusing to admit certain eyewitness testimony?

ANALYSIS

I. Directed Verdict

At trial, Appellant moved for a directed verdict on the breach of the peace indictment because his conduct in punching the victim did not "rise to the level suggested by our legislature for [the breach of the peace] charge to go forward." The circuit court denied the directed verdict based upon the number of punches thrown by Appellant, the public nature of the incident, and the number of people who witnessed the fight. Appellant renewed his directed verdict motion at the close of his case on the same basis as his previous motion, and the trial court again denied the motion. On appeal to this Court, Appellant contends the trial court erred in denying his directed verdict because there is no evidence in the record to support the finding that there were aggravating circumstances. We find that the State presented evidence sufficient to withstand Appellant's directed verdict motion with respect to the breach of the peace charge.

A breach of the peace is a common law offense. *State v. Randolph*, 239 S.C. 79, 121 S.E.2d 349 (1961). Encompassing a broad range of conduct, South Carolina courts have analyzed a breach of the peace over the centuries as a crime defying strict definition:

> The term "breach of the peace" is a generic one embracing a great variety of conduct destroying or menacing public order and tranquility. In general terms a breach of peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order.

State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967) (citation omitted); *see also Randolph*, 239 S.C. at 83, 121 S.E.2d at 350 ("Breach of the peace is a common law offense which is not susceptible of exact definition."). As noted by the court of appeals in *State v. Peer*:

> Throughout the various definitions appearing in the cases there runs the proposition that a breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect,

> or by inciting or tending to incite such a disturbance of the public tranquility. Under this general definition, therefore, in laying the foundation for a prosecution for the offense of breach of the peace it is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace, is sufficient.

320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996) (citing 12 Am. Jur. 2d *Breach of Peace & Disorderly Conduct* § 4 (1964)). "Whether conduct constitutes a breach of the peace depends on the time, place, and nearness of other persons." *Id.* (citing 3 S.C. Juris. *Breach of Peace* § 7 (1991)). However, despite including "acts likely to produce violence in others, actual violence is not an element of breach of peace." *Id.* (citations omitted); *see also State v. Langston*, 195 S.C. 196, 11 S.E.2d 1 (1940).

Normally, a breach of the peace is a misdemeanor punishable in magistrate's court by a fine "not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both . . . ." S.C. Code Ann. § 22-3-560 (Supp. 2013). When, however, the breach of the peace is deemed to be of a high and aggravated nature, the case may be "waived up" to the Court of General Sessions:

> Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in § 22-3-560 or, *when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions*.

S.C. Code Ann. § 22-5-150 (Supp. 2013) (emphasis added); *cf. id.* § 22-5-110(A)(3) (Supp. 2013) (requiring a magistrate to "commit or bind over for trial those who appear to be guilty of crimes or offenses not within their jurisdiction").

Thus, a simple breach of the peace is a common law offense defined in our precedents in broad terms. Where aggravating circumstances exist, however, the

General Assembly has permitted a defendant to be prosecuted in circuit court, as happened here. *See* S.C. Code Ann. § 22-5-150. It makes no difference that the aggravators are not expressly defined by statute. Rather, the law only requires that a breach of the peace be "of a high and aggravated nature." Thus, a wide variety of factual circumstances could render a simple breach of the peace triable in circuit court because of its "high and aggravated nature."

Here Appellant was indicted for "Breach of Peace - High and Aggravated."[3]

---

[3] The dissent would find that Appellant cannot be convicted of a high and aggravated breach of the peace under South Carolina law because the specific language used in the indictment is not found in our criminal law, and where such crime is listed elsewhere in South Carolina law as "aggravated breach of peace" or just "breach of the peace." *See, e.g., State v. Mason*, 108 S.C. 410, 94 S.E. 870 (1918) (affirming a conviction for "aggravated" breach of the peace).

We begin by noting the points of our analysis on which the dissent agrees. First, the dissent agrees that the crime of breach of the peace is a creature of the common law. Second, the dissent agrees that section 22-5-150 directs that some breach the peace offenses should be tried in the Magistrate's Court and others should be tried in circuit court *due to their high and aggravated nature*.

Because we agree on these fundamental points, then all that remains—its convoluted analysis notwithstanding—is that the dissent simply opposes the indictment's reference to Simm's crime as a "Breach of Peace - High and Aggravated." Thus, our entire disagreement is a matter of semantics. Where the dissent would find the State was creating (and we are now sanctioning) an entirely new crime, we find that by including the requisite jurisdictional language of "high and aggravated" in the indictment, the State was merely providing Simms with notice of the crime for which it sought to prosecute him in circuit court—a ***breach of the peace*** that was aggravated, or serious enough, to be "waived up." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 499–500 (2005) ("The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation . . . . The indictment is a notice document." (quoting *State v. Faile*, 43 S.C. 52, 59–60, 20 S.E. 798, 801 (1895), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991))).

The indictment states:

> That [Appellant] did in Richland County on or about October 9, 2010, knowingly, willfully and intentionally disturb public order and/or public tranquility through his conduct, accompanied by circumstances of aggravation, fighting in the roadway and/or disrupting traffic such acts constituting the offense of Breach of Peace in violation of the Common Law of South Carolina.

Considering the time, place, and nearness of others as required by *Peer*, we find that the trial court did not err in refusing to direct a verdict of acquittal regarding the aggravated breach of the peace charge, because the State presented evidence of aggravation. *See State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (stating that in cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict); *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)) (stating when reviewing a denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in the light most favorable to the state).

The fight and the victim's subsequent death occurred in a public roadway immediately adjacent to Williams-Brice Stadium after a football game attended by a capacity crowd. At the time, thousands of fans were attempting to exit all corners of the stadium on foot and in vehicles. Moreover, the resultant melee caused previously slow-moving traffic to come to a standstill for over two hours, as the fight occurred on a particularly busy thoroughfare. Further, many members of the public witnessed the victim's death. Several witnesses testified to the extremely disturbing nature of the crime scene. Ultimately, Appellant's direct involvement in the incident, which led to the victim's unfortunate demise, contributed to the distress of many members of the community, and the general public upheaval that followed. Thus, Appellant's actions exemplify the type of behavior constituting an aggravated breach of the peace.

At the end of the day, the dissent's complicated analysis is undermined by faulty logic. We do not understand how the majority can be charged with creating a new crime when the dissent agrees that the crime for which Simms was prosecuted already exists. Furthermore, the adoption of the dissent's analysis would produce the absurd result that simple breaches of the peace may be prosecuted in South Carolina, but serious breaches of the peace may not.

Accordingly, we affirm the circuit court's refusal to grant Appellant's directed verdict motion.

II. Sentence

Appellant contends the maximum sentence he could have been subjected to for a conviction of aggravated breach of the peace in circuit court is thirty days, citing section 22-3-560 of the South Carolina Code. *See* S.C. Code Ann. § 22-3-560 (Supp. 2013) ("Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all breaches of the peace."). We disagree.

Appellant relies on the language of section 22-3-560 that permits magistrates to punish "*all breaches of the peace*." (Emphasis added). Specifically, Appellant argues that thirty days and $500 fine is the maximum sentence for *any* breach of the peace.

