The Supreme Court of South Carolina

In the Matter of Judith Lineback, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 6, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 23, 2009, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Judith W. Lineback shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

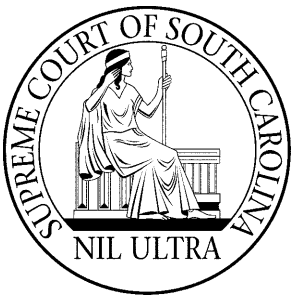
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 8, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 16, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ted Corbett,	Petitioner,
v.	
Jordan William Weaver, a minor over the age of fourteen (14) years, and Michael Joel Weaver,	Defendants,
of whom Michael Joel Weaver is the	Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26769
Heard January 6, 2010 – Filed February 8, 2010

DISMISSED AS IMPROVIDENTLY GRANTED

E. LeRoy Nettles, Sr., and Marian D. Nettles, both of Nettles, Turbeville & Reddeck, of Lake City, for Petitioner.

Robert C. Brown, of Brown & Brehmer, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals decision in *Corbett v. Weaver*, 380 S.C. 288, 669 S.E.2d 615 (Ct. App. 2008). After a thorough review of the Appendix, record, and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Christopher Williams, Appellant.

Appeal from Greenville County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26770
Heard September 17, 2008 – Filed February 8, 2010

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this capital murder case, Charles Christopher Williams (Appellant) appeals his sentence of death. Appellant argues (1) that once the jury disclosed its numerical division it was

incumbent upon the trial judge to declare a mistrial; (2) that S.C. Code Ann. § 16-3-20 required the trial court to sentence Appellant to a life sentence because the jury could not agree on a sentence after "reasonable deliberation;" (3) the trial judge committed error by issuing a coercive *Allen* charge; and (4) the trial judge erred in refusing to declare a mistrial when a forensic psychiatrist's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty. We disagree.[1]

FACTS/PROCEDURAL HISTORY

Around 10:00 a.m. on September 3, 2003, Appellant entered a Bi-Lo grocery store in Greenville where his former girlfriend, Maranda Williams (Victim), worked. Appellant accosted Victim and forced her into an office in the bakery/deli. Victim called 911 from her cell phone. During the ninety-minute phone call, hostage negotiators tried to convince Appellant to release Victim. When Victim attempted to escape Appellant chased, shot, and killed her. Hearing the shots, law enforcement entered the store and apprehended Appellant. Shortly after his arrest, Appellant gave a statement in which he confessed to the crimes for which he was later charged.

Appellant was tried and found guilty of murder, kidnapping, and possession of a firearm during the commission of a violent crime. During the sentencing phase of the trial, the State sought to establish two statutory aggravating circumstances: (1) the murder was committed while in the commission of kidnapping; and (2) the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (C)(a)(3) (2003 & Supp. 2007). As its primary witness, the State called Dr. Pamela Crawford. Dr. Crawford testified that she was associated with SLED

[1] This case consolidates Appellant's direct appeal and the mandatory review provisions of S.C. Code Ann. § 16-3-25 (2003).

and called by the Greenville County Solicitor's Office within an hour and fifteen minutes of the crime to "provide assistance."[2]

Defense counsel objected to Dr. Crawford's testimony and argued that it amounted to expert testimony. The trial judge sustained the objection and gave a curative instruction telling the jury to disregard anything Dr. Crawford said about the death penalty.

The solicitor resumed his questioning of Dr. Crawford and asked, "[w]as the purpose of you interviewing the defendant to provide information to me in consideration of whether or not - - -." Before the solicitor could finish the question, defense counsel again objected and the jury was sent out of the courtroom. Defense counsel renewed his objection and emphasized that Dr. Crawford had not been qualified as an expert but was giving testimony that she assisted the solicitor in whether to seek the death penalty. Defense counsel then moved to have Dr. Crawford excused as a witness. The solicitor stated he would withdraw the question. Defense counsel explained he believed the jury would think that the defense was hiding relevant evidence by objecting to Dr. Crawford's testimony. Defense counsel then moved for a mistrial. The trial judge reminded defense counsel that the question was withdrawn, but defense counsel responded with a demand for a mistrial.

The Court denied the motion for a mistrial. After a lunch break, Dr. Crawford was called back to the stand and defense counsel renewed the motion for a mistrial. The judge gave a curative instruction in which he told the jury that Dr. Crawford had not been qualified as an expert. Dr. Crawford then resumed her testimony.

Dr. Crawford testified that she interviewed Appellant for several hours at the Greenville County Law Enforcement Center.[3] According to Dr.

[2] Dr. Crawford's employment by the Department of Mental Health required her to do a variety of things, including going on SWAT calls and providing assistance to prosecutors.

Crawford, the primary purpose of this interview was to understand Appellant's state of mind at the time of the crime. At the outset of the interview, Dr. Crawford informed Appellant she was a forensic psychiatrist who worked for SLED and the solicitor's office, and any information she obtained could be used in court. Dr. Crawford also emphasized to Appellant that she was not his treating psychiatrist but would refer him to someone if she felt he needed treatment. Although Appellant was not very expressive during the interview, Dr. Crawford testified that Appellant was coherent and characterized his demeanor as calm, pleasant, and cooperative. During the interview, Appellant again confessed to murdering Victim and explained his feelings and the events leading up to the crime.

After motions, closing arguments, and charges, the jury deliberated from 3:50 p.m. to 7:00 p.m. on Friday, February 18, 2005. The jury resumed deliberations the next morning at 9:30. Shortly before 11:55 a.m., the foreman sent the trial judge a note which stated: "[the] jury is at 9 for death imposition, 3 for life imprisonment. Please refer to instruction about what procedure to follow to resolve."

The judge, out of the presence of the jury, indicated that he intended to give an *Allen* charge.[4] Defense counsel moved for a mistrial arguing that because the jury indicated its division as to a life versus death sentence the judge was required to end the jury's deliberations and impose a sentence of life without parole. The solicitor disagreed, noting the jury had voluntarily revealed its voting division, thus the judge was not required to impose a sentence of life imprisonment.

Defense counsel made a motion for a mistrial, motion to sentence Appellant to life imprisonment, and a motion to charge the defense's

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[3] Dr. Crawford interviewed Appellant the evening of the crime and the next morning. Dr. Crawford and the investigating officers testified that Appellant was apprised of his rights prior to these interviews pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] *Allen v. United States*, 164 U.S. 492 (1896) (establishing the charge used to encourage a deadlocked jury to reach a verdict).

proposed *Allen* instruction. The trial judge denied all of defense counsel's motions. The trial judge then informed counsel that he intended to give the jury an *Allen* charge and would instruct them to continue their deliberations.

After the judge issued an *Allen* charge, the jury resumed deliberations at 12:02 p.m. At 3:45 p.m., the jury returned to the courtroom after indicating they had reached a verdict. The jury found beyond a reasonable doubt that the murder was committed while in the commission of a kidnapping, and the jury recommended Appellant be sentenced to death. The trial judge then sentenced Appellant to death.[5]

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

LAW/ANALYSIS

I. Jury's Disclosure of Vote Division

Appellant argues the trial judge erred in declining to sentence him to life imprisonment when the jury, by its written note, revealed it was divided nine to three in favor of death. Appellant contends that under these "unusual circumstances" giving the jury an *Allen* charge was impractical and coercive against the minority faction of the jury that opposed the death penalty. Ultimately, Appellant argues that once the jury disclosed its numerical

[5] At a post-trial hearing, the trial judge denied all of defense counsel's motions.

division it was incumbent upon the trial judge to declare a mistrial. We disagree.

As a threshold matter, "[n]either the Due Process clause nor the Eighth Amendment forbid the giving of an *Allen* charge in the sentencing phase of a capital proceeding." *Tucker v. Catoe*, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Jones v. United States*, 527 U.S. 373 (1999)). "The typical judicial mechanism for encouraging an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004).

We find the trial judge's issuance of an *Allen* charge was not improper. Initially, we agree with Appellant that it is improper for a trial judge to inquire into the numerical division of a jury. *See State v. Middleton*, 218 S.C. 452, 457, 63 S.E.2d 163, 165 (1951); *Lowenfield*, 484 U.S. at 239-40 *Brasfield v. United States*, 272 U.S. 448, 450 (1926). However, these decisions are inapplicable in the instant case because the jury here voluntarily disclosed its numerical division and requested further instructions on how to proceed. The judge then promptly informed the attorneys of the jurors' numerical division and indicated that he could give an *Allen* charge. Unlike other cases, the trial judge did not inquire about the specifics of the jury's impasse. *See United States v. Brokemond*, 959 F.2d 206, 209 (11th Cir. 1992) ("Unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial."). Therefore, we hold the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death.

II. S.C. Code Ann. § 16-3-20

Appellant argues that S.C. Code Ann. § 16-3-20 required the trial court to sentence Appellant to a life sentence because the jury could not agree on a sentence after "reasonable deliberation." We disagree.

Section 16-3-20 provides in pertinent part:

> If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

S.C. Code Ann. § 16-3-20(C) (2003). A review of the pertinent statutory language in S.C. Code Ann. § 16-3-20(C) reveals the analysis of this issue is dependent upon an interpretation of "reasonable deliberation." Given the subjective nature of this term, this Court has been reluctant to define as a matter of law what constitutes "reasonable deliberation" sufficient to end the jury's deliberations and impose a life sentence. We note that "'reasonable deliberation' is not simply an elapsed-time dependent determination," but rather is an issue "committed to the trial judge's discretion." *Tucker*, 346 S.C. at 489-90, 552 S.E.2d at 715.

Although we have not precisely defined "reasonable deliberation," our previous decisions make clear that here the trial judge did not abuse his discretion in permitting the jury to resume deliberations. In *Tucker*, this Court refused to determine as a matter of law that the jury had engaged in "reasonable deliberation" sufficient to require the trial judge to impose a life sentence. *Id.* at 490, 552 S.E.2d at 716. We found that the jury deliberated for a substantial period of time before informing the judge it was "hopelessly deadlocked," and that the jury took its responsibility seriously, diligently working to reach a verdict. *Id.* at 490, 552 S.E.2d at 715. Under those circumstances, had the "reasonable deliberation" issue been raised to him, the trial judge in his discretion "may or may not have found the jury had engaged in 'reasonable deliberation.'" *Id.* at 490, 552 S.E.2d at 716.

Here, the jury only deliberated about a lengthy capital murder trial for approximately five hours and thirty-five minutes before sending the note to the judge. However, unlike the jury in *Tucker*, this jury did not indicate it was deadlocked, but rather requested additional instructions to resolve their impasse. *Cf. State v. Robinson*, 360 S.C. 187, 193-94, 600 S.E.2d 100, 103 (Ct. App. 2004) (concluding mistrial should have been granted after jury indicated it was again deadlocked after receiving *Allen* charge and that additional deliberation would not break deadlock). Thus, the jury's request

was an indication that the jurors had not given up on reaching a verdict and that they anticipated further deliberations. Accordingly, we hold the trial judge properly permitted the jury to resume its deliberations and S.C. Code Ann. § 16-3-20 did not mandate a sentence of life imprisonment.

III. *Allen* Charge Not Coercive

Alternatively, Appellant argues that the trial judge's *Allen* charge was unconstitutionally coercive. We disagree.

Because we find the trial judge properly charged Appellant's jury with an *Allen* charge, the question before us is whether the charge was coercive. "Whether an *Allen* charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" *Tucker*, 346 S.C. at 490, 552 S.E.2d at 716 (quoting *Lowenfield*, 484 U.S. at 237). This Court has explained:

> In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002) (citations omitted).

In *Tucker*, we adopted the standard set by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. In *Lowenfield*, the Supreme Court set forth the following factors to be considered:

> (1) the charge did not speak specifically to the minority juror(s);
>
> (2) the judge did not include in his charge any language such as "You have got to reach a decision in this case;"

> (3) there was no inquiry into the jury's numerical division, which is generally coercive; and
>
> (4) while the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield*, 484 U.S. at 237).

Applying these factors, we found the *Allen* charge in *Tucker* was unconstitutionally coercive. *Id.* at 494, 552 S.E.2d at 718. Specifically, this Court concluded: (1) viewed as a whole, the jury charge was directed to the minority juror; (2) Tucker's jury was told of the importance of a unanimous verdict; (3) even though the jury informed the trial judge of their numerical split, the judge failed to instruct the jurors not to disclose their division in the future; and (4) Tucker's jury returned a verdict approximately an hour and a half after receiving the *Allen* charge. *Id.* at 492-94, 552 S.E.2d at 717-18.

In this case, defense counsel took exception to the judge's *Allen* charge on the ground that it deviated from counsel's proposed instruction. Defense counsel's proposed *Allen* charge stated:

> By law I cannot tell you where to go from here, but I suggest that you continue deliberations in an attempt to reach a verdict. I can tell you that each of you have a duty to consult with one another and to deliberate with a view to reaching an agreement that does not do violence to any one of your individual judgments. Each of you as jurors must decide the case for yourself after impartial consideration of the evidence with your fellow jurors. During the course of your continued deliberations each of you should not hesitate to re-examine your own views and change your opinion if convinced that your opinion is erroneous. Each juror who finds

himself or herself to be in the minority should consider their views in light of the opinions of the jurors of the majority. Those in the majority must consider their views in light of the minority. No juror should surrender their honest conviction for the mere purpose of returning a unanimous verdict.

In response to defense counsel's exceptions, the trial court noted that the charge issued covered "basically the same thing" as the submitted *Allen* charge. The trial judge also referenced counsel's concern that the jury be instructed that they should not surrender their convictions just to get a unanimous vote. The trial judge read the following portion of his original charge: "Ladies and gentlemen, you have stated you are unable to agree on a verdict in this case. As I instructed you earlier, the verdict of a jury must be unanimous." The judge then stated, "I am not going to charge that. I'm taking that sentence out." The trial judge then instructed the jury:

> Mr. Foreman, Ladies and Gentlemen of the jury, you've stated you've been unable to reach a verdict in this case. When a matter is in dispute, it isn't always easy for even two people to agree. So, when 12 people must agree, it becomes even more difficult. In most cases absolute certainty cannot be reached or expected. You should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds. Therefore, to some degree it can be said jury service is a matter of give and take.
>
> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. You must lay aside all outside matters and reexamine the question before you base[d] [on] the law and the evidence in this case.

> I, therefore, ask you to return to your deliberations with the hope that you can arrive at a verdict.

Defense counsel again objected to the trial judge's charge. Relying on this Court's opinion in *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999),[6] counsel claimed that his proposed charge "specifically identifies to the jurors that they have the right and specifically essentially an obligation to deal with their own views in this case and not to agree simply to agree." The trial judge denied counsel's motion and explained that his charge covered defense counsel's concern by charging the jury to maintain their own convictions.

We find the *Allen* charge in the instant case was not coercive. First, unlike *Tucker*, the charge was not directed at the minority jurors. Instead, it evenly addressed both the majority and minority jurors and urged them to consider each other's views. *See Green*, 351 S.C. at 195, 569 S.E.2d at 323-24 (finding *Allen* charge was not coercive and did not focus on the position of the minority juror). Second, the trial judge's charge did not include language such as "You have got to reach a decision in this case." Rather, the charge instructed the jurors to resume their deliberations "with the hope you can arrive at a verdict." Third, there was no inquiry into the jury's numerical division. Here, without solicitation the jury disclosed its numerical division to the trial judge who then informed the trial attorneys. In contrast to *Tucker* where there was one holdout juror, the judge here did not direct his *Allen* charge to the three minority jurors despite his knowledge of the jury's numerical split. Finally, the jury deliberated for approximately three hours and forty-five minutes after being given the *Allen* charge, which was significantly longer than the *Tucker* jury. We believe the extended

[6] In *Hughes*, this Court determined an *Allen* charge was an "even-handed admonition to both the minority and majority jurors" where it stated: "Each juror who finds himself or herself to be in the minority should reconsider their views in light of the opinions of the jurors of the majority and, conversely each juror finding themselves in the majority should give equal consideration to the views of the minority." *Hughes*, 336 S.C. at 597-98, 521 S.E.2d at 507.

deliberations would appear to weigh against any allegation that the charge was coercive.

Viewing the *Allen* charge in the context of the specific circumstances of the case, we find it was not coercive.[7] Furthermore, a careful review of the trial judge's charge compared with defense counsel's proposed charge reveals the charge was a correct statement of the law and covered the substance of defense counsel's proposed charge. *See State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (stating, "[I]f the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request.").

IV. Dr. Crawford's Testimony

Appellant argues the trial judge erred in refusing to declare a mistrial because Dr. Crawford's testimony impermissibly bolstered and vouched for the solicitor's decision to seek the death penalty.[8] We disagree.

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[7] Although we find no reversible error in the *Allen* charge in this case, we take this opportunity to caution trial judges against using the following language: "with the hope that you can arrive at a verdict." Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive. Furthermore, to alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division.

[8] The question of whether the trial judge committed an abuse of discretion in denying Appellant's mistrial motion is preserved for our review. Appellant objected to Dr. Crawford's testimony before it was given and renewed this objection both during and after her testimony. Appellant moved for mistrial on these grounds, and the trial judge denied the motion. Appellant then sought to introduce a curative instruction, which the trial judge accepted. Under these circumstances, the trial judge's denial of the mistrial motion is properly preserved for appellate review. *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) ("'There are four basic requirements to preserving issues at trial for appellate review. The issue must

We find that there was nothing improper about the solicitor's examination of Dr. Crawford as a lay witness. Furthermore, to the extent there was any confusion among the jurors regarding Dr. Crawford's role as a lay witness, such confusion was effectively cured by the trial court's instruction to the jury.

Dr. Crawford was introduced to give fact testimony regarding her observation of Appellant's mental state within hours of Victim's murder. We have long held that a lay witness may testify as to a defendant's mental state. *See State v. Rimert*, 315 S.C. 527, 446 S.E.2d 400 (1994), *cert. denied*, 513 U.S. 1080 (1995) (where the State relied on lay testimony to establish defendant's sanity); *State v. Smith*, 298 S.C. 205, 379 S.E.2d 287 (1989) (holding that where defendant presents expert testimony regarding his insanity, the State may introduce lay testimony in rebuttal).

We recognize that while a witness of Dr. Crawford's professional expertise may in many cases be called upon to deliver expert testimony, the solicitor was not bound to call her in that capacity so long as her testimony was limited to lay matters. The solicitor was justified in asking Dr. Crawford to observe Appellant's mental state subsequent to his arrest and in calling upon her to testify regarding her observations. Appellant had been duly informed of his rights under *Miranda*, and spoke with Dr. Crawford voluntarily. Dr. Crawford's testimony was reasonably limited to her factual observations over the course of the interview. In our view, Dr. Crawford was called as a lay witness to give lay testimony. There is no indication in the record that the jury's responsibility for determining Appellant's fate was diminished in any way by the solicitor's questioning of Dr. Crawford.

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have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'") (quoting JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)).

Even if Dr. Crawford's testimony was improper, any prejudice was cured by the jury instruction. Therefore, we find no error in the trial judge's denial of Appellant's motion for mistrial.

PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(C) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that Appellant's sentence is neither excessive nor disproportionate. *See, e.g.*, *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

CONCLUSION

For the foregoing reasons, we hold (1) the trial judge committed no error in not declaring a mistrial and giving an *Allen* charge after the jury revealed it was divided nine to three in favor of death; (2) S.C. Code Ann. § 16-3-20 did not mandate a sentence of life imprisonment; (3) the trial judge's *Allen* charge was not coercive; and (4) the trial judge committed no error in refusing to declare a mistrial based on Dr. Crawford's testimony. The conviction and sentence below are therefore affirmed.

WALLER, and BEATTY, JJ., concur. KITTREDGE, J., concurring except for Part IV in which he concurs in result only. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's decision to affirm here, but write separately to express my disagreement with Part IV of the majority's opinion. In my opinion, whether the trial judge committed an abuse of discretion in denying appellant's mistrial motion following improper questioning by the solicitor is not preserved for our review.

The sole issue regarding Dr. Crawford before the Court at this juncture is whether the trial judge should have granted a mistrial because of Dr. Crawford's penalty phase testimony. To explain why I do not believe this issue is preserved, I will quote liberally from the penalty phase transcript of the solicitor's questioning of Dr. Crawford:

> Solicitor: And your employment with the Department of Mental Health is as what?
>
> Answer: A forensic psychiatrist.
>
> Solicitor: And, now, back on September the 3rd, did you have occasion at my request to come to Greenville, South Carolina?
>
> Answer: Yes, I did.
>
> Solicitor: As an employee of the Department of Mental Health?
>
> Answer: That's correct.
>
> Solicitor: And were you also in any way connected with any other state agency at that time?
>
> Answer: Yes. The Department of Mental Health had what we call a memorandum of agreement with SLED, South Carolina Law Enforcement Division, where I was the consultant forensic psychiatrist for SLED.

Solicitor: Explain to the jury prior to September the 3rd of 2003, what the working relationship you had either with my office or other solicitors.

Answer: This was all through my work with Department of Mental Health, through the memorandum of agreement with SLED. I would do a variety of things. Some of the things I would do, for example, go on SWAT calls and assist with negotiations. But as far as your office and the solicitor's office is concerned, I would be called by a solicitor if, for example, there was some kind of alleged crime of significant magnitude. And they would call me and ask me to come and provide assistance.

Solicitor: All right. What type of assistance in particular did I request from you in this particular case on September the 3rd?

Answer: In this particular case, and again I'm called by various solicitors throughout the state, and I'm only called when it's a case of a very severe nature. And typically it's when the death penalty may be considered. And I'm asked to assess –

Mr. Nettles: Objection. And I'm going to ask the jury be sent out.

The Court: Mr. foreman, members of the jury don't discuss the case. I'll get you back very shortly.

After an *in camera* discussion, the judge gave the following curative instruction, without objection from appellant, and the questioning continued:

The Court: Mr. foreman, ladies and gentlemen of the jury please disregard anything that she said that she may be asked

to assess concerning the death penalty. Disregard that. That's not appropriate. We're not going there.

Solicitor.

Solicitor: Let me clarify and go back. We were talking about what you had come to Greenville for. And as a result of coming to Greenville, did you in fact interview the defendant?

Answer: Yes, I did.

Solicitor: What was the purpose of you interviewing –

Mr. Nettles: Objection.

The Court: Hold on a second. Solicitor, you may lead her through these questions, please, sir, laying your foundation. You may lead her.

Mr. Ariail: Was the purpose of you interviewing the defendant to provide that information to me in consideration of whether or not –

Mr. Nettles: Objection. And I'm going to –

The Court: Hold on. Don't get into the facts. Come on up here for a second, both of you.

(bench conference held within the presence but outside the hearing of the jury.)

The Court: Mr. foreman, ladies and gentlemen, go to the jury room. Don't discuss the case please.

During the ensuing *in camera* discussion, the solicitor agreed to withdraw the question. One of appellant's attorneys requested a curative

instruction, and was given an opportunity to write one for the trial judge's use. While that charge was being written, appellant's other attorney argued for a mistrial.[9] The judge denied the mistrial request, but gave the solicitor and Dr. Crawford strict instructions on the limits of permissible questions and answers. Following that, appellant renewed his mistrial motion. When the jury returned, they were given this curative instruction:

> The Court: Mr. foreman, members of the jury, I told you this in the first phase of the trial. I'm going to tell you again. Whenever one of the attorneys makes an objection, they're merely telling the court that they do not think that's admissible under the rules of evidence or the rules of court. And it's my job to decide whether it's admissible or not admissible. I ask you to leave the courtroom so I can comment on the facts, because I'm not at liberty to comment on the facts when the jury is present.
>
> I'm the one that asked you to leave the courtroom so I can be free with what I say to the attorneys and the questions I ask the attorneys. The attorneys are not trying to hide anything, they just have an opinion it's not admissible, and that's their job. You are not to consider anything for or against either one of the attorneys when they make objections as to the rules of evidence. That's the procedure we are going through, and that's the reason I've been running you in and out of the courtroom, so I would be free, not that the attorneys are hiding anything. You understand?
>
> All right. Now, normally opinions are not given in a courtroom. However, opinions may be given in a courtroom by laypersons when they're

[9] In my view, the better practice is to permit only one of the attorneys to object to evidence.

> based on the perceptions of a witness, such as, if someone is staggering and you smell alcohol on their breath, you have an opinion they're intoxicated, that's a lay opinion that may be admissible in a courtroom; or if it's going to be helpful for the jury to understand and does not require special skill, experience, or training.
>
> An expert may give his opinion if they qualify when there's a scientifically, technical, or other specialized knowledge required for the jury to understand the question.
>
> Now, in this particular case this witness has not been qualified as an expert. In order for an expert to give an opinion, they have to be qualified. And the court has to find that they're qualified. This witness has not been qualified as an expert and I'm going to tell you, you must disregard any suggestion either in the solicitor's questions or any answer that this witness has given an opinion of any kind in this case. She's going to be treated as a lay witness, not an expert.
>
> Solicitor.

Appellant made no objection to the sufficiency of this instruction, but argues on appeal that the trial judge erred in failing to grant a mistrial. In my opinion, this issue is not preserved for appellate review. As the factual recital above demonstrates, appellant did not seek a mistrial when the solicitor first questioned Dr. Crawford about her consulting role, and her assessments in serious death-penalty type cases. Instead, appellant merely objected. The trial judge sustained the objection and gave a curative instruction, to which appellant did not object. Since appellant accepted this ruling and neither objected to the charge's sufficiency nor moved for a mistrial following it, no issue regarding these questions and answers are preserved for our review. See, e.g., State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

When the solicitor resumed his improper questioning, the trial judge sustained the objection. One of appellant's attorneys sought a curative instruction; the other, a mistrial. Following the *in camera* arguments, the judge denied the second attorney's mistrial motion but then gave, again without objection, the curative instruction apparently drafted by the other lawyer. Under these circumstances, the mistrial issue is not before us. State v. George, *supra*; cf. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (mistrial motion arguably preserved where trial attorney specified he did not "waive" mistrial motion after hearing curative instruction). Here, appellant did not renew or reserve his mistrial motion after hearing the curative instruction drafted by his own attorney, apparently finding it sufficiently cured any prejudice from the solicitor's improper questioning. Accordingly, there is no mistrial issue before the Court.

Although I do not believe the mistrial issue is preserved, because it is addressed, and because I differ in my assessment, I comment briefly. The State's position is that Dr. Crawford was being offered merely as a "fact" witness. If this is so, then her education, her training, her profession, and her special relationship with the solicitor's office are irrelevant. The only reason to allow this background evidence is to enhance Dr. Crawford's credentials, that is, to permit the jury to view her testimony in light of her expertise. Compare State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (testimony from expert clothed "with an air of authority that does not attach to "ordinary witnesses"") (Pleicones, J., dissenting).

Moreover, I do not understand why Dr. Crawford's testimony, offered allegedly to show appellant's mental state, was relevant in this penalty phase. The State sought to prove two aggravating circumstances, neither of which involved appellant's state of mind. Had appellant put his mental state at the time of the offense in issue, then Dr. Crawford's testimony as to her "lay" observations in the hours surrounding the offense would be relevant. Here, however, Dr. Crawford's testimony was offered only to bolster the solicitor's decision that this case warranted a death sentence. Unlike the majority, I do not see how the curative instruction negates the prejudice from Dr. Crawford's irrelevant yet prejudicial testimony.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

J. Lamar Kolle, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 26771
Submitted October 21, 2009 – Filed February 16, 2010

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Daniel E. Grigg, of Columbia, for Petitioner.

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

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review the post-conviction relief (PCR) judge's order granting J. Lamar Kolle a new trial following his plea of guilty to trafficking in cocaine in an amount greater than 28 grams but less than 100 grams. We affirm.

FACTS

On July 12, 2003, Officer Vincent Canfora received a phone call at approximately 11:30 p.m. concerning a complaint about loud music at the Myrtle Beach apartment where Kolle was staying. When he arrived between 11:45 p.m. to 12:00 a.m., Officer Canfora heard music coming from inside the apartment. As he knocked on the door, he observed "fresh damage" to the door, which appeared to be forced entry marks. Although the door seemed to be open, Officer Canfora knocked on it for approximately five to ten minutes while announcing he was a police officer. Receiving no response, he then knocked on the window beside the door. Because there were lights on in the apartment and no one answered his knocks, Officer Canfora "presumed that there may be something wrong inside the apartment . . . that somebody was in the residence, maybe injured or incapacitated."

Based on his assessment of the situation, Officer Canfora called for a back-up officer to assist him with making an entry into the apartment. Lance Corporal Steven Atwood responded to the scene within three minutes of receiving Officer Canfora's call. The two officers then decided to enter the apartment by pushing on the door. Upon entering, the officers announced themselves as police officers and asked if anyone inside the residence needed assistance. Once inside, the officers conducted a protective search of the residence. During this protective search, Officer Canfora observed a small plate with a moderate amount of what appeared to be cocaine, partially covered by a saltine cracker, drying under an elevated oscillating fan. The officers also noticed a large steel press used for processing and manufacturing cocaine as well as other materials commonly used for processing or cutting cocaine. Finding no one in the apartment, the officers seized the small amount of cocaine-like substance and returned

to the police department. After the substance field-tested positive for cocaine, Officer Canfora completed an application for a search warrant for the apartment based on the cocaine seized during the initial entry. According to Officer Canfora, he and another narcotics officer prepared the warrant at approximately 12:30 a.m.

After obtaining the search warrant from a municipal judge, Officer Canfora returned to the residence at approximately 12:43 a.m. with his lieutenant and another narcotics officer in order to execute the warrant. As the officers knocked on the door, Sharon Hakes opened the door. Once inside, the officers presented Hakes, Jessica Everhart, and Kolle with a copy of the search warrant. During the subsequent search, Officer Canfora discovered a bag of flour in a kitchen cabinet that contained approximately sixty-three grams of cocaine.

As a result, the officers arrested Kolle, Hakes, and Everhart.[1] Shortly thereafter, the officers also arrested Willis Holmes, the resident named on the apartment lease.

Subsequently, the Horry County grand jury indicted Kolle for trafficking in cocaine in an amount of more than 28 grams but less than 100 grams. In response to the charge, Kolle's public defender filed a discovery motion with the solicitor's office. Ultimately, this requested information was turned over by the solicitor's office to plea counsel, a private attorney retained by Kolle. In addition to the public defender's discovery motion, plea counsel filed a motion in which he requested "any and all search warrants applied for and a copy of all dispatch logs from the North Myrtle Beach Police Department."

Based on his review of the discovery information, plea counsel moved to suppress evidence seized pursuant to the search warrant. After a hearing, the trial judge denied this motion on the ground there were exigent circumstances to justify the officers' entry into the

[1] Hakes and Everhart gave statements in which they identified Kolle as the primary participant in the drug activity.

apartment. Additionally, the judge ruled the officers saw the cocaine in plain view. As a result, the judge concluded the search was valid.

On the day of this ruling, Kolle pled guilty to trafficking cocaine in an amount greater than 28 grams but less than 100 grams. The plea judge sentenced Kolle to seven years in prison.

Kolle did not appeal his plea or sentence. Four months after the plea proceeding, Kolle filed a PCR application. In this application, Kolle alleged he was being held in custody unlawfully based on the following grounds: the trafficking charge arose out of an unlawful search and seizure; the plea judge lacked subject matter jurisdiction due to an invalid indictment; and he did not receive all of the discovery materials that he was entitled to pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

Underlying these allegations, Kolle primarily contended plea counsel was ineffective in failing to: procure certain discovery materials; thoroughly advocate the suppression of the drug evidence; properly advise him regarding plea negotiations and potential sentences; and properly inform him of his right to appeal.

The PCR judge held a hearing on Kolle's application. At this hearing, plea counsel testified regarding the chronology of his representation of Kolle. When he agreed to represent Kolle, plea counsel had been practicing law for approximately three years and had not yet represented a client with a felony charge.

At the onset of his representation, plea counsel received discovery materials from the solicitor's office that had been previously requested by Kolle's public defender. Although plea counsel had limited discovery material, he believed the search that led to Kolle's charge was improper, particularly the lack of exigent circumstances. In turn, plea counsel filed a motion to suppress the drug evidence.

In recounting the suppression hearing, plea counsel conceded that he did not point out the discrepancies between the officers' testimony

and the documentary evidence, which included the incident reports, the search warrant, and the police call logs. Specifically, PCR counsel established that plea counsel failed to question the officers regarding the following time discrepancies: the call/dispatch log indicated the loud music complaint was received at 12:43 a.m.; Officer Canfora arrived at the apartment at 12:48 a.m.; the search warrant appears to indicate it was issued at 12:01 a.m. and executed at 12:43 a.m. Plea counsel admitted that he did not have this documentary evidence in his file. He further acknowledged that he never requested the lab report or the chain of custody report regarding the cocaine that was seized pursuant to the search warrant.[2]

In terms of plea negotiations, plea counsel testified that prior to the suppression hearing the State offered Kolle a sentence of ten years suspended upon the service of five years with three years' probation.[3] Plea counsel admitted that he told Kolle the offer was not "a good deal," but that it would remain open even after the suppression hearing. He acknowledged that the offer did not remain open and was significantly less than the seven-year sentence Kolle received.