However, Appellant's argument ignores the clear language of sections 22-5-150 and 22-5-110(A)(3), which suggest that once the defendant has been "waived up" to circuit court, the magistrate loses jurisdiction. Thus, while section 22-3-560 applies to all breaches of the peace tried in magistrate's court, it does not affect sentencing in circuit court. Accordingly, because no sentence is specified for aggravated breach of the peace under our criminal law, section 17-25-30 of the South Carolina Code controls. *See* S.C. Code Ann. § 17-25-30 (Supp. 2013). That section provides:

> 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.

Id.

Because Appellant's sentence fell safely within the limits of section 17-25-30, we affirm the sentencing by the trial court. *See, e.g., State v. Hill*, 254 S.C. 321, 175 S.E.2d 227 (1970).

III. Evidentiary Ruling

Finally, Appellant contends the trial court erred in refusing to allow a witness who was riding in the car directly behind the victim to testify regarding his personal observations of the victim in the hour leading up to the fight. The witness would have testified that he saw the victim harass Alabama fans on foot as he rode past them in his vehicle and exit his vehicle to urinate in the roadway before the fight.

Appellant argues that the circuit court erred in excluding the witness's testimony because it impeached other testimony elicited at trial that the victim was not acting in a disorderly fashion, and because it was "part of the fabric of the case." Appellant was acquitted of the involuntary manslaughter charge, and whether or not the victim also engaged in a breach of the peace is irrelevant to *Appellant*'s indictment for high and aggravated breach of the peace, as the victims of a breach of the peace are members of the public. Because this evidence is irrelevant to the question of Appellant's guilt for high and aggravated breach of the peace, we find any error in the circuit court's refusal to admit the testimony was harmless.

Accordingly, we affirm the circuit court's decision to exclude this testimony. *See State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (stating the admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion (citation omitted)); *see also State v. Kelly*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)).

CONCLUSION

Based on the foregoing, Appellant's conviction for high and aggravated breach of the peace and resulting sentence are

AFFIRMED.

BEATTY AND KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE PLEICONES: I respectfully dissent because I find there is no criminal offense denominated "high and aggravated breach of the peace" (BPHAN) cognizable in circuit court. Since there is no such offense, I would vacate appellant's conviction and sentence. *See, e.g., State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000) ("conviction" of an offense not recognized in South Carolina is void for lack of subject matter jurisdiction).[4]

The majority concludes that BPHAN is a common law offense. While I acknowledge that this Court has the ability to create such a crime if it chooses,[5] I find no evidence that we have done so.[6] My conclusion that BPHAN is not a criminal offense in South Carolina is based upon my review of the common law understanding of breach of the peace, and the nature of the statutes upon which the majority relies to find the legislature has permitted BPHAN to be prosecuted in General Sessions.[7]

I begin my analysis with the Reception Statute. This statute, enacted in 1712 by the General Assembly of the Colony of South Carolina, adopted English common

---

[4] Were I to reach the merits of appellant's directed verdict issue, my analysis would be confined to a review of the evidence of aggravated breach of the peace up to the point of the victim's death, and not with the "resultant melee" or the "many members of the public [who] witnessed the victim's death," or "the extremely disturbing nature of the crime [sic] scene." Because the jury absolved appellant of criminal responsibility for that tragedy, the consequences of the victim's death are not attributable to appellant for purposes of the directed verdict motion.

[5] "The Court has the right and the duty to develop the common law of South Carolina to better serve an ever-changing society," including recognizing new criminal offenses. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (recognizing new common law offense of feticide).

[6] The single reference to BPHAN in our jurisprudence is found in *State v. Mason*, 108 S.C. 410, 94 S.E. 870 (1918). The *Mason* opinion states the defendant was indicted and convicted of assault and battery with intent to kill and aggravated breach of the peace. Unfortunately the transcript and briefs from this period, including Mason's indictments from 1916 and 1918, were destroyed in a flood and thus it is impossible to confirm the actual aggravated offense for which Mason and his codefendant Davis were indicted and convicted.

[7] I regret that the majority has difficulty following my convoluted and complicated analysis. Were they able to do so, they would not conclude that my logic is faulty.

law as the law of South Carolina. The Reception Statute is currently codified at S.C. Code Ann. § 14-1-50 (1976).[8]

In 1712, as today, breach of the peace occupies an unusual status in England as a civil "offense." In order to hold that BPHAN is a common law **criminal** offense in South Carolina, we must find the opinion in which the Court recognized and defined this offense. *State v. Horne*, *supra*. I suggest that there is no such opinion.[9]

At common law, an individual may be arrested for breach of the peace if a breach has occurred, or if one is imminent. An English police officer arresting an individual for breach of the peace may either detain the individual until the threat of breach has passed, or bring the individual before a magistrate to be "bound over" to keep the peace or to be of 'good behavior' or both. *See Albert v. Lavin* [1982] A.C. 546. While an individual may be arrested, detained, or placed under a surety bond if he breached or threatened the peace, breach of peace is not a criminal offense at common law in England. As Blackstone explained:

> Any justice of the peace may, *ex officio*, bind all those to keep the peace who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendance, to the terror of the people; and all such as be known to be common barretors; and all as are brought before him by the constable for a breach of the peace in his presence; by causing the person to post a surety as security for the peace.

4 Blackstone's Commentaries on the Laws of England pp. 254-255.

When South Carolina received the common law in 1712, we accepted the concept of breaches of the peace as non-criminal offenses, but nonetheless acts which

---

[8] **Common law of England shall continue in effect.** All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.

[9] If I am correct, and it is with this decision that we create BPHAN, then we must reverse appellant's conviction as a new common law crime applies only prospectively. *State v. Horne*, *supra*.

subjected an individual to arrest. For example, from 1895 until 1976, the state constitution defined a magistrate's jurisdiction to include "the power to bind over to keep the peace and for good behavior for a time not to exceed twelve months." S.C. Const. art. V, § 21 (1895); *see State v. Garlington*, 56 S.C. 413, 34 S.E. 689 (1900) (authority of magistrate to commit to jail in lieu of requiring peace bond).

This understanding of non-criminal breach of the peace as a matter within the magistrate's jurisdiction is confirmed by an opinion of the Attorney General. In a 1969 opinion,[10] he explained the peace bond process under the 1895 Constitution. A person arrested for breach of the peace was brought before a magistrate who, upon a showing that the person was likely to commit a crime, could place that individual under a surety bond. The duration of the bond could not exceed one year, and if the individual failed to post the bond, then the individual could be committed to jail by the magistrate for a period up to a year. The individual was released only when the bond was posted, the surety period expired, or the magistrate so ordered. *See also State v. Garlington*, *supra*. The opinion further states that should the individual violate the terms of his surety bond by breaching the peace, he could not be incarcerated for that breach although the bond or part of it could be forfeited. Instead, the individual could only be criminally punished for the specific crime he committed which breached the terms of his bond. *See also* 4 *Blackstone's Commentaries* at pp. 252-53.

While no longer a part of our State Constitution, the practice of permitting magistrates to place individuals under peace bonds is retained by statute. South Carolina Code Ann. § 22-5-140 (2007)[11] authorizes a magistrate to require a "peace bond" to ensure an individual keeps the peace or to jail that person if he

---

[10] 1969 Atty. Gen. Op. No. 2720 p. 171.