At the beginning of his testimony, Kolle reiterated his allegations of ineffective assistance of counsel. In explaining his dissatisfaction with plea counsel's representation, Kolle outlined his version of the facts and primarily argued that the search warrant and subsequent seizure of the cocaine was improper given there were no exigent circumstances for the initial entry. Kolle contended that the evidence could have been suppressed had plea counsel: thoroughly investigated the case; filed a more inclusive discovery motion; interviewed the other co-defendants; pointed out during the suppression hearing the discrepancies between the call logs, the incident reports, and the search

[2] Through another witness, PCR counsel attempted to establish that there was a ten-day "break" in the chain of custody for the cocaine.

[3] Kolle's PCR counsel played a tape of a conversation between Kolle and plea counsel that substantiated this plea offer.

warrant; and identified errors in the chain of custody evidence form that was prepared for the cocaine.

In terms of his decision to plead guilty, Kolle claimed he felt under duress to accept the plea because plea counsel was not prepared for trial. Additionally, Kolle asserted plea counsel provided incorrect information regarding the State's initial plea offer. Specifically, Kolle contended plea counsel told him the offer was not a good deal and he should not accept it until after the suppression hearing. Because he did not have accurate advice or information prior to the plea, Kolle claimed his decision to plead guilty was not knowing and voluntary.

On cross-examination, Kolle acknowledged that he had admitted his guilt regarding the trafficking in cocaine charge at the plea proceeding as well as during his testimony at co-defendant Holmes's trial. Kolle, however, explained that he pled guilty and expressed satisfaction with plea counsel's representation because he lacked the necessary information to raise any challenge during the plea proceeding.

Following the hearing, the PCR judge granted Kolle's application and ordered a new trial. In reaching this conclusion, the PCR judge found that plea counsel's failure to point out the discrepancies between the officers' testimony and the documentary evidence constituted ineffective assistance. Specifically, the PCR judge believed that had plea counsel raised these issues at the suppression hearing, this information "would have resulted at the very minimum suppressing the evidence gained in the search warrant to sustain the evidence on the Trafficking charge."

Additionally, the PCR judge found plea counsel was deficient in failing to properly advise Kolle regarding the State's plea offer. Because plea counsel misadvised Kolle not to plead guilty prior to the suppression hearing, which in turn resulted in the withdrawal of the State's negotiated sentence, the PCR judge found that these facts "undermined the willful and voluntary nature of [Kolle’s] plea."

Finally, the PCR judge found plea counsel would have discovered exculpatory evidence regarding the search warrant and radio/dispatch logs had he properly prepared for trial. The PCR judge believed "such discovery would have reversed the outcome." Thus, the judge held that plea counsel's lack of preparation satisfied the standard of deficiency under Strickland v. Washington, 466 U.S. 668 (1984). Ultimately, the judge concluded that this deficient performance "deprived [Kolle] of adequate representation and that a different verdict from a verdict of guilty could have been a logical conclusion."

The State filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. In a summary order, the PCR judge denied the State's motion.

This Court granted the State's petition for a writ of certiorari to review the PCR judge's order.

DISCUSSION

The State contends the PCR judge erred in finding that Kolle did not freely, knowingly, and voluntarily enter his guilty plea. In support of this contention, the State asserts that plea counsel was not deficient in his representation of Kolle given he: met with Kolle on multiple occasions prior to the entry of the plea; investigated the case; requested discovery; and thoroughly challenged the search which precipitated Kolle's arrest for the drug charge.

Even if counsel's performance was deficient, the State claims Kolle failed to establish that he was prejudiced. The State asserts that Kolle lacked standing to challenge the legality of the search and seizure, thus, negating Kolle's primary basis for contesting the drug charge. Additionally, the State argues that Kolle's guilty plea "must stand due to the overwhelming evidence of his guilt."

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong

presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to

support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber, 371 S.C. at 558-59, 640 S.E.2d at 886. "This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

I.

As a threshold matter, we find the State's argument regarding Kolle's lack of standing was not preserved for this Court's consideration. Based on our review of the record, the State did not raise this claim at the PCR hearing but did so only in its motion for reconsideration. Therefore, this argument is not properly before the Court. See Palacio v. State, 333 S.C. 506, 514 n.7, 511 S.E.2d 62, 66 n.7 (1999) (concluding issue that was neither raised to nor ruled upon by the PCR court was not preserved for appellate review); see also Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (recognizing that an issue may not be raised for the first time in a motion to reconsider).

Even if properly preserved, we disagree with the State's assertion that Kolle lacked standing to challenge the search and seizure which precipitated his arrest for the drug charge. The fact that Kolle did not own or lease the apartment that was searched does not negate his standing to challenge the search and subsequent seizure. Following the decisions of the United States Supreme Court, this Court has definitively held that an overnight guest has a reasonable expectation of privacy, the legal prerequisite to confer standing on an individual. See State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004) (citing Minnesota v. Olson, 495 U.S. 91 (1990) and concluding that defendant, who on several occasions in the past and the occasion in question stayed at the searched apartment, had a reasonable expectation of privacy to challenge the search and seizure which resulted in his charge of trafficking in crack cocaine). Here, there was evidence that Holmes,

the person who leased the apartment, befriended Kolle and permitted him to stay for an extended period of time at the residence. Accordingly, Kolle had a reasonable expectation of privacy in the apartment and, thus, had standing to challenge the search.

II.

Finding that Kolle had standing, we address the remainder of the State's arguments.

A determination of the core issue of ineffective assistance of counsel requires a two-part assessment. We find it is necessary to determine whether plea counsel was ineffective: (1) with respect to Kolle's fundamental decision to plead guilty; and (2) regarding Kolle's decision to reject the State's initial plea offer and enter a plea without a negotiated sentence.

A.

Cognizant of this Court's recent pronouncements regarding guilty plea challenges and its standard of review, there is evidence to support the PCR judge's determination that plea counsel was ineffective in advising Kolle to plead guilty.

Initially, we agree with the PCR judge's decision that plea counsel was deficient in failing to procure pertinent discovery materials, in particular the call/dispatch logs and the search warrant. If plea counsel had these materials, he could have effectively cross-examined the officers at the suppression hearing and pointed out the time discrepancies and the following additional discrepancies: (1) the arrest warrant affidavit, the incident reports, and the search warrant refer to the drug evidence as crack cocaine as opposed to powder cocaine; and (2) the investigative report and the affidavit in support of the search warrant do not reference the "fresh damage" or "forced entry" to the apartment door as testified to by Officer Canfora to justify the exigent circumstances for entry into the apartment. Had plea counsel adequately attacked the credibility of the officers, there is a

reasonable probability this would have influenced the trial judge's decision regarding the existence of exigent circumstances, i.e., affected the outcome of the suppression motion.

Moreover, if plea counsel truly believed the suppression issue was meritorious, he could have advised Kolle to proceed to trial and, if convicted, challenge the denial of the suppression motion on direct appeal.

B.

Given there is evidence to support the PCR judge's finding that plea counsel was ineffective with respect to his representation regarding the suppression hearing and, in turn, Kolle's decision to plead guilty, we need not address the remaining issue.

However, in the interest of thoroughness, we review the remaining issue of whether plea counsel was ineffective in advising Kolle to reject the State's initial plea offer and plead guilty without a negotiated sentence.

We find plea counsel was deficient in advising Kolle that the State's initial plea offer was not a "good deal" and misinforming Kolle that the offer would remain open until after the suppression hearing.

Clearly, the State's offer of a sentence of ten years suspended on the service of five years with three years' probation was significantly better than the seven to twenty-five-year sentence Kolle faced for the trafficking charge.[4] Moreover, plea counsel advised him not to plead guilty until after the suppression hearing at which time the State withdrew the plea offer. Had Kolle known that the State would

[4] In making this offer, the State would have reduced Kolle's indicted charge to trafficking in cocaine in an amount greater than ten grams but less than twenty-eight grams, which would not constitute a violent offense. S.C. Code Ann. § 44-53-370(e)(2)(a)(1) (2002) (providing for sentence of a term of imprisonment of not less than three years nor more than ten years for a first offense).

withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (concluding petitioner proved ineffective assistance of counsel where plea counsel failed to communicate the State's proposed plea offer which was a significantly lower sentence than petitioner would have accepted had it been communicated).[5]

CONCLUSION

Based on the foregoing, we find there is evidence to support the decision of the PCR judge. Accordingly, the order granting Kolle's PCR application is

AFFIRMED.

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[5] The dissent appears to contend that a defendant may never raise a claim of ineffective assistance of counsel following the entry of a guilty plea if he expressed satisfaction with his attorney during the plea colloquy. An expression of satisfaction with plea counsel is necessarily conditional. The extent of satisfaction is dependent upon the attorney's diligence and degree of information shared with the client. Although a plea of guilty may preclude certain PCR claims, it would not preclude those that directly involve the voluntariness and knowledge with which the guilty plea was made. Here, Kolle entered his guilty plea without the benefit of all exculpatory information or knowledge that the State's initial plea offer would not remain open. Because Kolle was unaware of this information, his claim of ineffective assistance of counsel clearly impinged upon the voluntariness and knowledge with which he entered his plea. Accordingly, we find this case constitutes a valid collateral attack of a guilty plea. See Davila v. United States, 258 F.3d 448, 451 (6th Cir. 2001) (considering question of whether a plea agreement that waives the right to file for post-conviction relief is enforceable when the petition claims ineffective assistance of counsel and holding that "[w]hen a defendant knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring[ing] a claim of ineffective assistance of counsel"); Watts v. State, 248 S.W.3d 725, 729 (Mo. Ct. App. 2008) ("Where . . . there is a negotiated plea of guilty, a claim of ineffective assistance of counsel is immaterial except to the extent that it impinges upon the voluntariness and knowledge with which the guilty plea was made." (citation omitted)); cf. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (concluding appellate rights and post-conviction review may be waived by a knowingly and voluntarily entered guilty plea pursuant to a written plea agreement).

WALLER, J., concurs. PLEICONES, J., concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES: I agree with the majority that we must affirm the post-conviction relief (PCR) judge's order granting respondent PCR. Our scope of review is limited to whether there is any evidence of probative value in the record to support the PCR judge's findings, Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), and we give great deference to the PCR judge's credibility determinations. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). This deference requires that we accept the PCR judge's finding that a witness is credible even where the PCR testimony is directly refuted by the trial or guilty plea record. See Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994). Given our limited scope of review, and the deference accorded the PCR judge's credibility determinations, I concur in the result reached by the majority here.

JUSTICE KITTREDGE: I respectfully dissent. I vote to reverse and reinstate the guilty plea and sentence.

The plea judge, the Honorable Steven H. John, conducted a thorough and textbook guilty plea. J. Lamar Kolle pled guilty freely and voluntarily, and acknowledged satisfaction with plea counsel.

> THE COURT: Now, you are here with your attorney . . . is that correct?
> DEFENDANT KOLLE: Yes, sir.
> THE COURT: Have you told him everything you need to tell him about this case?
> DEFENDANT KOLLE: I believe so, sir.
> THE COURT: All right, sir. Have you had enough time to talk to him?
> DEFENDANT KOLLE: Yes, sir.
> THE COURT: Do you need any more time to talk to him?
> DEFENDANT KOLLE: No, sir.
> THE COURT: Has he done everything that you expected of him, that you wanted him to do to try to help you in this case?
> DEFENDANT KOLLE: Yes, sir.
> THE COURT: Are you satisfied with his representation?
> DEFENDANT KOLLE: Yes, sir.
> THE COURT: Any complaints about his representations?
> DEFENDANT KOLLE: No, sir.

The guilty plea colloquy, including allocution, revealed the following facts. In the summer of 2003, Kolle and "ladies" traveled from Ohio to North Myrtle Beach, South Carolina. Kolle and his lady friends were befriended by Willis Holmes, who invited the group "to stay at his house and save on the hotel bill."

The cocaine was found in Holmes's residence. According to the plea allocution:

DEFENDANT KOLLE: I let Mr. Willis Holmes know what me and the ladies had in our possession, and he said that wouldn't be an issue, but he would prefer that it stayed outside of the house.
It stayed outside of the house, in my vehicle, for the first three or four days, and then once Mr. Holmes started selling it and purchasing it, it came in the house, and he knew that because he had asked for some in the house, and received it in the house from me, and it stayed in the house from that time on. I demonstrated the machine to Mr. Holmes also, so he was well aware of what was going on.
THE COURT: All right, sir.
Solicitor, anything further that you would like to ask Mr. Kolle at this time?
SOLICITOR: Your Honor, I would ask that – in his allocution he indicated the "stuff." What would that "stuff" be?
THE COURT: Mr. Kolle.
DEFENDANT KOLLE: The cocaine ---
THE COURT: All right.
DEFENDANT KOLLE: ---And the tools.
THE COURT: And the paraphernalia that was seized by the police; is that correct?
DEFENDANT KOLLE: Yes sir.
THE COURT: All right, sir. And the weight that – of the cocaine that was seized, in your estimation, that was a correct amount as far as the weight at the time that it was seized, as best you could tell?
DEFENDANT KOLLE: I believe it is a little heavy, and if you review the documents there are several different amounts that the police have come up with, and that's going to be due to moisture and sweating, so I would ---
THE COURT: All right. But it's no question in your mind it was certainly a good deal bit more than twenty-eight grams?
DEFENDANT KOLLE: Yes.

THE COURT: All right. Now, Mr. Kolle, just a second. I just have one or two other questions for you. Regarding the answers that you have given me here today, are they the truth?
DEFENDANT KOLLE: Yes.
THE COURT: And did anybody tell you, or give you the answers that you have given to the Court, or are they your answers?
DEFENDANT KOLLE: They are my answers.

Following the trial of Holmes, Kolle appeared for sentencing before Judge John. Kolle recited the reasons he believed he was a good candidate for probation:

DEFENDANT KOLLE: I just wanted to let the Court know that I was offered some pleas that were a lesser sentence than this, and it was not the fact that I was not trying to accept responsibility for the crime, but as informed by my attorney, he felt that it was an illegal search and seizure, so that's why I took it to this point, and I feel like I kind of lost out a little bit because of that, and I just want to say that I do accept responsibility for what happened, but in the same light, these girls, they were of equal responsibility. They have known what's gone on, and I think that is apparent by their own statement. They received a hundred day plea and some probation. I'm not – I feel that I should pay for my crime, but however, I have seven kids which, you know what I'm saying, are in dire need of my support, and I just request that the Court have mercy on me and grant me probation. I successfully have completed parole in Ohio when I – on my prior offense, with no problems, and I would not be a threat to society, and I feel that I'm a good candidate for probation.
THE COURT: I'm going to look at one thing first, before I impose a sentence in this matter. . . . [N]o probation is possible regarding this particular matter. The court does feel that the minimum sentence should be imposed in this

> offense that is allowable by law, and that would be the sentence of seven years. That is the sentence in this particular matter.

According to Kolle's PCR testimony, when he pled guilty he was aware of plea counsel's alleged deficient representation and repeatedly complained to counsel about it. For example, Kolle testified that he and counsel "actually debated about this beforehand"; Kolle "continued to argue with [counsel] and he continued to try not to do it" when counsel apparently failed to investigate the case as instructed by Kolle; and Kolle testified that "[counsel] didn't investigate my case whatsoever or follow my instructions concerning the investigation of my case."[6]

Kolle's PCR testimony stands in stark contrast to his guilty plea testimony. Presumably, Kolle lied to the plea judge in stating he was satisfied with counsel and had no complaints. It is my view that a guilty plea is not rendered involuntary where, as here, a defendant knowingly testifies falsely at the guilty plea proceeding.[7] I would not grant a PCR applicant relief under such circumstances. I find no

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[6] Moreover, Kolle fancies himself as a legal expert, as reflected in his lecture-like testimony to the PCR court on the laws of search and seizure and *Brady*.

[7] The majority opinion states that I "appear[] to contend that a defendant may never raise a claim of ineffective assistance of counsel following the entry of a guilty plea if he expressed satisfaction with his attorney during the plea colloquy." I contend no such thing. I contend that a defendant should not be permitted to successfully collaterally challenge a guilty plea on the basis of an involuntary plea tied to a claim of deficient representation where: (1) the alleged deficient representation was known to the defendant at the time of the guilty plea; and (2) the defendant knowingly testified falsely at the plea proceeding concerning plea counsel's representation.

evidence to support the PCR court's decision and would reverse the grant of PCR.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Hercules E. Mitchell, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26772
Heard January 20, 2010 – Filed February 16, 2010

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Petitioner.

Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals decision in *State v. Mitchell*, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008). After a thorough review of the Appendix, record, and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry William Smith, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Darlington County
Paul M. Burch, Circuit Court Judge

Opinion No. 26773
Submitted October 21, 2009 – Filed February 16, 2010

REVERSED

Desby Smith, of Lamar, and John Dennis Delgado, of Bluestein, Nichols, Thompson & Delgado, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen Ratigan, of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of post-conviction relief. We reverse.

I.

In 2004, Petitioner Larry Smith was convicted of second-degree criminal sexual conduct (CSC) with a minor and contributing to the delinquency of a minor. Smith was sentenced to twelve years in prison. Smith's direct appeal challenged only the denial of his directed verdict motion. The court of appeals affirmed in an unpublished opinion.[1] Smith then sought post-conviction relief (PCR).

II.

In his application for PCR, Smith claimed trial counsel had rendered ineffective assistance by failing to object to "hearsay testimony that was improperly corroborative of the Victim." At the PCR hearing, Smith contended he was entitled to a new trial because forensic interviewer Ginger Gist had testified without objection that the Victim told Gist that Smith had sexually assaulted her. The forensic interviewer, at the invitation of the solicitor, also testified without objection that she found the Victim's statement "believable" and stated the Victim had no reason "not to be truthful."

Smith contends the testimony of the forensic interviewer interjected impermissible hearsay into the trial, which improperly bolstered the Victim's testimony. Smith additionally contends counsel's failure to object to this testimony resulted in prejudice, pointing to the State's closing argument, which emphasized the forensic interviewer's testimony.

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[1] *State v. Smith*, 2006-UP-362 (S.C. Ct. App. filed October 24, 2006).

In denying relief, the PCR court found trial counsel's failure to object was a valid "trial strategy." *See Watson v. State*, 370 S.C. 68, 634 S.E.2d 642 (2006) (recognizing when counsel provides a valid trial strategy in response to a Sixth Amendment ineffective assistance of counsel claim, counsel's performance will not be deemed deficient). However, when trial counsel was asked if he had a strategy in failing to object to the hearsay and the bolstering testimony, he responded, "none."

The PCR court further found Smith had failed to show he was prejudiced by the challenged testimony. The PCR court's order acknowledged that the testimony at trial was conflicting, but noted the Victim had identified Smith as the perpetrator and a partial DNA profile had indicated the probability of Smith not being the assailant was "1 in 1600." As noted, the PCR court denied Smith's application for relief.

III.

The burden is on the petitioner to prove the allegations in the PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). In reviewing the PCR judge's decision, an appellate court will uphold the PCR court if any evidence of probative value supports the decision. *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)).

To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

IV.

A.

Limited, Non-hearsay Corroborative Testimony in a CSC Case

In a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is *not* hearsay when:

> [T]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is *limited to the time and place of the incident.*

Rule 801(d)(1), SCRE (emphasis added).

In *Jolly v. State*, this Court found trial counsel ineffective for failing to object to the introduction of a social worker's testimony that the child Victim had discussed her sexual abuse by Jolly. 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). This Court reversed the PCR court's denial of relief after finding there was a "reasonable probability" that the social worker's testimony affected the outcome of Jolly's trial. *Id*. at 21, 443 S.E.2d at 569.

Under Rule 801(d)(1), SCRE, corroborative witness testimony is limited to time and place of the alleged assault. The corroborative testimony cannot include "details or particulars" regarding the assault. *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). In *Dawkins*, four witnesses testified without objection regarding the Victim's out-of-court

conversations with them concerning the alleged abuse, and each witness repeated the Victim's identification of Dawkins as the perpetrator. *Id.* at 154, 551 S.E.2d at 261. This Court found trial counsel's failure to object to the admission of inadmissible corroborative hearsay was an error that fell below an objective standard of reasonableness. *Id*. at 156, 551 S.E.2d at 263. Furthermore, the Court disagreed with the PCR court's finding that no prejudice had resulted from the improper corroboration testimony, explaining:

> [P]etitioner was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the [V]ictim's testimony cannot be harmless. . . . '[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'

Id. at 156-57, 551 S.E.2d at 263 (quoting *Jolly*, 314 S.C. at 21, 443 S.E.2d at 569).

In contrast to *Dawkins*, in another PCR case involving CSC, the Court applied the *Strickland* analysis and denied relief after finding: (1) defense counsel's failure to object to the admission of written witness statements that went beyond time and place of the alleged sexual assault fell below an objective standard of reasonableness, *but* (2) counsel's failure to object had not prejudiced the defendant's case "[i]n light of the overwhelming evidence presented by the State." *Huggler v. State*, 360 S.C. 627, 634-36, 602 S.E.2d 753, 757-58 (2004).

B.

Trial Strategy

Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Caprood v. State,* 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000).

In *Dawkins,* this Court rejected the PCR court's finding that trial counsel had a valid strategic reason for not objecting to the introduction of impermissible hearsay:

> The testimony of the four witnesses relating what [the Victim] told them regarding her alleged sexual abuse served only to bolster her credibility. This case hinged on whether [the Victim] was credible. The improper corroboration of [the Victim's] allegation of sexual abuse by several witnesses thus had a 'devastating impact' on petitioner's trial. Counsel's failure to object because he did not want to confuse or upset the jury does not constitute valid strategy.

346 S.C. at 157, 551 S.E.2d at 263. The Court added that counsel's trial strategy "was inappropriate especially given the fact there was not overwhelming evidence that petitioner sexually abused [the Victim]." *Id.*, 551 S.E.2d at 263. The Court concluded: "[C]ounsel did not articulate a valid strategy for failing to object to the testimony. Accordingly, we find petitioner is entitled to a new trial because he was prejudiced by counsel's deficient performance." *Id.*, 551 S.E.2d at 263. *Compare Watson v. State,* 370 S.C. 68, 634 S.E.2d 642 (2006) (finding trial counsel had articulated a valid strategy for not objecting to the corroborative and impermissible hearsay where counsel reasonably believed that objecting to the corroborative testimony could lead to the introduction of more damaging evidence).

C.

Petitioner Has Demonstrated Ineffective Assistance of Counsel

The forensic interviewer's testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE. The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony. Moreover, we can discern no defensible basis for trial counsel's failure to challenge the forensic interviewer's objectionable testimony. The evidence in the record suggests that trial counsel was deficient, thereby satisfying the first prong of *Strickland*.

We next consider whether counsel's deficient performance resulted in prejudice to Smith. Having carefully reviewed the entire transcript of the underlying trial, we find Smith was prejudiced by trial counsel's deficient performance. The contrary determination by the PCR court has no evidentiary support in the record.

We find this case strikingly similar to *Dawkins*. Here, as in *Dawkins*, the outcome of the case hinged on the Victim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of Smith's guilt. The forensic interviewer's hearsay testimony impermissibly corroborated the Victim's identification of Smith as the assailant, and the forensic interviewer's subsequent opinion testimony improperly bolstered the Victim's credibility.

The State relied heavily on the forensic interviewer's testimony to overcome inconsistencies in the Victim's testimony. In its closing argument to the jury, the State highlighted the forensic interviewer's testimony:

> Well, Ginger Gist talked to [the Victim]. She's the forensic interviewer if you recall. . . . And she determines in her opinion [the Victim] is believable. Says she's examined many, many

> children and you know sometimes you just can't believe them. But she said she believed [the Victim]. Believed what [the Victim] told her.

There is no valid claim of overwhelming evidence of Smith's guilt. Even the State acknowledged in its brief that "there was a great deal of conflicting testimony from virtually every State and defense witness who testified at trial." Moreover, in addressing Smith at sentencing, the trial judge commented on the conflicting testimony: "I'm not giving you the maximum sentence in this matter. I'm not sure what all went on in this case. There is a lot of confusion as to the stories that were told by many of the witnesses."

The State's concession and the trial court's observation support our conclusion that Smith was prejudiced by deficient representation at trial and that confidence in the outcome was thereby undermined.

V.

Because trial counsel was deficient in failing to object to the improper hearsay and bolstering testimony, and because this deficiency prejudiced the outcome of Smith's trial, we reverse the denial of post-conviction relief.

REVERSED.

WALLER, PLEICONES, BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the PCR court's denial of Petitioner's application should be affirmed.

The PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). In my view, trial counsel's performance was not deficient. Nonetheless, even if it was deficient, Petitioner suffered no prejudice.

In my opinion, the PCR court correctly found that trial counsel articulated a valid trial strategy consistent with his failure to object to the inadmissible hearsay testimony at issue. This finding is supported by trial counsel's testimony and should be affirmed. *See Watson v. State*, 370 S.C. 68, 73, 634 S.E.2d 642, 644 (2006) (holding that where trial counsel articulates "a valid reason for failing to object to . . . hearsay testimony," he has not performed deficiently with respect to the lack of objection).

Nonetheless, even if trial counsel's performance was deficient, Petitioner suffered no prejudice. In my view, the State presented overwhelming evidence of Petitioner's guilt.[2] Therefore, it is not reasonably probable that the result of Petitioner's trial would have been different absent counsel's alleged deficient performance. See *Cherry*, 300 S.C. 117-18, 386 S.E.2d at 625 (holding that a PCR applicant has shown prejudice where he is able to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

For these reasons, I would affirm the PCR court's denial of Petitioner's application.

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[2] First, the State presented evidence that showed the victim was a 12 year old girl that had sexual intercourse. Second, a nurse practitioner and physician who examined the victim testified that the intercourse was not consensual. Third, the victim positively identified Petitioner as her attacker. Fourth, the DNA profile developed from material collected during an examination of the victim was a 1 in 1600 match to Petitioner.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles E. Johnson, Respondent.

Opinion No. 26774
Heard November 30, 2009 – Filed February 16, 2010

DEFINITE SUSPENSION

Henry Dargan McMaster, Attorney General, and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Charles E. Johnson, *pro se*, of Columbia

PER CURIAM: In this disciplinary matter, the Office of Disciplinary Counsel (ODC) brought formal charges against Respondent Charles E. Johnson arising out of his alleged neglect of a client's case and his failure to follow proper procedures in numerous real estate closings. In one particular closing, ODC alleged Respondent was not present at the closing. In another closing, ODC alleged Respondent was responsible for a real estate transaction involving mortgage fraud. A Hearing Panel of the Commission on Lawyer Conduct ("the Panel") found ODC's allegations to be true and recommended an indefinite suspension as a result of the misconduct. We agree with the Panel in substantial part, but we find ODC failed to meet its burden of proof that Respondent actively participated in the

transaction involving mortgage fraud. Based on the proven misconduct, we suspend Respondent for one year from the practice of law.

I.

a. Longwood Matter

On February 20, 1998, Pamela Longwood and Beverly Sumter retained an associate with Respondent's firm to represent them regarding an automobile accident that had occurred just days prior. Longwood and Sumter, who are cousins, informed the associate that they were involved in an accident with James Usher and that Sumter was the driver and Longwood was her passenger. Subsequently, the associate left Respondent's firm, and Respondent assumed representation in May 1999. In July 1999, Usher filed suit against Sumter, the at-fault driver. As a result of this suit, Respondent learned of a potential conflict of interest between Sumter and Longwood and terminated his representation of Sumter. In April 2001, two months after the expiration of the statute of limitations, Respondent filed suit against Usher and Sumter, despite Longwood's continued instructions not to file suit against her cousin.[1] The case was dismissed as time-barred.

b. Cantey Closing Matter

Amanda Cantey purchased a home in which her father, Amos Price, was the co-signor. Respondent served as the closing attorney, and Joseph Wright served as the broker. The closing documents indicated that the closing took place on October 2, 2001. ODC alleged Respondent could not have been present at the closing at his office in Columbia because he was attending the public defenders conference in Myrtle Beach on this date.

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[1] Respondent attempted to serve Sumter, but the pleadings were returned for non-service.

c. Amos Price/Joseph Wright Matter

On November 29, 2001, approximately two months after the Cantey closing, Respondent conducted a closing on a $340,000 home located in the Spring Valley subdivision in Columbia. The HUD statement indicated that Amos Price, Cantey's father, was the borrower and the purchaser of the home. In 2003, the mortgage company began contacting Price regarding his failure to make mortgage payments on the Spring Valley home. Price and his family informed the mortgage company that he had not purchased the home, and he did not know how or why the mortgage was listed under his name.

An investigation revealed that Joseph Wright, the broker involved in the Cantey closing, had assumed Amos Price's identity and had moved into the home. Wright was indicted for financial identity fraud and pled guilty to forgery. ODC alleged Respondent knowingly participated, either directly or indirectly, in the fraudulent transaction.

d. Various Real Estate Closing Matters

ODC examined a number of Respondent's files involving real estate closings. ODC presented HUD statements and disbursement statements from thirteen unrelated closings conducted by Respondent to the Panel. The statements contained numerous and significant financial discrepancies.

II.

At the hearing before the Panel, Sumter and Longwood testified that Respondent never warned them of the potential conflict of interest. Moreover, Sumter testified that Respondent did not obtain her consent to sue her despite her status as a former client. Longwood testified that she had specifically instructed Respondent not to sue Sumter and never directed him otherwise.

Regarding the Cantey closing, Amanda Cantey testified that Respondent was not at the closing on October 2, 2001. Cantey stated

that she, her husband, Wright, and Beulah Stallings, who is Respondent's secretary and sister, were the only individuals present at the closing. She testified she had never been to Respondent's office prior to this closing and that only one meeting took place. Cantey further testified the signatures on the documents relating to the Spring Valley closing were not her father's signatures, her father was not involved in the Spring Valley home purchase, and he was unaware of Wright's actions.[2]

ODC called Wright to testify as to the Price/Wright matter. He testified that he had received the loan closing documents from the lender and then compiled the forged documents prior to the closing. He admitted that he had contacted Amanda Cantey and Amos Price and falsely told them he needed to make another copy of Price's driver's license for the Cantey file. Wright stated that the closing took place in Respondent's office and Respondent was not present, but Stallings was present at the closing. Wright maintained that he acted alone in forging the documents and neither Respondent nor Stallings had knowledge of his scheme. Respondent declined to cross-examine Wright.

As to the various real estate closings that ODC examined, ODC called Andrew Syrett to testify. Syrett served as the seller's attorney and Respondent represented the buyer in a transaction in which the buyer had been renting the home on a lease/purchase contract. Syrett testified Respondent drafted a HUD statement indicating a refinancing transaction, yet the transaction was clearly a purchase transaction. Syrett testified that Respondent prepared an incorrect HUD statement and an incorrect deed. Syrett instructed his client not to sign either document, and he subsequently redrafted the documents correctly.

In addition to witness testimony, ODC submitted HUD and disbursement statements from twelve other real estate closings, all of which contained numerous financial discrepancies and inaccuracies. In essence, the files contained HUD statements which did not match the disbursement sheets and did not match the checks drawn on

[2] Amos Price was deceased by the time this hearing was held.

Respondent's trust account. The documents included inaccurate numbers for cash advanced to the borrower, processing fees, and the price of the homes.[3]

Stallings testified on Respondent's behalf at the hearing. Concerning the Cantey closing, she maintained all the parties were present and had executed the closing documents at a "dry closing" that took place the Friday before October 2.[4] Stallings also testified as to the Price/Wright matter. She stated Wright arrived at Respondent's office with a man she believed to be Amos Price, she made copies of the driver's license that he presented to her, which indicated he was Amos Price, and she recognized the man as Amos Price from the October 2 closing. Stallings testified Wright did not bring in pre-signed documents because "[Wright] know[s] we wouldn't do that." She further testified that she witnessed the man sign "Amos Price" on the documents.

Finally, Respondent testified. He admitted he neglected Longwood's case in failing to file her claim within the statute of limitations. However, he claimed he drafted pleadings in February 2001, but Longwood refused to come to his office to review them. He indicated the reason he knowingly filed the claim outside the statute of limitations was because he thought he may be able to obtain a settlement offer from the insurance company.

Respondent admitted he was in Myrtle Beach on October 2 and acknowledged that the closing could not possibly have occurred on that

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[3] The amount of the inaccuracies ranged from hundreds to thousands of dollars. Wright acted as the mortgage broker in several of these closings.

[4] According to Respondent, a "dry closing" is a closing where the documents are executed, but funds are not exchanged and the property is not transferred until days later. On cross-examination, ODC pointed out that Stallings never mentioned a dry closing in her testimony at the Notice to Appear hearing.

date. Respondent testified that, although he could not recall what exactly transpired, "the only thing [he] can think of" was that a dry closing took place the Friday before in which the parties executed the documents.[5]

Regarding the Price/Wright closing, Respondent insisted that Wright brought in a man who purported to be Amos Price. Respondent testified that Wright told him Price was his grandfather and that Price intended to purchase the home for Wright's use. He too asserted that he recognized Price from the Cantey closing and that the man brought in a driver's license indicating he was Amos Price. Respondent could not offer an explanation as to why Wright "lied" to the Panel in saying he brought pre-signed documents to the closing. On cross-examination, Respondent admitted he was "shocked" that Amos Price was approved for a loan for $340,000 for the Spring Valley home after co-signing on Cantey's loan just a month earlier. Similarly, at oral argument, Respondent acknowledged that he was concerned with the nature of this transaction from an economic standpoint.