[11] The text of § 22-5-140 provides:

> Any magistrate shall command all persons who, in his view, may be engaged in riotous or disorderly conduct to the disturbance of the peace, to desist therefrom and shall arrest any such person who shall refuse obedience to his command and commit to jail any such person who shall fail to enter into sufficient recognizance either to keep the peace or to answer to an indictment, as the magistrate may determine.

does not post the bond. *Cf. State v. Garlington, supra* (same procedure under 1895 Const. art. 5, § 21).

In addition to continuing the "peace bond" practice, § 22-5-140 acknowledges a magistrate's authority to require those engaged in "riotous or disorderly conduct" "to answer to an indictment." Section 22-5-140, which authorizes the magistrate to refer "rioters" or "disorderly conductors" to the solicitor, is followed by S.C. Code Ann. § 22-5-150 (2007), titled "**Arrest of persons threatening breach of peace; trial or binding over.**" This section provides:

> Magistrates may cause to be arrested (a) all affrayers,[12] rioters,[13] disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in § 22-3-560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.

Section 22-5-150 lists the criminal offenses which are traditionally categorized as "Offenses Against the Public Peace," e.g., affrays, riots, and disturbing the peace. *See* Russell, *A Treatise on Crimes & Misdemeanors* (8th Am. ed. 1857); 4 *Blackstone's Commentaries* Chapter 11, *passim.* An individual who commits or threatens to commit any of these acts is subject to arrest and to being placed under a peace bond. The individual may also be referred to the solicitor for prosecution. Under the statute, that prosecution would be for the affray, riot, or other named

---

[12] An affray is a fight between two or more persons in a public place, "to the terror of the people." *State v. Sumner*, 36 S.C.L. (5 Strob.) 53 (1850).

[13] A riot is "a tumultuous disturbance of the peace, by three or more persons assembled together, of their own authority, with the intent mutually to assist each other against anyone who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not . . . ." *State v. Connolly*, 37 S.C.L. (3 Rich.) 337 (1832); *see also State v. O'Donald*, 12 S.C.L. (1 McCord) 532 (1822) (arrest of judgment where riot indictment only named two people).

offense, and not for breach of the peace. While appellant's indictment twice references § 22-5-150, it does not charge him with any of these named offenses.[14]

As explained below, I believe history supports my reading of sections 22-5-140 and -150. Both sections 22-5-140 and -150 derive from 1870 Act No. 288 (402). This Act defined the jurisdiction of Trial Justices, the predecessors to magistrates, and provides the foundation for our current magistrate's court statutes. This Act provided in pertinent part:

> Sec. 2.[15] Trial Justices shall have jurisdiction of all offences which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars, or imprisonment in the Jail or Work House not exceeding thirty days, and may impose any sentence within those limits, singly or in the alternative.
>
> Sec. 3.[16] They may punish by fine not exceeding one hundred dollars, or imprisonment in the Jail or House of Correction not exceeding thirty days, all assault and batteries, and other breaches of the peace, when the offence is not of a high and aggravated nature, requiring, in their judgment, greater punishment.
>
> Sec. 4.[17] They may cause to be arrested all affrayers, rioters, disturbers and breakers of the peace, and all who go armed offensively, to the terror of the people, and such as utter menaces or threatening speeches, or otherwise dangerous and disorderly persons.

---

[14] To put it another way, a person charged with the criminal offense of breach of the peace is not subject to being waived up to General Sessions under the plain language of § 22-5-150. This "omission" reflects the purely civil nature of breach of the peace in 1870 when the statute was adopted, a status that did not change until 1940. *See* note 20, *infra*.

[15] The jurisdiction of magistrates is now found in S.C. Code Ann. § 22-3-550 (Supp. 2014).

[16] The statute defining the criminal sentencing limits for breaches of the peace tried in magistrates' court is now found in S.C. Code Ann. § 22-3-560 (Supp. 2014).

[17] Section 4 is now codified in § 22-5-150.

> Persons arrested for any of said offences shall be examined by the Trial Justice before whom they are brought, and may be tried before him, and, if found guilty, may be required to find sureties of the peace, and be punished within the limits prescribed in Section 2, or, when the offence is of a high and aggravated nature, they may be committed or bound over for trial before the Court of General Sessions.

In *State v. McKettrick*, 14 S.C. 346 (1880), the Court explained that, among other things, 1870 Act No. 288 divided assaults and batteries into two classes: those of a high and aggravated nature and others "below that grade," the lesser offenses lying within the exclusive jurisdiction of the Trial Justices [i.e., magistrates] and the high and aggravated within the exclusive jurisdiction of the court of general sessions. Further, *McKettrick* explains that the Trial Justice must refuse to adjudicate a "high and aggravated" assault and battery but instead must "send the case up" to General Sessions. *McKettrick*, 14 S.C. at 354; *see State v. Sims*, 16 S.C. 486 (1886) (explaining that general sessions has jurisdiction to try only high and aggravated rioters).

Just as Act No. 288 divided assaults and batteries into two classes, it also divided offenses which breach the peace into two jurisdictional categories, simple breaches triable in magistrates' courts and high and aggravated breaches triable in General Sessions. *McKettrick*, *supra* (assaults and batteries); *Sims*, *supra* (riots). However, Act No. 288 did not create a new magistrate level crime called "breach of the peace" nor did it create a new General Sessions offense known as "breach of the peace of a high and aggravated nature."[18] As the Court explained in *State v. Robinson*, 31 S.C. 453, 10 S.E. 101 (1889) the term "assaults and batteries and other breaches of the peace of a high and aggravated nature [used in the Act]. . . [did not] create a new and distinct offense of that character; but rather, [the term] indicate[s] a class of cases of which the court of general sessions had jurisdiction." *Id*. at 456, 10 S.E. at 102. Section 22-5-150 reflects the jurisdictional boundary between circuit court and magistrates' court for criminal breaches of the peace, a division created by 1870 Act No. 288. *E.g.*, *State v. Grant*, 34 S.C. 109, 12 S.E. 1070 (1891).

[18] Had the Act created the crimes, we would be concerned with a statutory offense rather than a common law one.

That our law retains the principle that persons whose criminal offense breaches the peace in a "high and aggravated" manner should be referred to General Sessions is reflected in Title 16 as well as in Title 22. Certain offenses named in Section 4 of 1870 Act No. 288 as breaching the peace, and found today in § 22-5-150, are also found in Title 16, Chapter 5, titled "Offenses Against Civil Rights." *See* § 16-5-120 (establishing additional penalty for unarmed person who is convicted of "engaging in a riot, rout,[19] or affray") and § 16-5-130 (Riot).[20] Consistent with § 22-5-150's division of offenses which breach the peace into those triable in magistrate's court and those of a high and aggravated nature which should be bound over to General Sessions, § 16-5-140 requires persons arrested for violation of an "Offense Against Civil Rights" be brought "for a trial before such court as shall have jurisdiction of the offense." In other words, § 16-5-140 recognizes that "Offenses Against Civil Rights" are properly tried either in magistrate's court or in General Sessions, depending upon the aggravated nature of the defendant's conduct. *See also* 1895 S.C. Const. art. V, § 18 recognizing concurrent jurisdiction of circuit court and magistrates' court "in all cases of riot, assault and battery, and larceny . . . ."

While the common law did not recognize a criminal offense known as "breach of the peace" in 1712, nor does England today, South Carolina has come to acknowledge a common law offense with this name. The origin of this common law crime is not clear, but it appears to have evolved from our use of the generic term "breach of the peace" to identify the criminal act committed by the defendant,[21] where the underlying criminal conviction was either for the violation of an ordinance forbidding disturbing the peace,[22] or for one of the criminal

---

[19] A rout differs from a riot in that the defendants meet and "do not actually execute their purpose, but only make some motion towards its execution." *State v. Sumner*, 29 S.C.L. (2 Speers) 599 (1844). Unlawful assembly is a lesser included offense of rout. *Id.*; *State v Brazil*, 24 S.C.L. (Rice) 257 (1839).

[20] See footnote 9 and 10, *supra*, defining these terms.

[21] *See e.g. Lining v. Bentham*, 2 S.C.L. (2 Bay) 1 (1796) (referring to a non-party as having been guilty of a breach of the peace).

[22] *See*, *e.g.*, *State v. Praser*, 173 S.C. 284, 175 S.E. 551 (1934).

offenses generally categorized as "Offenses Breaching the Peace." Over time, "breach of the peace" has evolved into a synonym for "disturbing the peace." [23]

However, there is nothing in this Court's decisions to suggest that concomitant with our recognition of a common law magistrate's level offense denominated "breach of the peace" that we also created a new crime known as "high and aggravated breach of the peace," punishable in General Sessions. Instead, as explained above, the statutory reference to high and aggravated breach of the peace derives from an

---

[23] The first reported decision stating the defendants were convicted in magistrate's court of the crime of breach of the peace, and defining that crime, is *State v. Langston*, 195 S.C. 190, 11 S.E.2d 1 (1940). The definition in *Langston* is taken from "Kansas v. Herbert," annotated in 48 A.L.R. 85. *Id*. However, the defendant in the Kansas case referenced in *Langston*, was actually convicted of "disturbing" the peace, and it is the definition of that offense which is adopted in *Langston*. *See State v. Herbert*, 246 P.2d 507 (Kan. 1926). To the extent *Langston* relies on South Carolina civil decisions for its definition of the crime of breach of the peace, those cases are inapposite. In those cases, the plaintiff claimed the defendant had committed a trespass *quare clausum fregit* when repossessing its property, and the defendant asserted as its defense that the repossession had been peaceful. *See, e.g.*, *Lyda v. Cooper*, 169 S.C. 451, 169 S.E. 236 (1933); *Childers v. Judson Mills Store Co.*, 189 S.C. 224, 200 S.E. 770 (1939); s*ee also Jordan v. C&S Nat'l Bank of S.C.*, 278 S.C. 449, 298 S.E.2d 213 (1982) (holder of chattel mortgage may retake property either peacefully or by claim and delivery proceedings). Our criminal opinions continue to rely, erroneously in my opinion, on these civil cases when defining the crime of breach of the peace. *See, e.g., State v. Peer*, 320 S.C. 546, 466 S.E.2d 375 (Ct. App. 1996). In addition, our cases cite to *Cantwell v. Connecticut*, 310 U.S. 296 (1940) for the definition of the common law offense of breach of the peace. *Cantwell* notes that breach of the peace is "a common law concept of the most general and undefined nature," that punishes "violent acts" and "acts and words that destroy or menace public order and integrity." The Court stated that "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious." Further, the Court was careful to note in discussing the state conviction for common law breach of the peace that "The court below has held that petitioner's conduct constitutes the commission of an offense under state law, and we accept its decision as binding upon us to that extent." *Id*. at 308.

Act directing that some offenses which breach the peace should be tried in the magistrates court and others in General Sessions. § 22-5-150.

My review of the common law history of breach of the peace, including the Court's decisions, and my review of related South Carolina statutes and the 1895 Constitution, convinces me that this Court has not created a common law criminal offense cognizable in General Sessions denominated "Breach of the Peace of a High and Aggravated Nature." I would therefore vacate appellant's conviction and sentence for this non-existent crime.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Daniel A. Beck, Respondent.

Appellate Case No. 2014-001912

Opinion No. 27529
Heard February 18, 2015 – Filed June 10, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James K. Holmes, of The Steinberg Law Firm, LLP, of Charleston, for Respondent.

PER CURIAM: Respondent self-reported misuse of his trust account. He and the Office of Disciplinary Counsel (ODC) stipulated the facts, and at the Panel Hearing the sole issue was the appropriate sanction. The Panel found that mitigating factors outweighed aggravating factors, and recommended Respondent be suspended for three years, retroactive to the date he was indefinitely suspended,[1] and that several other conditions be imposed.[2] ODC has taken exception to the three-year suspension recommendation, and contends that disbarment, retroactive

[1] *In re Beck*, 394 S.C. 208, 715 S.E.2d 336 (2011).

[2] Those conditions are that Respondent pay the costs of the proceeding ($1,450.07); that within six months of reinstatement he attend both the Legal Ethics and Procedure Program Ethics School and Trust Account School; and that for the two years following reinstatement, he provide the Commission on Lawyer Conduct with quarterly reconciliations of his Trust Account.

to September 2, 2011, is the appropriate sanction. We agree with ODC, and disbar Respondent retroactive to September 2, 2011. Further, we impose the additional conditions recommended by the Panel.

FACTS

1. Respondent operated a law firm as the principal shareholder for twenty-four years, primarily handling plaintiff's personal injury cases on a contingency basis. For a period of approximately eleven years, Respondent used funds from his trust account for purposes for which those funds were not intended, including funding other clients' litigation, cash advances to clients, office operating expenses, payroll, and personal expenses.

2. Respondent instructed his nonlawyer staff with signatory authority on his trust account to issue checks from that account for purposes for which those funds were not intended.

3. Respondent failed to properly reconcile his trust account or otherwise maintain records required by Rule 417, SCACR. As a result of inadequate accounting practices, Respondent made numerous mistakes in client transactions resulting in overpayments of attorney's fees to the firm, overpayments to clients, and bank fees that were not covered by firm funds.

4. Periodically, Respondent attempted to restore misappropriated funds by leaving earned fees in his trust account, but no regular accounting of those credits was maintained.

5. As of August 31, 2011, Respondent had approximately $565,806.86 in negative client ledger balances. At the time of his interim suspension, the balance in Respondent's trust account was $439,042.30.

6. As of the date of these stipulations, the attorney appointed to protect Respondent's interests has restored the trust account with funds received on behalf of Respondent in the form of earned fees and cost reimbursements and has reimbursed from those funds all clients, medical providers, and lien holders with claims that have been identified to date.[3]

7. Respondent's conduct violated Rules 1.8(e), 1.15, 5.3, 8.4(d) of the Rules of Professional Conduct (RPC), Rule 407, SCACR.

8. The foregoing constitutes grounds for discipline pursuant to Rule 7(a)(1), (5) and (6) of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR.