The Panel found that Respondent's actions in failing to file suit on behalf of Longwood within the statute of limitations and in suing Sumter against Longwood's instructions constituted misconduct. Regarding the Cantey closing, the Panel found clear and convincing evidence that Respondent allowed a non-lawyer to conduct a real estate closing, to sign his name to the HUD document, and to notarize a document bearing his signature that falsely reflected that he was present on October 2. As to the Price/Wright matter, the Panel noted that this matter was most troubling to the Panel and that it was a question of credibility. The Panel found by clear and convincing evidence that Wright committed fraud by forging the closing documents and obtaining a loan in Price's name and found that Price was not present at the closing. The Panel ruled that by allowing criminal activity to occur in his office, Respondent violated the Rules

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[5] Similar to Stallings' testimony, ODC pointed out that Respondent also never mentioned a dry closing in his testimony at the Notice to Appear hearing.

of Professional Conduct. Finally, regarding the thirteen closings containing inaccurate HUD and disbursement statements, the Panel noted that although there were no allegations of misappropriation of funds, the transactions did implicate Respondent's trust account and found that Respondent's actions in this matter constituted misconduct.

III.

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). We "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the [Panel]." Rule 27(e)(2), Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. While this Court may draw its own conclusions and make its own findings of fact in an attorney disciplinary matter, the unanimous findings and conclusions of the Panel are entitled to much respect and consideration. *In re Thompson*, 343 S.C. at 11, 539 S.E.2d at 401. ODC carries the burden of proof and most prove misconduct by clear and convincing evidence. Rule 8, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

IV.

Respondent challenges the Panel's findings as to all four matters. Specifically, Respondent claims there was not clear and convincing evidence to support the allegations in the Price/Wright matter, there was no testimony contradicting his version of the Cantey closing, and the Panel's report contains no allegations of misconduct in the thirteen real estate closings. While he admits he violated Rule 1.3 (diligence) of the Rules of Professional Conduct, Rule 407, SCACR, in the Longwood matter, he claims the Panel's further findings of misconduct related to this matter are not supported by clear and convincing evidence and the proper sanction is an admonition.

We find that Respondent's actions in the Longwood matter violated the rules on conflicts of interest as well as the rules on

competence and diligence. Longwood and Sumter made a full disclosure to Respondent regarding the accident. Respondent should have informed Sumter and Longwood of the potential conflict of interest before he agreed to represent both of them. Respondent clearly neglected this matter by filing Longwood's suit after the statute of limitations had expired and by filing it against Sumter in direct contravention to Longwood's instructions. We give no credence to Respondent's assertion that Longwood refused to come to his office to review the pleadings, for it was Respondent's responsibility to ensure that his client review the pleadings before the eve of the expiration of the statute of limitations.

Next, we find that Respondent violated the Rules of Professional Conduct in the Cantey closing. We agree with the Panel's findings that Respondent allowed a non-lawyer to conduct a real estate closing and sign his name to a HUD statement. We find that Respondent's and Stallings' assertion regarding a prior "dry closing" lacks credibility. Neither Respondent nor Stallings mentioned a dry closing in their testimony at the Notice to Appear hearing. Cantey unequivocally testified that she went to Respondent's office only one time, Respondent was not present, and there had been no dry closing. Regardless of any purported dry closing, Respondent allowed Stallings to notarize a document indicating that Respondent was present on October 2, when in fact, he was not.

In our view, the Price/Wright matter is extremely troubling and is the most serious of the allegations. As stated above, we find Cantey's testimony that Respondent was not present at her closing is credible. Thus, Respondent would likely not be in a position to identify Amos Price. Moreover, one could reasonably question why Wright would provide false testimony, before the Panel and at his guilty plea, by asserting that he brought pre-signed documents to the closing. In both proceedings, Wright's testimony was consistent, and he openly admitted his actions. Wright did not shift blame or implicate anyone but himself and consistently maintained that neither Respondent nor Stallings was involved in or aware of his fraudulent scheme to assume

Amos Price's identity.[6] In our view, Stallings' and Respondent's version of events is problematic, yet we must examine the evidence through the lens of the clear and convincing standard.

Applying this heightened standard, we find that ODC did not meet its burden of proving the allegation that Respondent actively participated in this fraudulent scheme. Neither Respondent nor Stallings was ever indicted for any offense arising out of this matter, and the only evidence ODC presented in support of this allegation was Wright's testimony. In our view, this does not rise to a level of clear and convincing evidence that Respondent was an active participant in the fraud and forgeries. While we do not overlook or disregard the undisputed fact that serious criminal conduct occurred in Respondent's office, we do not find that ODC established Respondent's knowing participation in the fraudulent scheme. We view Respondent's conduct in line with his general slack and casual approach to real estate closings, perhaps explaining Wright's choice of Respondent as the closing attorney for his fraudulent scheme.

Finally, we agree with the Panel's finding that the numerous inaccurate closing documents reflect Respondent's loose approach in the handling of real estate closings. The HUD statements and disbursement sheets reflected incorrect, inaccurate, and sometimes missing important information. This court takes real estate transactions very seriously, and we have consistently issued harsh sanctions against attorneys who do not conduct closings in accordance with proper procedures. *See In re Moore*, 382 S.C. 610, 677 S.E.2d 598 (2009) (suspending attorney for one year for failing to follow proper procedures in real estate closings); *In re Hall*, 370 S.C. 496, 636 S.E.2d 621 (2006) (imposing a nine-month suspension where lawyer served as the senior South Carolina attorney for a national title agency company

[6] We do not intend to commend Wright for his actions or to excuse his criminal conduct. We are examining and analyzing Wright's testimony solely for the purpose of ascertaining how a criminal was able to perpetrate serious mortgage fraud involving identity theft in a lawyer's office.

that conducted closing which did not follow proper closing procedures). Moreover, not only did Respondent's files indicate failure to follow proper closing procedures, they also reflected failure to properly maintain his trust account. In our view, this evidence establishes a consistent pattern of negligence, inattention, failure to supervise, and an overall cavalier attitude and approach to real estate transactions, his client's interests, and the practice of law.

We recognize that this disciplinary matter was highly contentious. We commend the Panel for conducting a thorough hearing and completing a careful assessment in making their fact-finding determinations.

V.

By his misconduct in the Longwood matter, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: 1.1 (competence); 1.2 (scope of representation); 1.3 (diligence); 1.7 (lawyer shall not represent a client if representation is adverse to another client's interests unless both clients consent); and 1.9 (lawyer owes a duty of loyalty to former clients). As to the Cantey closing, we find Respondent violated the following Rules of Professional Conduct Rule 407, SCACR: 1.1 (competence); 1.3 (diligence); 5.3 (addressing responsibilities for non-lawyer assistants); 5.5 (lawyer shall not assist another in the unauthorized practice of law); and 8.4(a) and (e) (lawyer shall not violate the Rules of Professional Conduct or engage in conduct that is prejudicial to the administration of justice). Lastly, regarding the thirteen real estate closings containing inaccurate closing documents, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: 1.1 (competence); 1.3 (diligence); 4.1(a) (lawyer shall not make a false statement of material fact to third persons); 5.3 (addressing responsibilities for non-lawyer assistants); and 8.4(a) (lawyer shall not violate Rules of Professional Conduct).

As to mitigating factors, we have considered the fact that Respondent was admitted to the South Carolina Bar in 1985 and has no

prior disciplinary history. Additionally, as noted above, Respondent was not indicted as a result of the Price/Wright matter.

We hold that a sanction of a one year definite suspension is warranted in light of Respondent's misconduct, especially his neglect in supervising real estate transactions. In issuing this sanction, we especially considered the fact that serious criminal conduct was so easily perpetrated in his office while under his watch and control. *See In re Johnson*, 375 S.C. 499, 654 S.E.2d 272 (2007) (issuing a definite suspension of one year where attorney unknowingly assisted others in perpetrating real estate fraud by failing to adequately investigate the facts surrounding the circumstances of the loans); *In re Helton*, 372 S.C. 245, 642 S.E.2d 573 (2007) (indefinitely suspending a lawyer who allowed closings to be conducted by his non-lawyer assistants, was not present when the closing documents were executed, improperly witnessed documents, and failed to review the closing documents).

Respondent has exhibited a pattern of a careless approach to real estate closings. Accordingly, we suspend Respondent for one year effective the date of this opinion and direct Respondent to pay the costs of these proceedings. We further order Respondent to participate in the LEAP program.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Theresa H. Camp and William James Camp, Respondents,

v.

James Scott Camp, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 26775
Heard November 3, 2009 – Filed February 16, 2010

REVERSED

G. Waring Parker, of Summerville, for Petitioner.

William E. Hopkins, Jr., of McCutchen Blanton Hopkins & Campbell, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: In this family court case, we granted James Scott Camp's (Father) petition for a writ of certiorari to review the court of appeals' decision in *Camp v. Camp*, 378 S.C. 237, 662 S.E.2d 458 (Ct. App. 2008). We reverse.

FACTS/PROCEDURAL HISTORY

Father and Theresa H. Camp (Mother) are the parents of William James Camp (Son), who was born September 22, 1987. Father and Mother divorced in 2003. In 2005, Son began attending the University of South Carolina. The divorce decree did not address the issue of the parties' respective financial responsibilities for Son's college education. Although Mother and Son sought financial assistance from Father, Father refused to assist with Son's college expenses.

Thereafter, Mother and Son (Respondents) filed suit against Father seeking contribution toward Son's college education. On August 1, 2006, the family court filed an order directing Father to pay seventy percent of Son's college tuition, fees, and associated expenses. The family court also awarded Respondents attorney's fees in the amount of $4,000.00.

On August 11, 2006, Father filed a motion for reconsideration which stated, in its entirety:

> PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs.
>
> This motion hearing is set to be heard on the 18th day of October, 2006, at 3:45 o'clock, p.m.
>
> Please be present to defend if so minded.

There was no accompanying brief in support of the motion.

Respondents filed a memorandum in response to this motion on October, 16 2006. Respondents argued, *inter alia*, that Father's motion failed to state with particularity the grounds upon which the motion was based or the specific relief sought. Father filed a memorandum in support of the motion for reconsideration on October 18, 2006. After a hearing, the family court denied Father's motion in an order filed October 26, 2006.[1]

Father filed a notice of appeal on November 16, 2006; less than thirty days after the family court's denial of the motion for reconsideration, but well over three months after the date of the original order. Respondents argued that because Father's motion for reconsideration was not valid under the Rules of Civil Procedure, the motion did not toll the time for filing a notice of appeal, and therefore, the appeal was not timely. The court of appeals found the appeal untimely and dismissed.

ISSUE

Did the court of appeals err in dismissing the appeal?

STANDARD OF REVIEW

This case raises a novel question. In a case that raises a novel question of law, we are free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

LAW/ANALYSIS

When seeking review of a family court's order, a notice of appeal must be served on all respondents within thirty days after receipt of written notice

[1] The issue of the sufficiency of the motion was not mentioned at the hearing before the family court.

of the order or judgment. *See* Rule 203(b)(1) & (3), SCACR. Service of the notice of appeal is a "jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985). A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP.

Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[2] The particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.'" *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1st Cir. 1996) (quoting *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 808 (Fed. Cir. 1990)).[3] "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" *Calderon v. Kansas Dept. of Soc. and Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1192, at 42 (2d ed. 1990)). Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'" *Registration Control*, 922 F.2d at 807-08 (quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1192, at 42). "The particularity

[2] The federal rule 7(b)(1) is substantively the same as South Carolina's Rule 7(b)(1).

[3] "'[N]on-particularized motions have been allowed where the opposing party knew or had notice of the particular grounds being relied upon.'" *Registration Control*, 922 F.2d at 808 (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* ¶ 7.05, at 7-16 (1990)).

requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 793 (8th Cir. 2003) (citations omitted).

Because the particularity requirement is to be read flexibly in light of the peculiar circumstances of each case, we do not believe applying the particularity requirement in an overly technical fashion in this case would serve the purpose behind the rule. Applying an overly technical analysis in this instance would not reduce prejudice to either party nor would it assure the court that it would be able to deal with the motion fairly. In our view, neither party was prejudiced by Father's motion for reconsideration, and it appears from the record the court was able to both comprehend the motion and deal with it fairly. The trial court's order denying Father's motion for reconsideration stated that "[b]ased on the arguments of counsel" the motion was denied. Hence, neither party was prejudiced, and the court dealt with the motion fairly.

CONCLUSION

When neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRCP. For these reasons, we reverse the court of appeals decision and hold Father's motion for reconsideration tolled the time for filing a notice of appeal.

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

JUSTICE WALLER: I respectfully dissent. In my opinion, the Court of Appeals properly found Father's motion for reconsideration was **defective** under Rule 7(b)(1), SCRCP, and therefore, the motion failed to toll the time for filing the notice of appeal. Accordingly, I would affirm.

The Court of Appeals relied on Martinez v. Trainor, 556 F.2d. 818 (7th Cir. 1977). In Martinez, the court found that a one-sentence Rule 59(e) motion failed to satisfy the particularity requirement of Rule 7(b)(1), Fed.R.Civ.P.,[4] because the motion "failed to state even one ground for granting the motion and thus failed to meet the minimal standard of 'reasonable specification.'"[5] Martinez, 556 F.2d at 820 (quoting 2-A Moore's Federal Practice (3rd ed. 1975). Although the appellant had later filed a brief in support of the motion, the Martinez court explained that "if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated." Id.[6]

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[4] The federal rule 7(b)(1) is substantively the same as South Carolina's Rule 7(b)(1).

[5] The motion in Martinez stated as follows:

> NOW COMES the Defendant James L. Trainor, Director, ILLINOIS DEPARTMENT OF PUBLIC AID, by and through his attorney, WILLIAM J. SCOTT, Attorney General of Illinois, requests this Honorable Court, pursuant to Rule 59(e) FRCP, to alter, amend, or vacate the Declaratory Judgment entered November 11, 1976.

[6] Other federal and state courts are in accord with Martinez. See Intera Corp. v. Henderson, 428 F.3d 605, 611 (6th Cir. 2005) ("A party who files a Rule 59(e) motion must comply with the motions filing requirements set forth in Fed.R.Civ.P. 7(b)."); Talano v. Northwestern Med. Faculty Foundation, Inc., 273 F.3d 757, 761 (7th Cir. 2001) (a Rule 59(e) motion "devoid of specificity" for its reasons for reconsideration does not satisfy Rule 7(b)(1), and therefore does not toll the time period for filing an appeal); Riley v. Northwestern Bell Telephone Co., 1 F.3d 725, 727 (8th Cir. 1993) (where the court dismissed for lack of appellate jurisdiction and stated that "overlooking the defect" of a skeletal motion "would only serve to whittle away at the rules and ultimately render them meaningless and unenforceable"); Allender v. Raytheon Aircraft Co., 439 F.3d 1236, 1240 (10th Cir.

The Court of Appeals in the instant case reasoned that to permit an insufficient post-trial motion to toll the time for filing an appeal would allow a litigant "to buy time without asserting a meritorious claim" which in turn would "further neither justice nor efficiency." Camp v. Camp, 378 S.C. at 242, 662 S.E.2d at 461. Moreover, the Court of Appeals recognized that Father not only failed to specify the grounds for the motion for reconsideration, but failed to identify the relief that was sought. The Court of Appeals therefore stated the following:

> Our rules clearly state the requirements for motions and for appeals. Permitting a post-trial motion that identifies neither the grounds on which it relies nor the relief sought to stay the time for appeal under Rule 59(e), SCRCP, would undermine our procedural rules. Moreover, it would encourage parties to file baseless post-trial motions with the expectation of "filling in the blanks" at a later date.

Id. at 243, 662 S.E.2d at 461.

I agree with the Court of Appeals' analysis. To allow such patently defective motions to stay the time period for filing an appeal would "whittle away at the rules and ultimately render them meaningless." Riley v. Northwestern Bell Tel. Co., 1 F.3d 725, 727 (8th Cir. 1993).