The Panel found these aggravating factors:

(1) The serious nature of Respondent's misconduct, with more than half a million dollars of client funds having been converted by Respondent at the time of his suspension;

(2) Respondent's pattern of misconduct, having misappropriated client funds over eleven years;

(3) The number of disciplinary rules violated:

(a) Rules 1.15 and 8.4(d), RPC, Rule 407 (misappropriation);

(b) Rule 1.8, RPC, Rule 407 (improper financial assistance to clients);

[3] At the Panel Hearing there was testimony was that some funds remain undistributed as there are unresolved medical liens, and that one claim has been "referred back to the [Lawyers Fund for Client Protection]."

(c) Rule 5.3(c)(1), RPC, Rule 407 (instructing legal assistants to write checks to remove trust account funds for improper purposes); and

(d) Rule 417, SCACR (failure to maintain trust account records); and

(4) Respondent's prior disciplinary history, a 2009 Letter of Caution finding he violated Rule 1.8(e), RPC, Rule 407, which prohibits lawyers from providing financial assistance to clients. Respondent admits to continuing to violate this rule after receiving the Letter of Caution.

The Panel found the following matters mitigated Respondent's conduct:

(1) Respondent is sincerely remorseful and regretful, and accepted full responsibility with honesty and candor;

(2) Respondent self-reported his misconduct, and fully cooperated during the disciplinary proceedings; and

(3) Respondent's conduct following his interim suspension in hiring an accountant to assist in identifying clients whose funds had been misappropriated, thus allowing the attorney to protect to distribute incoming funds to clients and medical providers.[4]

While the Panel recognized "disbarment would seem to be the most appropriate sanction," it recommended a three-year retroactive suspension based in part on the mitigating factors, and in part on its belief that a lesser sanction will provide an incentive for lawyers to self-report.

SANCTION

The authority to discipline lawyers and the manner in which discipline is imposed is a matter within the Court's discretion. *In re Jardine*, 410 S.C. 369, 764 S.E.2d

[4] *But see* Fn. 3, *supra*.

924 (2014). Like the Panel, we are moved by the depth and sincerity of Respondent's remorse and impressed by the level of cooperation he has demonstrated since self-reporting his misconduct. We cannot, however, ignore that in addition to violating Rules 1.8 and 5.3(C)(1), RPC, Rule 407, SCACR, and Rule 417, SCACR, Respondent took money that was not his from his trust account over the course of eleven years. We find disbarment is the appropriate sanction, but order that it be retroactive to the date of Respondent's interim suspension, September 2, 2011. We also order that within 30 days of the date of this opinion Respondent pay the costs of this proceeding ($1,450.07), and comply with the requirements of Rule 30, Rule 413, RLDE, SCACR. Further, we order that within six months of reinstatement Respondent attend both the Legal Ethics and Procedure Program Ethics School and the Trust Account School, and that for two years after reinstatement, he provide the Commission on Lawyer Conduct with quarterly reconciliations of his Trust Account.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No.5254
Heard February 5, 2014 - Filed July 30, 2014
Reheard January 13, 2015
Withdrawn, Substituted, and Refiled June 10, 2015

AFFIRMED

Dwight Franklin Drake and Michael J. Anzelmo, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

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

LOCKEMY, J.: In this criminal appeal, Leslie Parvin argues the trial court erred in allowing inadmissible hearsay testimony from two witnesses. We affirm.

FACTS

Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. The State tried the case under the theory that Parvin solicited Lopez for sex and then killed Lopez and Gutierrez in retaliation when Lopez refused him later in the night. Parvin argued self-defense.

Motion In Limine

Immediately prior to trial, Parvin made a motion in limine to exclude any testimony referring to other crimes, wrongs, or bad acts. He contended any statements alleging he was at Lopez's home for homosexual sex were inadmissible. Specifically, he objected to statements from three different witnesses—testimony from Adan Soto and Marlin Avila regarding statements made by Lopez at a gas station and testimony from José Monroy regarding statements Monroy overheard at Lopez's home. For purposes of this appeal, we focus only on the contested testimony from Soto and Avila, which will be referred to as the Lopez statements. Parvin does not appeal any issue related to Monroy's testimony.

Parvin argued (1) the Lopez statements were inadmissible pursuant to Rule 404(b), SCRE, because the State could not prove by clear and convincing evidence Parvin committed any bad acts; (2) the State was improperly introducing the Lopez statements to prove he was of bad character; and (3) the Lopez statements were more prejudicial than probative. Parvin also contended the Lopez statements would be inadmissible as hearsay.

The State argued the Lopez statements were admissible under the theory of res gestae or the present sense impression exception to the hearsay rule.[1] As to the issue of res gestae, the State asserted there was an ongoing chain of events and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, as statements of the declarant's "[t]hen existing mental, emotional, or physical condition." Finally, the

[1] The State cited *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), to support its arguments.

State emphasized that the Lopez statements also indicated Parvin's alleged motive and were not intended to show bad character. The State, however, asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.[2]

The trial court ruled the Lopez statements (1) were admissible under the res gestae theory, (2) constituted an exception to the hearsay rule, and (3) were probative to the issue of Parvin's motive. During trial, the trial court clarified its decision and stated that in admitting the testimonies under the res gestae theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." It further stated the probative value of the evidence outweighed the prejudicial effect.

Parvin's Version of the Events

Parvin testified that on July 30, 2010, the day of the incident, he was driving his van and collecting scrap metal for recycling and profit. He carried a forty-five caliber pistol in his van as a result of his prior military service. On the way home from an unsuccessful search, Parvin bought beer and passed Lopez's home, where Lopez and Gutierrez were drinking beer in the yard. Parvin stated he assumed the men were in the construction industry due to their attire and could possibly have leads regarding scrap metal. Parvin stopped in the yard and began speaking and drinking with Lopez and Gutierrez. Parvin claimed he did not want to immediately ask for connections or leads on scrap metal and first wanted to establish some sort of relationship with the men.

Parvin agreed to drive Lopez to the gas station for more beer and gave Lopez money for the beer. While at the gas station, Parvin claimed Lopez observed him move his gun from between the front seats and place it in the waistband of his shorts. Parvin remained in the van while Lopez entered the store and purchased the beer. Parvin and Lopez then returned to Lopez's home. Throughout the evening, several people came and left the home until only Parvin, Lopez, and Gutierrez remained. Parvin stated that when he tried to leave, Lopez would not let him and requested more money. Parvin refused and then asked for the change from the beer Lopez had purchased earlier in the night. Lopez became upset and

[2] Rule 404(b), SCRE, provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

threatened Parvin and Parvin's family. When Parvin attempted to leave again, Gutierrez blocked his exit. Gutierrez made physical contact with Parvin and tried to obtain control of Parvin's gun. Parvin kept control of his gun and saw Lopez reach for something in the shed located in the yard. Parvin stated he became fearful for his life at that time and shot both Lopez and Gutierrez in self-defense.

The State's Case

In support of its version of events, the State offered testimony from Monroy, who claimed he was drinking with Parvin, Lopez, and Gutierrez prior to the incident. Monroy stated he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with Lopez that evening. The beer was depleted at some point during the evening, and Lopez asked Parvin to drive him to a gas station to purchase more. The State presented testimony from Soto and Avila, who spoke with Lopez at the gas station.[3] Soto and Lopez were both from Guatemala, and Soto knew Lopez through Soto's sister-in-law. Soto stated Lopez approached him and began talking with him. Lopez mentioned he was at the gas station with an American to purchase a case of beer and further explained Parvin had offered him $200 to buy the beer and have sex. Lopez then showed Soto the $200 but told Soto he was going to tell Parvin to go home. Avila testified Lopez made similar comments to her inside the store.

After returning to Lopez's home, the State opined Parvin became angry because Lopez refused to have sex with him. The State presented Roberto Gonzalez-Merrin as an eyewitness to the shooting. Merrin explained Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutiererez, who was attempting to flee the scene, and shooting him in the back. Merrin testified that when the shooting occurred, Parvin was outside of the fence that surrounded Lopez's front yard while Lopez and Gutierrez were both inside the fence.

Following the shooting, Parvin fled the scene in his minivan. Parvin then returned to his home, destroyed the gun used in the shooting, checked his family into a motel for the evening, changed his appearance, and drove his minivan to Louisiana. While in Louisiana, Parvin sold his minivan for scrap and continued to Texas. Parvin returned to Columbia on August 15, 2010, and despite knowing the

[3] Parvin objected to the testimony immediately prior to Soto's and Avila's answers, but the trial court overruled the objection.

authorities were looking for him, he never attempted to contact police. Police obtained warrants for Parvin's arrest for murder after Monroy identified Parvin in a photographic lineup. Police eventually arrested Parvin pursuant to search and arrest warrants executed at his home.

Verdict

The jury convicted Parvin of two counts of murder, and the trial court sentenced him to thirty-five years' imprisonment. Parvin moved for a new trial, which the trial court denied. This appeal followed.

LAW/ANALYSIS

Parvin argues the trial court erred in allowing Soto and Avila to testify about the Lopez statements. Specifically, he argues the Lopez statements were hearsay and did not qualify as present sense impressions under Rule 803(1), SCRE. We agree.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this court has held a statement given nearly ten

hours after the perceived incident cannot be admitted under Rule 803(1). *See State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997).

Parvin contests the admission of the following testimony from Soto:

> Q: And did you have a chance to speak to [Lopez] on that day?
> A: Yeah, I spoke to him the day that I saw him at the gas station at that time.
>
> . . . .
>
> Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?
> A: Yeah, he told me he was going to buy a case of beer, that he was with an American.
> Q: Okay. Did he say anything else about the American and the beer?
> A: Yes, he said the American had given him $200 to buy beer because he wanted to have sex with him.

Parvin also contests the admission of the following testimony from Avila:

> Q: What did [Lopez] tell you about what he was doing with that American?
> A: He said that the American had given him money to buy beer and he said the American had given him $200 to have sex.

The witnesses gave no indication as to the amount of time between when Parvin allegedly solicited sex and when Lopez spoke with them. The State simply explained it was an "ongoing chain of events." We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant's statement is a critical component of the present sense impression exception.

Despite finding error in the trial court's ruling, we must also find the error prejudiced Parvin before we can reverse. *See State v. Garner*, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony

constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (citation and internal quotation marks omitted)).

Later at trial, the State presented Investigator William Gonzalez as a witness. Investigator Gonzalez recorded statements from both Avila and Soto regarding the night of the incident. On cross-examination, Investigator Gonzalez testified, without objection, about a report he prepared following his interview of Avila and Soto.

> Q: And in your report you noted that [Avila] told you that . . . [Lopez] referred to the American as "the fuc**** American," and you put that in your report?
> A: That's correct. . . .
> Q: And the next -- I'm sorry. You were also involved in, as the solicitor stated, the arrest of --
> A: Well, it -- can I clarify one thing? It wasn't just "the fuc**** American." It was "the fuc**** American [who] gave me $200 to have sex with him."

The State also presented Investigator Brien Gwyn as a witness to testify regarding his interview of Avila and Soto. On direct examination, he testified without objection, "Both in their statement advised us that according to [Lopez]'s conversation with [Soto and Avila] in the store or at the store, [Lopez] was solicited for sex by the individual he was at the store with." On cross-examination, Parvin asked Investigator Gwyn whether the store was "the place where [Lopez was] telling [Avila] about this sex for money," and Investigator Gwyn replied that it was. Later on cross-examination, Parvin asked the officer if "the only evidence that you have that there is a sex for money is the words of a man who [had a] .379 [blood alcohol content]," and Investigator Gwyn replied, "From two separate witnesses, yes."

We find the trial court's error in admitting Soto's and Avila's hearsay testimonies was rendered harmless because they subsequently became cumulative to Investigator Gonzalez's and Investigator Gwyn's unobjected-to testimonies. *See Townsend*, 321 S.C. at 59, 467 S.E.2d at 141 ("Where the hearsay is merely cumulative to other evidence, its admission is harmless."); *State v. Kirby*, 325 S.C.

390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding even if an officer's testimony regarding information radioed by the police dispatcher was inadmissible hearsay, its admission was harmless because it was cumulative to similar testimony that was admitted without objection).

On rehearing, Parvin argues our finding of harmless error is contrary to the rule of appellate preservation that a party need only object once and obtain a ruling from the trial court to preserve an issue for appellate review. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again." (internal quotation marks omitted)). Parvin asserts that our holding requires for the first time "that a party must object to the same evidence repeatedly in order to avoid losing an appeal based on a 'harmless error' analysis." We disagree. Although Parvin objected to Soto's and Avila's hearsay testimonies, he did not object to Investigator Gonzalez's or Investigator Gwyn's testimonies, nor does he challenge the admission of the officers' testimonies on appeal. *See State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122 (Ct. App. 2008) (finding any error in allowing the victim's testimony that the defendant sexually assaulted the victim six years earlier was harmless when, although the defendant objected to the victim's testimony, he "did not timely object" to testimony from two other witnesses regarding the defendant's touching of the victim prior to the sexual assault for which the defendant was charged).

Parvin further asserts our holding "contradict[s]" Rule 17 of the South Carolina Rules of Criminal Procedure, which states "[i]f an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence." We disagree. A review of the historical notes to Rule 17 indicates this language was "taken from Rule 43(c)(1), SCRCP." *Id.* In *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992), this court rejected a similar argument in the context of Rule 43(c)(1). We explained Rule 43(c)(1), which uses the exact same language as Rule 17, "merely states that once a contemporaneous objection has been made, no further reservation of rights is needed to preserve the objection." *Id.* at 482, 424 S.E.2d at 519. Our court specifically noted, however, Rule 43(c)(1) "does not alter the rule requiring a contemporaneous objection" when evidence is presented to preserve the issue of its admissibility on appeal. *Id.* *Parr* therefore makes clear Rule 17, similar to Rule 43(c)(1), did not relieve Parvin of his requirement to object to Investigator

Gonzalez's and Investigator Gwyn's testimonies to challenge the admissibility of their testimonies on appeal.