The majority concludes that as long as "neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration," then a

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2006) (where Rule 59(e) motion "did not provide a single ground for relief," it was held insufficient and therefore did not toll the time for filing notice of appeal); N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp., 645 S.E.2d 105 (N.C. Ct. App. 2007) (where a Rule 59 motion fails to list the grounds on which the motion is based, the time for filing an appeal is not tolled); Schaan v. Magic City Beverage Co., 609 N.W.2d 82 (N.D. 2000) (where the court deemed invalid a motion for new trial because it was lacking in particularity and thus concluded the time for filing an appeal was not tolled).

skeletal motion is proper. I believe this effectively vitiates the plain (and relatively undemanding) requirements of the applicable rules of civil procedure. See Rule 7(b)(1), 59(g), SCRCP. Moreover, it will create unnecessary fact-intensive inquiries by our appellate courts to determine whether parties were – in fact – prejudiced by an insufficient motion.

I would affirm the Court of Appeals' decision to dismiss the appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

John Boyd Frazier, Petitioner/Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 26776
Heard November 17, 2009 – Filed February 16, 2010

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, Solicitor John Gregory Hembree, of Conway, for Respondent/Petitioner.

Appellate Defender Katherine H. Hudgins, of Columbia, for Petitioner/Respondent.

JUSTICE KITTREDGE: John Boyd Frazier was convicted and sentenced for the offenses of murder, conspiracy to commit murder, and armed robbery.[1] The court of appeals affirmed Frazier's murder conviction, but held Frazier was entitled to a directed verdict on the armed robbery charge and reversed the conviction. *State v. Frazier*, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007). We hold the trial court properly denied the motion for a directed verdict as to both charges, and reinstate the conviction and sentence for armed robbery. We, therefore, affirm in part and reverse in part.

I.

Kimberly Renee (Renee) and Brent Poole were married. Renee, an exotic dancer, was having an affair with Frazier. The State's theory of the case was that Frazier and Renee conspired to murder Brent.[2]

On the night of June 9, 1998, Brent was fatally shot twice in the head at close range as he and Renee were walking on the beach in Myrtle Beach. Renee was not injured and flagged down an officer patrolling the beach for help. She told the officer, "my husband has been shot."

The investigation quickly focused on Frazier. The State asserted that Renee lured Brent to Myrtle Beach with the pretense of celebrating their anniversary. Renee then convinced Brent to take a moonlight romantic stroll on the beach where Frazier was waiting to kill Brent. The State further alleged that Renee and Frazier staged the murder scene to appear as a robbery.

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[1] This was Frazier's second trial. We reversed Frazier's first conviction as a result of the trial court's exclusion of certain expert evidence proferred by Frazier and the admission of testimony against Frazier. *State v. Frazier*, 357 S.C. 161, 592 S.E.2d 621 (2004).

[2] Brent, Renee, and Frazier were all residents of Winston-Salem, North Carolina.

On June 11, North Carolina police interviewed Frazier at his Winston-Salem, North Carolina, home. Frazier admitted that he and Renee had an affair but claimed the affair had ended when Renee decided to return to her husband. Frazier denied any involvement in the murder.

Frazier admitted that he did not go to work on June 9, telling the officers he called in sick. Frazier made no mention of an email he sent to his employer a week prior to the murder requesting June 8, 9 and 10 off from work. Additionally, Frazier claimed he had not been to Myrtle Beach in many years. The police asked Frazier where his vehicle was and Frazier told them he had temporarily switched cars with his friend who was a mechanic so that the friend could fix a rattling noise in his car.

Police obtained and executed a search warrant for Frazier's home and found a day planner which had several notations indicating dates on which he had plans with Renee. Significantly, on June 9, the day planner had the notation "Renee and Brent." The evidence revealed that Renee and Frazier's affair continued after the date he told police it had ended.

The day following the crime, Mark and Donna Hobbs contacted the Myrtle Beach authorities. The Hobbses were visiting Myrtle Beach and learned of the murder from the media. On the night of the murder, at approximately midnight, the Hobbses observed a suspicious man in dark clothing outside of their hotel. The man looked at them and turned away and walked quickly to the beach. Although Donna was frightened, the couple walked towards the beach. They again spotted the man crouched behind the motel and made eye contact with him. The man then proceeded to walk north, parallel to the beach. Brent was murdered shortly thereafter in the vicinity of where the Hobbses saw the suspicious man. Mark and Donna Hobbs separately identified Frazier as the suspicious man in a photographic lineup.

Frazier was indicted for murder, conspiracy to commit murder and armed robbery.[3]

At trial, the State presented witnesses who testified that Renee and Frazier had been having an ongoing affair and that Frazier's vehicle was often seen parked outside of the Poole home, including the Wednesday, Thursday, and Friday before the murder. Bruce Wolford, a friend of Frazier, and a bartender at the Silver Fox where Renee worked, testified Frazier tried to fight Brent on May 30 in the parking lot of the Silver Fox. Wolford also overheard Renee telling Frazier of her plans to go to Myrtle Beach with Brent on June 9. Kahle Schettler, the mechanic friend of Frazier, testified he let Frazier borrow his car on June 8 and Frazier returned the car on June 10. Schettler also testified Frazier called him after the police had questioned Frazier regarding the murder and told Schettler "it would be a great help to him and his attorney if [Schettler] knew if [the car had] a small amount of miles or not." Frazier's boss verified an email sent on June 2 to him from Frazier, in which Frazier requested June 8, 9, and 10 off from work. Frazier's boss testified that he gave Frazier permission to take those days off. Mark and Donna Hobbs testified and identified Frazier as the individual they saw lurking in the vicinity just prior to the murder.

The State also presented evidence that police found a wedding ring, a Swiss Army knife, cigarettes, and 39 cents near Brent's body at the murder scene. Additionally, police found $50.73 in cash and a sales receipt dated 10:34 p.m., June 9 from Fast Eddie's, a restaurant, in Brent's pockets. Renee and Brent had been at Fast Eddie's shortly before the murder. On July 5, nearly a month after the murder, Brent's wallet was found in the yard of a residence several blocks from the crime scene. The wallet was soaking wet

[3] Renee was indicted for the offenses of murder and conspiracy. Renee and Frazier were tried separately. Renee gave a statement to police that "she and Frazier planned her husband's murder." *State v. Poole*, 2002-UP-029 (S.C. Ct. App. filed January 16, 2002). Renee was convicted and sentenced to life imprisonment. Renee's confession has no impact on the matters before us.

and contained $9 in cash, Brent's driver's license, and the ATM card which had been used to pay the bill at Fast Eddie's.

The jury found Frazier guilty on all counts. The court of appeals held the trial court properly denied Frazier's motion for a directed verdict on the murder charge and affirmed the conviction. However, the court of appeals found the evidence did not rise above the level of mere suspicion that Frazier committed an armed robbery and reversed the conviction. We granted both Frazier's and the State's petitions for a writ of certiorari.

II.

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

III.

Murder

Frazier argues the court of appeals erred in affirming the trial court's denial of his motion for a directed verdict because the State failed to present evidence placing him at the murder scene. We disagree.

We hold the State presented substantial circumstantial evidence of guilt, including: Frazier and Renee's ongoing affair; Brent was shot twice at point-blank range, yet Renee was unharmed; Wolford overheard Renee and Frazier discussing the trip to Myrtle Beach; Frazier requested June 8, 9 and 10 off from work a week prior to the date of the murder (although Frazier told police he had not been to work on the date of the murder because he was

sick); Frazier borrowed Schettler's car from June 8-10; Frazier tried to fight Brent days before the murder; and the Hobbses observed Frazier lurking around the murder scene just before the murder was committed and both independently identified Frazier in a photographic lineup. This evidence, when viewed collectively, presented a jury question as to Frazier's guilt.

Frazier cites to *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000), and *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984) for the proposition that the trial court must grant a directed verdict if the State fails to present evidence placing the defendant at the scene of the crime. In our view, Frazier overstates the holdings in these cases. In *Arnold*, *Martin*, and *Schrock* we held that the State did not produce substantial circumstantial evidence of the defendant's guilt and noted that the State presented *no* evidence that the defendant was at the scene. We reject any interpretation that these cases altered or increased the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence. In this case, unlike *Arnold*, *Martin*, and *Schrock*, the State offered substantial circumstantial evidence of Frazier's guilt. We agree with the court of appeals that Frazier's directed verdict motion on the murder charge was properly denied.

Armed Robbery

The State contends the court of appeals erred in reversing Frazier's conviction for armed robbery. We agree.

Armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). Robbery is the crime of larceny accomplished with force, and armed robbery occurs when a person commits robbery while armed with a deadly weapon. *State v. Keith*, 283 S.C. 597, 598, 325 S.E.2d 325, 325-26 (1985); S.C. Code Ann. § 16-11-330(a) (2008).

A court is not required to analyze an armed robbery and a homicide as two completely independent events. A defendant may be found guilty of armed robbery in conjunction with a homicide if the death and the robbery are a part of a continuous chain of events so interconnected as to be inseparable. *See* 77 C.J.S. Robbery § 9 (1994) ("Although, as an abstract principle of law, one ordinarily cannot be guilty of robbery if the victim is a deceased person, this principle does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable.").

We hold substantial circumstantial evidence exists to support the armed robbery charge. The State submitted evidence that Brent's wallet was found a month after the murder in a yard blocks from the murder scene, a receipt found in Brent's pocket showed that Brent used his ATM card the night of the murder, and the ATM card was found in the wallet. Additionally, a Swiss Army knife, a cigarette pack, coins, and a gold ring were all found near Brent's body.

The totality of the evidence, viewed as a whole, establishes substantial circumstantial evidence of the elements of armed robbery. Specifically, the evidence supports a reasonable inference that the wallet was on Brent just prior to his death and that the gun was used during the incident, establishing the elements of force and use of a deadly weapon. In addition, we find that the items found around Brent also support an inference that a robbery had taken place. Furthermore, the evidence shows that the homicide and robbery were a part of a continuous, inseparable chain of events. In sum, the State presented substantial circumstantial evidence that the murderer committed an armed robbery, and, as explained above, that Frazier was the murderer. *See State v. Douglas*, 359 S.C. 187, 205, 597 S.E.2d 1, 10 (Ct. App. 2004) (overruled on other grounds by *State v. Douglas*, 369 S.C. 424, 632 S.E.2d 845 (2006) (holding the State presented substantial circumstantial evidence that the murder and the taking of the property were part of a "single transaction or continuous sequence of events" where the victim had been shot five times, his house was ransacked, and his wallet was missing). We sustain the armed robbery conviction well aware that the taking and carrying away of

Brent's wallet was intended to mislead police as to real the motive for the murder.

IV.

We hold the trial court properly denied Frazier's motion for a directed verdict on the murder charge and the armed robbery charge. Accordingly, we reverse in part and affirm in part the opinion of the court of appeals.

TOAL, C.J., and WALLER, J., concur. BEATTY, J., concurring in part and dissenting in part in a separate opinion in which PLEICONES, J., concurs.

JUSTICE BEATTY (concurring in part and dissenting in part): I concur in part and dissent in part. I concur with the majority in affirming the Court of Appeals' upholding of Frazier's conviction for murder. However, I dissent in the majority's decision to reverse the Court of Appeals as to the armed robbery conviction.

In my view, the Court of Appeals was correct in reversing the armed robbery conviction. There is no evidence that a robbery took place, or that if it did that the defendant committed it. At best, the evidence in this case merely raises a weak suspicion that a robbery occurred.

The evidence showed that: the victim's gold ring was found near his body; victim had fifty dollars in his pocket; victim's wallet was found with its contents intact weeks later, in a location blocks away from the murder scene; there is no evidence that the victim had the wallet at the time of the murder; and there is no evidence that anything was taken from the victim.

I would dismiss certiorari as improvidently granted.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frantz Pierre, Appellant,

v.

Seaside Farms, Inc., Employer, and American Home Assurance Insurance Co. C/O AIG, Carrier, Respondents.

Appeal From Beaufort County
Marvin H. Dukes, III, Circuit Court Judge

Opinion No. 26777
Heard October 20, 2009 – Filed February 16, 2010

REVERSED AND REMANDED

Ilene Stacey King, of Turnipseed & Associates, of Columbia; Shaundra F. Young and James Hadstate, both of North Charleston; and Andrew H. Tuner, of Montgomery, Alabama; for Appellant.

Stephen L. Brown, Catherine H. Chase, and Lee Louis Gremillion, IV, all of Young Clement Rivers, of Charleston, for Respondents.

JUSTICE BEATTY: The South Carolina Workers' Compensation Commission denied Frantz Pierre's claim for benefits for an injury he sustained while employed as a migrant worker with Seaside Farms, Inc. Pierre fractured his right ankle when he fell on a wet sidewalk at housing supplied by his employer. The circuit court affirmed, and Pierre appeals. We reverse and remand, finding Pierre's injury is compensable under South Carolina's workers' compensation law.

FACTS

The facts in this case are undisputed. Seaside Farms, Inc. operates a 400-acre tomato farm and has a packing house on St. Helena Island, South Carolina. Pierre, a legal resident, was recruited as a seasonal worker by a crew leader for Seaside Farms and arrived in South Carolina from Florida on June 5, 2003. On that date, he completed paperwork at Seaside Farms and signed a written document entitled, "Terms and Conditions of Employment."

Under the terms of employment, Pierre's work week was Monday through Sunday, and the base pay for actual work time in the packing house was $6.00 per hour. The terms further provided: "There are not any set hours or days in this job, as it varies with picking in the field. Bad weather may delay or cancel work." According to the president and co-owner of Seaside Farms, at peak conditions, work would start around noon for those employed in the packing facility (as opposed to those harvesting) and could run until midnight or 1:00 a.m. He stated there are no regular hours for the employees because they "work as the season dictates and as we can harvest."

The terms also provided that Seaside Farms would supply housing to the migrant workers at no charge. Seaside Farms had three housing areas, and most of the individuals working in the packing facility resided at the Land's End housing, which was about four or five miles from the packing facility. The Land's End housing was a block building with a tin roof and barracks-type rooms on both sides, with showers and a kitchen in the middle.

Each room held three people, and up to 96 people could reside there. Outside the building there was also a sink for washing clothes and other items.

As soon as Pierre finished his paperwork around 4 p.m. or 5 p.m. on June 5, 2003, the crew leader drove Pierre to the housing supplied by Seaside Farms at Land's End. Pierre was scheduled to begin work the next morning. Transportation of the workers from the housing area to the packing facility and back each day was the responsibility of the crew leader as the workers did not own vehicles and it enabled the entire packing crew to arrive simultaneously to start the production line.

Pierre put his clothing in his room and decided to walk outside to look around. Just after 6:00 p.m., Pierre was exiting the building when he fell on a wet sidewalk as he walked out the door. Pierre noticed a woman was using the outside sink and water was flowing down the sidewalk in front of the building at the time he fell. Pierre was taken to a hospital, where it was determined he had fractured his right ankle.

Seaside Farms thereafter terminated Pierre's employment, and he was not immediately able to obtain other employment due to his fractured ankle. Pierre filed a claim for workers' compensation benefits, alleging he suffered his injury in the course and scope of his employment at Seaside Farms. Pierre asserted the accident took place in an employer-owned labor camp, the employer benefited from Pierre living at nearby housing, he was required by necessity to live there, and the accident occurred in the context of his reasonable use of the housing facility as contemplated by the employer. Pierre sought temporary total disability compensation from June 5, 2003 to January 31, 2004; causally-related medical treatment to date; and future medical treatment, including surgery.

The hearing commissioner determined Pierre had not sustained a compensable injury because he was not injured during the course and scope of his employment. Specifically, the hearing commissioner found Pierre "was under no requirement to live in the employer provided housing pursuant to his contract for employment" and his work did not require that he be on

continuous call. In addition, he was not engaged in any activities that were calculated to further, either directly or indirectly, the business of his employer. Finally, the wet sidewalk where Pierre fell was not different in character or design from other sidewalks, and the risk associated with slipping on the sidewalk was not one uniquely associated with his employment; rather, it was one he would have been equally exposed to apart from his employment.

The Commission's Appellate Panel upheld the hearing commissioner's order and incorporated it by reference. However, one member separately wrote to state that, although he agreed with the hearing commissioner's refusal to adopt the "bunkhouse rule," he disagreed with the hearing commissioner's conclusion that Pierre's accident did not arise out of his employment because the sidewalk in question was no different in character or design from any other sidewalk. The member stated this was too narrow a reading of the requirement that the accident "arise out of" the claimant's employment.

Pierre appealed to the circuit court, arguing his accident did arise out of and in the course of his employment and that Seaside Farms furnished the labor camp housing as part of his compensation. He alleged he "was functionally required to live in the . . . labor camp housing for lack of [a] reasonable alternative, in view of the distance of the work from residential facilities and the lack of availability of accommodations elsewhere." Additionally, "[t]he erratic work schedule described by [the] employment contract and in respondent's [Seaside Farm's] deposition testimony, indicates that [he] may have been summoned from [the] labor camp housing to work in [the] tomato packinghouse facility at odd and irregular hours." Pierre also alleged the wet sidewalk where he fell was a peculiar hazard to which he was exposed only as a result of his employment with Seaside Farms.

The circuit court affirmed. The court noted the parties had stipulated that Pierre was an employee under the South Carolina Workers' Compensation Act at the time of his injury. The court concluded Pierre's accident did not arise out of and in the course of his employment with

Seaside Farms because he was not performing any duties for his employer when the accident occurred. The court stated Pierre's proposed common-law theory of the "bunkhouse rule" was not applicable, in any event, as it does not apply when the employee is not required to reside in the employer-supplied housing. Pierre appeals.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the Commission. Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 84, 681 S.E.2d 595, 599-600 (Ct. App. 2009) (citing S.C. Code Ann. § 1-23-380).

In workers' compensation cases, the Commission is the ultimate fact-finder. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). "This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence." Tennant v. Beaufort County Sch. Dist., 381 S.C. 617, 620, 674 S.E.2d 488, 490 (2009) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id.

Under the APA, a reviewing court determines whether the circuit court properly determined if the Commission's findings of fact are supported by substantial evidence in the record and whether the Hearing Panel's decision is affected by an error of law. Geathers, 371 S.C. at 576, 641 S.E.2d at 32.[1]

[1] The South Carolina Legislature has since changed the review procedure for workers' compensation matters to eliminate review by the circuit court, but the change does not affect the procedure applicable to this case. See generally S.C. Code Ann. § 1-23-380

LAW/ANALYSIS

A claimant may recover workers' compensation benefits if he sustains an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2009). "Arising out of" refers to the origin and cause of the accident; the phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 758 (Ct. App. 2007). An accident arises out of the employment when the accident happens because of the employment, as when the employment is a contributing proximate cause. Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964).

"In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances." Hall, 376 S.C. at 349, 656 S.E.2d at 759. "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." Id. at 350, 656 S.E.2d at 759.

"Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945). "These words are construed broadly and should continue to be so construed." Id. (citation omitted). "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Id. (citation omitted).

(Supp. 2009) (regarding judicial review of administrative decisions); id. § 42-17-60 (concerning appeals of Commission awards).

In finding Pierre's claim was not compensable, the circuit court relied in large part upon a North Carolina[2] case, Jauregui v. Carolina Vegetables, 436 S.E.2d 268 (N.C. Ct. App. 1993). In Jauregui, the North Carolina Court of Appeals considered a claim by a migrant worker who was injured when he slipped and fell on a piece of soap as he walked down the steps outside a shower at the labor camp where he resided. Id. at 270. The worker testified he would not have taken the job if housing had not been provided by the employer. Id. The court considered the application of the "bunkhouse rule," and cited one version of the rule from Professor Larson:

> When an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. However, if the employee has fixed hours outside of which he is not on call, compensation is awarded usually only if the course of the injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

Id. (quoting 1A Arthur Larson, The Law of Workmen's Compensation, § 24.00, at 5-234 (1993)).[3]

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[2] Both Pierre and Seaside Farms acknowledge that South Carolina has not had occasion to consider the application of the "bunkhouse rule" per se, although we have had cases where an employee has been injured while residing on the employer's premises or going to the employer's work camp. See, e.g., Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) (holding an employee's death while traveling from a packing shed to a labor camp where he resided and performed additional duties arose out of and in the course of his employment); Jolly v. S.C. Indus. Sch. for Boys, 219 S.C. 155, 64 S.E. 252 (1951) (holding an employee's injury that occurred while he was off-duty and painting the hallway in the apartment supplied by his employer rent-free arose out of and in the course of his employment as a hog foreman and general utility worker at an industrial school).

[3] Identical language on this general rule applied to resident employees now appears in 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, Scope & § 24.01 (2009).

The court found that, "although the nature of his employment arguably required that he live on the premises," Jauregui was not continuously on call and at the time of his injury was not engaged in a duty that was calculated to further, directly or indirectly, the employer's business. Id. at 271. The court noted there was no precedent in that jurisdiction for it to follow the bunkhouse rule, in any event, and without it the employee could not prevail. Id. at 271-72.

Initially, we note that, although South Carolina courts frequently look to North Carolina's rulings since our workers' compensation code is very similar, there is no requirement that we abide by North Carolina's determination for our own law, particularly since it was decided by an intermediate appellate court. See Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945) (stating North Carolina workers' compensation decisions, while generally persuasive, are not binding on this Court).

Further, we do not find Jauregui persuasive. The decision does not comport with emerging developments in workers' compensation law, as courts have become more cognizant of the realities of the particularized conditions under which migrant workers are employed. For example, although the North Carolina court ostensibly determined that Jauregui was not "required" to live at the labor camp, presumably because he was not contractually required to do so, this ignores the reality that virtually all of the migrant workers lived on the employer's premises as there was no real housing alternative, and their presence on the employer's premises benefited not only the workers, but also the employer, since the workers could be transported each day to begin work without delay. The employer could not have found workers if it had not provided housing since the wages earned by the workers did not enable them to afford housing in the area. Thus, the first premise in its analysis, i.e., that Jauregui was not required to live at the labor camp, is inaccurate.

The North Carolina court, despite its holding, acknowledged this fact when it observed that "the nature of his [Jauregui's] employment arguably

required that he live on the premises." Id. at 271 (emphasis added). Therefore, in rejecting the bunkhouse rule, the North Carolina court failed to consider the full import of the definition that it quoted from Professor Larson, i.e., that the rule applies when the employee is required to live on the employer's premises either by the employment contract or by the nature of the work involved.

In addition, North Carolina lacks a consistent rule in resident-employee cases, which is illustrated by the fact that compensation was awarded in another North Carolina decision, in which the employee was required by the nature of his work to live at the employer's remote work site in a foreign country. See Chandler v. Nello L. Teer Co., 281 S.E.2d 718 (N.C. Ct. App. 1981) (allowing benefits where the employee was stationed at a remote work camp for a road building project in Africa and the accident occurred as he was traveling back to his employer's camp after an off-duty excursion with friends; the court found the employee was killed in an automobile accident arising out of and in the course of his employment, even though he was returning after a personal frolic, because he was still within the confines of the employer's road project and was returning to his employer-provided sleeping quarters at the time of the accident).

In Chandler the court stated that "[i]t is clear that if [the employee] had been injured while sleeping in the camp, walking to the dining hall, inspecting one of Teer's completed roads, or participating in a Teer-organized softball game, his injuries would be compensable." Id. at 720. The court held that in such situations where the employer provided its employees with sleeping, eating, and recreational facilities within the project area, employees are "continuously in an employment situation" and are "protected by the provisions of the Workers' Compensation Act" while they are within the confines of the employer's premises. Id. at 721.

The Chandler decision was affirmed by the North Carolina Supreme Court, which stated it had "carefully examined the Court of Appeals' opinion" and found "that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it to be altogether correct" and that it would

"adopt that opinion as [its] own." Chandler v. Nello L. Teer Co., 287 S.E.2d 890, 891 (N.C. 1982). Based on this fact and the reasonableness of the result, we find Chandler to be more persuasive here.[4]

Other jurisdictions have applied the bunkhouse rule under similar circumstances and found the injuries arose out of and in the course of employment where the employee was required, either by contract or by the nature of the work, to reside on the employer's premises, such as migrant workers, logging employees, and others who live at remote work sites. In such cases, the premises are considered an extension of the employer's primary work site. For the rule to apply, the injuries must have occurred during the employee's reasonable use of the premises and does include activities for personal comfort.

The Court of Appeals of Oregon analyzed the bunkhouse rule as a matter of first impression in the case of Hernandez v. Leo Polehn Orchards, 857 P.2d 213 (Or. Ct. App. 1993). In Hernandez, the claimant, a migrant worker at a cherry orchard, sustained injuries at the employer's labor camp where she resided when she slipped and fell in a mud puddle as she walked from the housing area to an outdoor bathroom facility to empty her spouse's bedpan. Id. at 214.

The court remarked that there are a variety of specialized situations where the activities of the employee have been categorized to determine if there is a sufficient work connection to make them compensable. Id. at 215. One example is the personal comfort line of cases, which provide that such activities are compensable if they are either undertaken at work or, if the employee was not at work, if the employee was required to reside on the premises and was continuously on-call. Id. "The basic underpinning of those

[4] Cf. Ramsey v. S. Indus. Constructors, Inc., 630 S.E.2d 681, 685-86 (N.C. Ct. App. 2006) (holding North Carolina has recognized that employees whose work requires travel away from their employers' premises are continuously within the course of their employment during such travel except when there is a distinct departure for a personal errand; the rationale for this rule is that while on a business trip, the employee must eat and sleep in various places in order to further the business of his employer).

cases is that it is the obligation of employment to be on the premises that creates the risk of injury to the employee; when the employee is free to leave when he or she pleases, that employment connection does not exist." Id. "The bunkhouse rule represents an incremental extension of that line of cases." Id. "It is the obligation of employment to reside on the premises that subjects the employee to the risk that resulted in injury." Id. at 216.

The court observed that although Hernandez was not contractually required to live on the premises, there was no other practical alternative, as even the employer had acknowledged that housing was supplied only because there was no other place for the workers to stay. Id. at 216-17. The court noted: "Larson observes that . . . the 'better view' upholds compensability when living on the premises is practically required." Id. at 217 (citing 1A Larson, Workmen's Compensation Law 5-271, § 24.40 (1993)). The court next found that the injury resulted from the condition of the premises where she lived. In this case, Hernandez slipped in a mud puddle that was created by the employer's act of hosing down the outhouse areas as part of its routine maintenance at the camp. Id.

In another case involving migrant workers, the Supreme Court of Florida held an accident by an employee recruited from Jamaica to work for a sugar company in Florida was covered under workers' compensation law, applying the bunkhouse rule. Carr v. United States Sugar Corp., 136 So. 2d 638 (Fla. 1962). The worker was injured when he slipped and fell on the stairs to his barracks as he was leaving to visit a worker in another barracks. Id. at 639. The court stated an injury may be compensable when either the contract or the nature of the work requires the worker's presence and the worker is making reasonable use of the employer's premises. Id. at 641.

The court noted that "the employer maintained the barracks for the obvious purpose of furthering the business of producing sugar so that the employees would be readily available to report for work in the fields at 7 A.M." Id. The court further noted that the employee was making reasonable use of the premises, as it must have been contemplated that the employees would be free to visit each other "rather than be confined when off

duty exclusively to the particular barracks where the employee was required to live." Id.

The court observed that migrant farm workers, by the nature of their jobs, must travel to follow the harvesting of produce and thus they do not establish residences, so often their housing is supplied as part of their employment;[5] additionally, their proximity to the farms benefits their employers since the products they are dealing with are perishable and providing housing "is an assurance that the workers are readily available at any time within a short distance from the work area." Id. (quoting Dupree v. Barney, 163 A.2d 901, 906-07 (Penn. 1960)).

In a case involving a logging employee, the New Mexico Court of Appeals also recognized the unique employment circumstances of workers who must live at remote work sites. Lujan v. Payroll Express, Inc., 837 P.2d 451 (N.M. Ct. App. 1992), cert. denied (N.M. 1992). In Lujan, the employee died of carbon monoxide poisoning while residing in a van at a logging site that was accessible only by rough roads. Id. at 452.

The court, applying the bunkhouse rule and citing the preferred view, i.e., that "even in the absence of a requirement in the employment contract, residence should be deemed 'required' whenever there is no reasonable alternative, in view of the distance of the work from residential facilities or the lack of availability of accommodations elsewhere," found Lujan's death was the result of a compensable accident arising out of and in the course of his employment. Id. at 454 (quoting 1A Arthur Larson, Workmen's Compensation Law § 24.40 at 5-270 (1990)). The court stated "Lujan's presence at the job site was necessary because no other accommodations

[5] See George L. Blum, Annotation, Injury to Employee as Arising Out Of or In the Course of Employment for Purposes of State Workers' Compensation Statute—Effect of Employer-Provided Living Quarters, Room and Board, or the Like, 42 A.L.R.6th 61, 93 (2009) ("The bunkhouse rule is considered to be an extension of the general rule that, where an employee is injured while on the employer's premises as contemplated by the employment contract or the necessity of work, the employee will be compensated. One rationale behind the bunkhouse rule is that an employee's reasonable use of the employer's premises constitutes a portion of the employee's compensation.").

were available within a reasonable distance . . . ." Id. at 454. The court remarked, "It seems particularly unreasonable to suggest that the worker in this case had viable alternative sleeping arrangements" where the nearest motels were thirty miles away and would have cost Lujan almost half of his daily wages to obtain. Id.

We find the reasoning in these cases persuasive and that they represent the modern view in employee-residence jurisprudence. Applying this reasoning, we conclude in the current appeal that the Commission's findings that Pierre was not required to live on his employer's premises and that his presence did not further, either directly or indirectly, the interest of his employer are not supported by substantial evidence. The president and part-owner of Seaside Farms stated that up to 96 people are allowed to reside in the Land's End camp, where most of the packers stayed. At peak operation, over 100 people were employed, and approximately 10 people (mostly locals who had their own housing) were retained year-round. Essentially, the crew leader would bring enough people to fill the housing. The company president testified that he provided housing to the workers as a cost of doing business because the workers had no other place to stay and his business could not operate if he did not provide the housing. The migrant workers did not earn enough to obtain housing, and short-term rentals that coincided with the time they would be in the area did not exist.

It is clear from the record that Pierre was required, not by contract, but by the nature of his employment, to live on-site near the packing facility as there was no reasonable alternative and virtually all of the workers at Seaside Farms lived in the housing provided by their employer. The employer absorbed the expense of housing the workers as the cost of doing business and to further its business, as it was convenient to have all of the workers ready to begin work at the same time, particularly those such as Pierre who were working in the packing house, which operates on an assembly-line basis.

In addition, we conclude the Commission's finding that the risk was not associated with Pierre's employment because the sidewalk was no

different in character from other sidewalks is not supported by substantial evidence in the record. Pierre's accident occurred as a result of a hazard that existed on the employer's premises, i.e., Pierre slipped and fell on a wet sidewalk just outside the employees' housing facility. The sidewalk was wet because another person was using the outside sink and the water ran down the sidewalk. The employer's placement of the sink and the apparent lack of drainage created the wet conditions that caused Pierre to fall. Thus, the source of the injury was a risk associated with the conditions under which the employees were required to live. But for the fact that Pierre's work essentially required him to live on his employer's premises near the farm, he would not have been exposed to the risk that caused his injury. Further, it is undisputed that Pierre was making a reasonable use of the premises at the time of his injury. Cf. Hernandez, 857 P.2d at 214 (stating the basic underpinning of cases finding compensability is that it is the obligation to reside on the employer's premises that subjects the employee to the risk that resulted in injury and creates the employment connection that does not exist when the employee is free to leave).

Although merely being on an employer's premises, without more, does not automatically confer compensability for an injury, we believe the circumstances of Pierre's accident—including the facts that he was required by the nature of his work to live on the employer's premises and such residence furthered the interests of the employer, the injury arose from a hazard existing on the employer's premises, and he was making reasonable use of the premises—establish the requisite work connection and compel a finding that Pierre's injury arose out of and in the course of his employment at Seaside Farms.

CONCLUSION

Based on the foregoing, we hold Pierre's accidental injury arose out of and in the course of his employment and is compensable under our workers' compensation law. Pierre was essentially required to live on the employer's

premises by the nature of his employment, and he was making a reasonable use of the employer-provided premises at the time of his accident. Moreover, his injury is causally related to his employment in that it was due to the conditions under which he lived, i.e., a wet sidewalk outside his building. Consequently, the decision of the circuit court is reversed and the matter is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

TOAL, C.J., WALLER and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gene Richard Hughes, Jr., Respondent,

v.

Western Carolina Regional Sewer Authority, Appellant.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4625
Heard May 27, 2009 – Filed October 22, 2009
Withdrawn, Substituted, and Refiled on February 9, 2010

REVERSED AND REMANDED

K. Lindsay Terrell, of Greenville, for Appellant.

David Alexander and Manning Y. Culbertson, both of Greenville, for Respondent.

THOMAS, J.: In this tort action, Western Carolina Regional Sewer Authority (WCRSA) appeals (1) the trial court's denial of motions for

directed verdict and judgment notwithstanding the verdict, based on an alleged lack of proximate cause; (2) the trial court's instruction to the jury; and (3) the trial court's denial of a motion to set-off the verdict by the amount the plaintiff received in settling with a negligent third party. We affirm in part, reverse in part, and remand.