We find *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007), similar to the present case. *Ladner* involved a prosecution for criminal sexual conduct with a minor. *Id.* at 106, 644 S.E.2d at 686. At trial, the State moved to admit a witness's testimony that after the sexual assault, the two-year-old victim told the witness her "tooch" hurt, and after the witness asked what happened, the victim responded by saying the defendant "did it" and then quickly stating he "didn't do nothing." *Id.* at 113, 644 S.E.2d at 689. Over the defendant's objection, the trial court allowed the witness's testimony, finding the victim's statement the defendant "did it" was admissible as an excited utterance. *Id.* at 115, 644 S.E.2d at 690. On appeal, our supreme court found no error in allowing this testimony because the victim's statement qualified as an excited utterance. *Id.* at 116-17, 644 S.E.2d at 690-91. In addition, the supreme court found "any arguable error regarding [the witness's] testimony would be deemed harmless" because "[o]ther hearsay statements by the victim identifying [the defendant] were also admitted during the State's case." *Id.* at 113 n.8, 644 S.E.2d at 689 n.8. Specifically, a doctor who examined the victim after the assault testified later at trial, without objection, the victim "indicated . . . she had been touched by her aunt's boyfriend [who] was previously identified at triage as someone named Bryan. And I asked her if the aunt's boyfriend was [the defendant] and she told me yes." *Id.*

Here, as in *Ladner*, the admission of Soto's and Avila's testimonies was rendered harmless in light of the other evidence that was later admitted at trial without objection. The investigators' unobjected-to testimonies was other evidence that tended to support the substance of Soto's and Avila's testimonies—that Parvin offered Lopez $200 in exchange for sex. Because this other evidence became cumulative to Soto's and Avila's testimonies and was admitted without objection, we find the error in allowing Soto's and Avila's testimonies was rendered harmless.

We note that several other occurrences at trial further support our conclusion that the error in admitting Soto's and Avila's testimonies was harmless. For example, during voir dire and before Parvin's motion in limine to exclude any statements that Parvin was at Lopez's home for homosexual sex, the trial court informed the pool of potential jurors that the trial might involve "allegations of homosexuality . . . and/or sex for money." Moreover, during opening arguments, the State asserted, without objection, that Lopez told Avila and Soto "I'm here with the white

American. I'm getting some beer and he offered to pay me money for sex." Likewise, Parvin's counsel told the jury Avila and Soto planned to testify that Lopez told them "[t]his fuc**** American gave me money for beer. This fuc**** American gave me $200 to have sex with him, but I'm not going to do it." While the trial court's comments during voir dire and counsels' opening arguments are not evidence Parvin offered Lopez $200 for sex, these instances show how this issue permeated the entire trial. Finally, as previously stated, Parvin does not challenge Monroy's testimony that he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. Accordingly, when considering Soto's and Avila's hearsay testimonies in relation to the entire record, the trial court's error in allowing this testimony was harmless.

CONCLUSION

For the forgoing reasons, we find the trial court's error in allowing Soto's and Avila's testimonies was rendered harmless because it became cumulative to other evidence later admitted at trial without objection. Thus, the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C.R. Meyer and Sons Company, Plaintiff,

v.

Custom Mechanical CSRA, LLC, Respondent.

And

Custom Mechanical CSRA, LLC, Third-Party Plaintiff, Respondent,

v.

Plumbers & Steam Fitters Local #150 Health and Welfare Fund, Plumbers & Steam Fitters Local #150 Pension Fund, Plumbers & Steam Fitters Local #150 Annuity Fund, and Jackie K. Nordeen, Jr. and Patrick H.F. Smith, IV, as Trustees of these Funds; Plumbers & Steam Fitters Local #150 Vacation Fund and Patrick H.F. Smith, IV, and Joseph L. Dozier, as Trustees of this Fund; Augusta Joint Apprenticeship and Journeyman Training Committee and Patrick H.F. Smith, IV and Charles I. Hardigree, as Trustees of this Fund; Trustees of Southeastern Iron Workers Healthcare Plan; Trustees of Southeastern Iron Workers Annuity Plan; Trustees of Iron Workers #709 Joint Apprenticeship and Training Committee and Local #709, International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers; Southeastern Carpenters and Millwrights Health Trust; Southeastern Carpenters and Millwrights Pension Trust; Larry Phillips and J. Kirk Malone, as Trustees of these Funds; Presidential Financial Corporation; Norton Welding Supply, Inc.; Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D.

Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Griffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phormmachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; Bruce Pollock, Jr.; Security Federal Bank; Joseph A. Doyle, Jr.; Brian Field; and Leonard Wade Cliett; Third-Party Defendants,

Of whom Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Griffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phormmachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; and Bruce Pollock, Jr. are the Appellants,

And Presidential Financial Corporation and Security Federal Bank are Respondents.

Appellate Case No. 2013-001839

Appeal From Richland County
James C. Williams, Jr., Special Referee

Opinion No. 5319
Heard March 12, 2015 – Filed June 10, 2015

REVERSED AND REMANDED

John S. Nichols, Bluestein Nichols Thompson & Delgado, LLC and Nekki Shutt, Callison Tighe & Robinson, LLC, both of Columbia, for Appellants.

Curtis Lyman Ott, Lindsay Anne Joyner, and John Thomas Lay, Jr., Gallivan, White & Boyd, PA, all of Columbia, for Respondent Presidential Financial Corporation; and Robert L. Buchanan, Jr., Buchanan Law Office, PA, of Aiken, for Respondent Security Federal Bank.

FEW, C.J.: This appeal involves section 29-7-10 of the South Carolina Code (2007), and whether the section created a first lien on money paid to a contractor when (1) the laborers claiming the lien did not work for the contractor, but for its subcontractor, and (2) the funds to which the lien would attach were held in escrow by court order instead of paid directly to the contractor. A special referee granted summary judgment based on a finding that the section did not create a lien under these circumstances. We reverse and remand for trial.

I. Facts and Procedural History

C.R. Meyer and Sons Company served as the general contractor for the construction of a toilet paper-making machine at the Kimberly Clark facility in Beech Island, South Carolina. C.R. Meyer subcontracted with Custom Mechanical, CSRA, LLC to install industrial piping. Custom Mechanical borrowed money from Presidential Financial Corporation and Security Federal Bank ("the lenders") to fund its work, and the lenders perfected security interests in Custom Mechanical's accounts receivable.

Custom Mechanical obtained labor for its work through its wholly-owned subsidiary, Custom Industrial Services, LLC. Custom Industrial and a labor union established a plan through which employees could elect to have a percentage of their wages withheld by Custom Industrial, which would be set aside in the union's vacation fund and paid to the employees twice a year.

C.R. Meyer suspended Custom Mechanical's work at the Kimberly Clark facility after a dispute arose, and Custom Industrial stopped making payments to the vacation fund. C.R. Meyer and Custom Mechanical arbitrated Custom Mechanical's claim that C.R. Meyer breached contracts between them, and an arbitration panel awarded Custom Mechanical $1,976,548.

C.R. Meyer filed an action against Custom Mechanical in circuit court challenging the arbitration award. Custom Mechanical filed a third-party complaint against its creditors, including the lenders and twenty-nine employees who participated in the vacation fund ("the employees"). After the circuit court confirmed the arbitration award, C.R. Meyer and Custom Mechanical reached a settlement. The settlement provided the circuit court would order C.R. Meyer to pay $1.8 million from the arbitration award into Custom Mechanical's attorneys' trust account pending the court's determination of the creditors' priorities.

The lenders and the employees answered Custom Mechanical's third-party complaint and asserted security interests in the arbitration award proceeds. The lenders sought a declaratory judgment that their security interests had "priority over all other alleged liens held by" Custom Mechanical's creditors. The employees asserted a "first lien" priority to the funds under section 29-7-10.

The case was referred to a special referee, who ordered all but $325,000 be disbursed to the lenders from the escrow account. The lenders and the employees filed cross-motions for summary judgment, each claiming priority to the remaining $325,000. The special referee granted the lenders' motion for summary judgment, finding the employees were not entitled to a first lien under section 29-7-10.

II. Summary Judgment

The employees argue the special referee erred in granting summary judgment to the lenders. We agree. *See* Rule 56(c), SCRCP (stating the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the

moving party is entitled to a judgment as a matter of law"); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870 (2012) ("The question of statutory interpretation is one of law for the court to decide.").

A. "Laborers" Under Section 29-7-10

Section 29-7-10 provides (1) "Any contractor . . . shall pay all laborers . . . for their lawful services . . . out of the money received for the erection . . . of buildings upon which such laborers . . . are employed or interested," and (2) "such laborers . . . shall have a first lien on the money received by such contractor." § 29-7-10. The special referee correctly determined the employees were "laborers" under the section. However, the special referee found the employees were not entitled to a first lien because they "were employed by Custom Industrial and not by Custom Mechanical." We disagree that the specific identity of the employer makes any difference.

The statute requires that a contractor "shall pay all laborers . . . for their lawful services" when the laborer is "employed or interested" in the project. *Id.* These employees were "employed" and "interested" in the work at the Kimberly Clark facility as "laborers" providing "lawful services." When such a laborer has a claim for the contractor's failure to pay, the lien attaches, pending resolution of the claim. *Id.* We find section 29-7-10 does not require "laborers" to be directly employed by the contractor who receives the money in order for them to be entitled to a first lien. We interpret section 29-7-10 as establishing a first lien in favor of "laborers" who worked on "the erection . . . of buildings" regardless of their specific employer.

B. "Money Received by" Custom Mechanical

The special referee also determined the employees were not entitled to a first lien because "[n]o money has come into the hands of Custom Mechanical." In reaching this determination, the special referee interpreted section 29-7-10 to require the contractor to actually receive the funds before a lien could attach under the section.

We find the employees are not prohibited from establishing a first lien on Custom Mechanical's arbitration award merely because the $325,000 balance remains in Custom Mechanical's attorneys' trust account pursuant to a court order. The circuit court ordered "C.R. Meyer will pay the sum of [$1.8 million] to Custom

[Mechanical]" and the funds must be held in the lawyers' trust account. The court also gave Custom Mechanical the right "to assert any priority to the funds." The court's order demonstrates Custom Mechanical retained ownership of the funds even though the funds were held "pending resolution of any claims asserted by [Custom Mechanical's creditors]" because they could only "be disbursed pursuant to further Order of the Court." Thus, the funds in the escrow account were owned by Custom Mechanical and were held for its benefit—to pay its creditors—upon court order.

The special referee relied on *Morgan & Austin v. D.W. Alderman & Sons' Co.*, 70 S.C. 462, 50 S.E. 26 (1905), in which our supreme court first interpreted the predecessor to section 29-7-10.[1] We find the special referee's reliance on *Morgan & Austin* to be misplaced. In that case, Morgan & Austin supplied materials for a builder, and when the builder did not pay, Morgan & Austin filed suit to enforce a lien under the section. 70 S.C. at 462-64, 50 S.E. at 26. This lien was enforced against funds attached by the sheriff from a debt owed to an individual partner of the builder's company. 70 S.C. at 462-63, 50 S.E. at 26. The supreme court held the section did not apply because the funds belonged to the individual partner, not the partnership—which was the entity that failed to pay Morgan & Austin. 70 S.C. at 465, 50 S.E. at 27. Thus, because "the money [was not] in the hands of the [builder]," but in the hands of its partner—a separate legal entity—Morgan & Austin had no lien under the statute. *Id.*

The situation here is different. The court ordered C.R. Meyer pay the money to Custom Mechanical, but that it be held by its attorneys. The fact that the circuit court ordered the funds be placed in the lawyers' trust account did not change the ownership of those funds. The lien attached once Custom Mechanical's attorneys received the funds on its behalf, and section 29-7-10 gave the lien first priority.

---

[1] The predecessor statute was identical in application. It read, "It shall be the duty of any contractor . . . to pay all laborers . . . for their lawful services . . . out of the money received for the erection . . . of buildings upon which said laborers . . . are employed or interested, and said laborers . . . shall have a first lien on the money received by said contractor . . . in proportion to the amount of their respective claims." *See* 70 S.C. at 463-64, 50 S.E. at 26 (quoting statute).

To interpret section 29-7-10 differently would defeat the purpose of the statute. The arbitration panel made its award based on a finding that C.R. Meyer owed Custom Mechanical money. When C.R. Meyer paid the arbitration award, the funds were owned by Custom Mechanical. However, the funds were insufficient to cover all of Custom Mechanical's secured obligations, so the circuit court entered the escrow order to preserve them until the dispute could be resolved as to how the funds would be allocated among Custom Mechanical's creditors. Under the special referee's interpretation of section 29-7-10, the court's action to *protect* the funds for Custom Mechanical's creditors—including the employees—would actually *defeat* the employees' otherwise valid lien. The special referee's interpretation creates a situation in which a competing creditor with a lien second in priority could make itself a first priority lienholder simply by bringing an action to place the funds in the hands of an escrow agent. Then, because the owner of the funds—here, Custom Mechanical—did not physically "receive" the funds, the second priority lien would become a first priority lien. Such a result would allow a contractor's creditors to prevent the establishment of section 29-7-10's first lien for the contractor's "laborers" by winning a race to the courthouse. We hold the Legislature did not intend the creation of a lien under section 29-7-10 to turn on how the contractor "received" the funds—whether physically, in its own bank account, or in the account of an escrow agent. *See Poinsett Constr. Co. v. Fischer*, 301 S.C. 343, 344-45, 391 S.E.2d 875, 876 (Ct. App. 1990) ("When the Legislature provided that the lien granted [under section 29-7-10] is a first lien, we must conclude that the Legislature meant what it said.").

C. The Union's Claim

Finally, the special referee determined the employees did "not have an independent claim" to the unpaid vacation funds because the union brought a claim for the funds that had "already been litigated and resolved."[2] We find the special referee erred. As the parties acknowledged at oral argument, each employee had a direct contractual right to receive the vacation funds. Therefore, the employees have independent claims regarding their entitlement to the funds regardless of whether the union also brought a claim.

---

[2] In 2007, the union obtained a default judgment against Custom Industrial in federal court.

III. Conclusion

We express no opinion as to the validity of the employees' claims. We merely find the special referee erred in granting summary judgment to the lenders as to the existence of the employees' lien under section 29-7-10.[3] The order of the special referee is **REVERSED** and the case is **REMANDED** for trial.

HUFF and WILLIAMS, JJ., concur.

[3] Our ruling makes it unnecessary to address issue II. We also find it unnecessary to address issue III as that is an issue the trial court must resolve on remand.