FACTS

In December 2005, Gene Richard Hughes, Jr. was injured in an automobile accident consisting of two separate collisions. A WCRSA employee, Timothy Moser, caused the initial collision, which left Hughes uninjured but caused his vehicle to become stopped in an intersection. Roughly ten minutes after this initial collision, a third driver, James Coker, while drunk, negligently drove through the intersection, collided with Hughes, and caused him extensive injury.

On the night of the accident, an ice storm caused widespread power outages in Greenville County. In order to keep the sewer pumps running, WCRSA charged employees Timothy Moser and Benjie Burns with delivering fuel to emergency generators. WCRSA provided Moser and Burns with a Ford F350 pickup truck temporarily outfitted with a two-hundred-gallon, diesel-fuel tank. While making a delivery, Moser approached a four-way intersection where the power outage had caused the traffic signals to become disabled. At the same time, Hughes, after having made a complete stop at the intersection, made a left turn in front of Moser's lane of travel. Moser failed to stop at the intersection and collided with Hughes's vehicle. The collision caused Moser's vehicle to proceed a short distance through the intersection and come to a rest on the median. Hughes's vehicle came to a stop in the intersection.

Although Hughes stated he was "shaken up" as result of the collision, neither he nor his passenger was injured. Because the traffic signals and street lights were out, a witness to the accident parked her vehicle with its headlights pointed to illuminate Hughes's vehicle stopped in the intersection.

During the minutes immediately following the accident, Hughes remained in the intersection outside of his vehicle.

Approximately ten minutes after the initial accident, Coker drove through the intersection, striking Hughes and his vehicle. Coker was intoxicated and driving a vehicle owned by his employer, Operator's Unlimited, Inc. As a result of this second collision, Hughes sustained extensive injuries to his leg. Coker later pled guilty to his second conviction for driving under the influence and admitted responsibility for the second collision.

Hughes brought suit against WCRSA and Coker.[1] During trial, Hughes entered a settlement agreement and covenant not to execute with Coker. WCRSA unsuccessfully moved the court for a directed verdict. Over WCRSA's objection, the trial court instructed the jury on various statutes dealing with WCRSA's alleged duty to carry emergency signaling devices. The jury returned a verdict of $225,000 for Hughes. The trial court denied WCRSA's motions for judgment notwithstanding the verdict (JNOV) and to have the verdict off-set or reduced by the $80,000 Hughes received from the settlement with Coker. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in denying Hughes's motions for directed verdict and JNOV?

II. Did the trial court err by instructing the jury on sections 56-5-5060 to -5100 of the South Carolina Code (2006)?

III. Did the trial court err in failing to set-off or reduce the verdict entered against WCRSA by the amount Hughes received from Coker?

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[1] Hughes also brought suit against Moser individually and Coker's employer, Operator's Unlimited, Inc.; however, these parties were dismissed.

LAW/ANALYSIS

Because we find it dispositive of this matter, it is only necessary that we address whether the trial court erred in instructing the jury. WCRSA alleges the trial court erred in instructing the jury on sections 56-5-5060 to -5100 of the South Carolina Code (2006).[2] We agree.

WCRSA's alleged error pertains primarily to instructing the jury on (1) section 56-5-5060, requiring, inter alia, "motor trucks" to carry flares or reflective devices and (2) section 56-5-5070 of the South Carolina Code (2006), which requires a vehicle transporting "inflammable liquids" to carry reflective devices.[3]

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[2] These sections provide generally that certain vehicles are required to carry various warning, lighted, or reflective signals, to be employed in case the vehicle becomes disabled.

[3] The various other sections on which the trial court instructed the jury deal specifically with how and where to set the specified warning devices and provide in pertinent part:

> Whenever any motor truck, passenger bus, truck tractor, trailer, semitrailer or pole trailer is disabled upon the traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles, the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway, except as provided in § 56-5-5100.

S.C. Code Ann. § 56-5-5090 (2006).

This court will not reverse the decision of the trial court as to particular jury instructions absent an abuse of discretion. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008); Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). A trial court abuses its discretion when the ruling is not supported by the evidence or is based on an error of law. Clark, 339 S.C. at 389, 529 S.E.2d at 539. However, an erroneous jury instruction is not reversible error unless it causes prejudice to the appealing party. Raut, 378 S.C. at 405, 663 S.E.2d at 33; Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961).

When interpreting a statute, the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hardee v. McDowell, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009); Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Ga.-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003).

When confronted with an undefined term, the court must interpret it in accordance with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). However, this court will consider the language of the particular clause in which the term appears and also its meaning in conjunction with the purpose of the whole statute. See Hinton v. S.C. Dep't of Prob. Parole & Pardon Servs., 357 S.C. 327, 332-33, 592 S.E.2d 335, 338 (Ct. App. 2004) ("Terms must be construed in context and their meaning determined by looking at the other terms used in the statute."). Statutes must be read as a whole and sections that are part of the same statutory scheme must be construed together. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); Hinton, 357 S.C. at 332-33, 592 S.E.2d at 338. Further, the maxim *expressio unius est exclusion alerius* provides that the expression of one thing implies the exclusion of another or

its alternative. State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002).

A. Section 56-5-5060

Section 56-5-5060 provides: "No person shall operate any motor truck, passenger bus or truck tractor upon any highway outside of the corporate limits of municipalities at any time from a half hour after sunset to half hour before sunrise unless there shall be carried in such vehicle" a specified quantity of signaling devices, flares, lanterns, or red-burning fuses.

The applicability of this statute hinges upon whether WCRSA's vehicle is a "motor truck." This chapter of the Code does not define the term "motor truck"; however, the term "truck" is defined as "[e]very motor vehicle designed, used or maintained primarily for the transportation of property." S.C. Code Ann. § 56-5-200 (2006). WCRSA argues the trial court erred in interpreting motor truck to be synonymous with the defined term truck. We agree.

In this case, when addressing whether truck and motor truck were synonymous, the trial court held because "there is no distinction between truck and motor truck in the definition section, I don't know how else to interpret it, except to think that they must be one in the same." However, a review of the statute as a whole, as well as reading the term motor truck in context with the remainder of the statute, does not support the trial court's interpretation.

In addition to the section in question, the term motor truck appears in section 56-5-4150 of the South Carolina Code (2006), providing in pertinent part:

> A private motor truck or truck tractor of more than twenty-six thousand pounds gross weight and a for-

> hire motor truck or truck tractor must have the name of the registered owner or lessor on the side clearly distinguishable at a distance of fifty feet. These provisions do not apply to two-axle straight trucks hauling raw farm and forestry products.

As the legislature specifically defines the term truck and clearly employs the term truck in other sections of the statute, the maxim *expressio unius est exclusion alerius* suggests motor truck and truck are not synonymous. See Leopard, 349 S.C. at 473, 563 S.E.2d at 345 (providing that the expression of one thing implies the exclusion of another). Had the legislature intended section 56-5-5060 to encompass trucks, we must surmise the drafters would not have elected to employ the term motor truck.[4] Moreover, considering the practices of statutory construction demonstrate the two terms are not to be construed as synonymous, motor truck must be given its plain and ordinary meaning. See Branch, 340 S.C. at 410, 532 S.E.2d at 292 (stating that terms must be given their natural and customary meanings). Naturally, the addition of the adjective motor qualifies the term to a narrower class of vehicles than merely a truck. The common meaning of motor truck is an automotive truck used especially for the transportation of goods. See Merriam-Webster English Dictionary 760, 466 (10th ed. 1993) (defining motor truck as a vehicle used for the transportation of freight, and defining freight as goods to be shipped). Further, the term motor truck appears in sections applicable to larger load-bearing and load-towing vehicles suggesting that a motor truck is a truck for the purposes of transporting freight being larger in size or weight than that of a common pickup truck, such as the WCRSA vehicle here. Accordingly, section 56-5-5060 does not require WCRSA to carry flares or reflective devices.

B. Section 56-5-5070

Section 56-5-5070 provides:

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[4] The term motor truck is used only four times in the South Carolina Code. See S.C. Code Ann. §§ 12-36-2570, 56-5-4150, 56-5-5060, 56-5-5090 (2006).

> No person shall operate at the time and under the conditions stated in § 56-5-5060 any motor vehicle used in the transportation of inflammable liquids in bulk or transporting compressed inflammable gases unless there shall be carried in such vehicle three red electric lanterns meeting the requirements stated in § 56-5-5060, and there shall not be carried in any such vehicle any flare, fuses or signal produced by a flame.

Whether section 56-5-5070 imposes a duty on WCRSA to carry warning devices hinges upon the interpretation of the term "inflammable liquid." This chapter of the Code does not define the term inflammable liquid; however, it does define the term "flammable liquid" as "any liquid which has a flash point of 70° F., or less, as determined by a Tagliabue or equivalent closed-cup test device." S.C. Code Ann. § 56-5-350 (2006). The general provisions of statutory construction would mandate that when the legislature employs a term other than one specifically defined, the implicit intent is that the undefined term has a different meaning. Leopard, 349 S.C. at 473, 563 S.E.2d at 345 (providing that the expression of one thing implies the exclusion of another). However, of paramount significance in this situation is that the defined term – flammable liquid – is used nowhere in this chapter outside of the definition section. Rather, the only similar term employed is inflammable liquid. We remain acutely mindful that the legislature employed different terms; however, the common definition of inflammable is flammable. See Merriam-Webster English Dictionary 598 (10th ed. 1993) (defining inflammable as flammable); see also Branch, 340 S.C. at 409-10, 532 S.E.2d at 292 (stating that terms must be given their natural and customary meanings); Ga.-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered from the language used . . . [and t]he legislature's intent should be ascertained primarily from the plain language of the statute."). Thus, in order to construe

the statute to be consistent and give the terms their natural and common meanings, we look to the legislative definition of flammable.

Because we interpret inflammable and flammable to be synonymous, section 56-5-5070 applies only to vehicles that carry liquids with a flash point of seventy degrees Fahrenheit or lower, in bulk. At trial, WCRSA inquired as to the existence of evidence that the liquid at issue, diesel-fuel, fell within the ambit of the statute. To this, the trial court simply replied it was a "reasonable inference." However, upon review of the record, we find no evidence to indicate the diesel-fuel being transported by WCRSA was actually a flammable or inflammable liquid. Notwithstanding that the truck in this case is not one described by section 56-5-5060, the trial court's assumption that the carrying of diesel-fuel implicated section 56-5-5070 is unsupported by the evidence and was therefore error.

As the trial court's erroneous instructions could have led the jury to infer WCRSA had a duty to carry and use warning devices, the instructions had a reasonable chance of influencing the jury's verdict and prejudicing WCRSA. Therefore, the trial court's instructions amount to reversible error.[5] See Raut, 378 S.C. at 405, 663 S.E.2d at 33 (stating that improper jury instruction is not reversible error unless it causes prejudice to the appealing party).

CONCLUSION

Accordingly, the ruling of the trial court is

REVERSED and REMANDED.

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[5] In light of this decision, we decline to address the remaining issue on appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding the appellate court need not address all issues when decision on a prior issue is dispositive).

HEARN, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley's Iron Works, Inc., and
Tindall Corporation, Appellants,

v.

City of Union, South Carolina,
Gilbert Group, LLC and
William E. Gilbert, Respondents.

Appeal From Union County
John C. Few, Circuit Court Judge

Opinion No. 4637
Submitted October 1, 2009 – Filed December 9, 2009
Withdrawn, Substituted, and Refiled on February 11, 2010

AFFIRMED AS MODIFIED

Boyd Benjamin Nicholson, of Greenville; N. Ward Lambert, and R. Patrick Smith, of Greenville; all for Appellants.

Andrew F. Lindemann, of Columbia; Gilbert Bagnell, of Columbia; William E. Whitney, Jr., of Union; all for Respondents.

WILIAMS, J.: In this case, we must determine whether the circuit court erred in granting summary judgment in favor of the City of Union (the City) as to Shirley's Iron Works, Inc. and Tindall Corporation's (Appellants) claims. We affirm as modified.

FACTS/ PROCEDURAL HISTORY

In 2000, the South Carolina Legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA). S.C. Code Ann. §§ 29-6-210 to -290 (Supp. 2008). The SPPA states, in pertinent part:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract.
> . . .
> (3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.
>
> (4) "governmental body" means . . . all local political subdivisions.

S.C. Code Ann. § 29-6-250 (Supp. 2008) (emphasis added).

On or about February 26, 2002, the City issued a request to general contractors for proposals for the design and construction of a building (the Project). The City chose the proposal of Gilbert Group, LLC (Gilbert). On June 4, 2002, the City and Gilbert entered into a general contract (the Contract) to build the Project. The total value of the Contract was approximately $875,000. Gilbert, in turn, entered into various subcontracts, including agreements with Shirley's Iron Works, Inc. and Tindall Corporation (collectively the Appellants). However, the City did not require Gilbert to furnish a payment bond for the Contract. The Appellants claim they performed their work under their subcontracts, but Gilbert has still not paid them in full.

On June 11, 2003, the Appellants filed a complaint against the City in which they alleged the City failed to obtain a payment bond from Gilbert as required by section 29-6-250. In response, the City filed an answer and third-party complaint on July 15, 2003. In its answer, the City denied the allegations in the complaint and presented a third-party complaint against Gilbert and William E. Gilbert[1] for breach of contract, breach of contract accompanied by a fraudulent act, negligence, and fraud.

In an order dated April 19, 2004, Judge Paul E. Short granted the City's motion to redesignate Gilbert and William E. Gilbert as defendants because they, along with the City, were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which the Plaintiffs seek to recover." In the order, the circuit court held, "the Plaintiffs' cause of action against the City sounds in tort," and was, therefore, "necessarily brought pursuant to the South Carolina Tort Claims Act . . . ." (SCTCA). That same day, the circuit court granted the City's motion to strike the Appellants' prayer for recovery of attorneys' fees. In that order, Judge Short again held the Appellants had alleged a cause of action that sounded in tort. The Appellants did not appeal either of these holdings.

On August 17, 2005, the Appellants filed an amended complaint against the City, Gilbert, and William E. Gilbert. In the amended complaint,

[1] William E. Gilbert is the sole proprietor of Gilbert Group, LLC.

the Appellants alleged Gilbert had failed to pay all the monies owed to them under their respective contracts. They also alleged the City failed to secure a payment bond from Gilbert, as required by section 29-6-250. The Appellants asserted causes of action for violation of section 29-6-250, violation of section 27-1-15 of the South Carolina Code, negligence, quantum meruit, and attorneys' fees. The Appellants also alleged for the first time in the amended complaint they were third-party beneficiaries of the Contract because the bonding requirements of section 29-6-250 are "legislatively mandated contractual obligations" that were incorporated into the Contract by operation of law.

Both parties moved for summary judgment, and the circuit court heard the motions on January 23, 2006. After the hearing, but before the circuit court ruled on the motions, this court issued its opinion in Sloan Constr. Co. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) on April 24, 2006. In that case, this court held South Carolina Code sections 29-6-250 and 57-5-1660(a)(2) do not provide a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded. Id. In light of this court's holding in Sloan Construction, the circuit court granted summary judgment in favor of the City as to the Appellants' tort, third-party beneficiary breach of contract,[2] and quantum meruit claims on September 24, 2007.

On March 24, 2008, however, our supreme court reversed this court's holding in Sloan Construction. See Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). While acknowledging "the SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body," the Supreme Court nevertheless held an implied right of action for subcontractors exists under

[2] In granting summary judgment, the circuit court did not specifically rule as to whether Appellants had properly raised a third-party beneficiary breach of contract claim in their amended complaint. The circuit court held, "[T]o the extent the amended complaint may be construed as alleging a third-party beneficiary breach of contract claim, the Court finds that such claim must be dismissed . . . ."

the SPPA because the Legislature "must have intended for [suppliers and subcontractors] to be able to vindicate their rights under a statute enacted for their special benefit." Id. at 114-16, 659 S.E.2d at 162.

In a footnote, however, the supreme court held although it did not agree with this court's analysis of the SPPA, it nevertheless agreed:

> "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [(SCTCA)] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute. [citations omitted]. Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA."

Id. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)) (emphasis added).

The supreme court further held the government's failure to comply with the SPPA's bond requirements also gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Id. at 118, 659 S.E.2d at 164. In arriving at this conclusion, the Court adopted the reasoning of the seventh circuit in A.E.I. Music Network v. Bus. Computers, Inc., 290 F.3d 952 (7th Cir. 2002). At issue in that case was whether the bond requirement of the Illinois Bond Act gave rise to a third-party beneficiary breach of contract action against a public entity for failing to acquire bonds from contractors on public construction contracts. Id. at 953-54. The Illinois court held whereas the existence of a direct third-party beneficiary to a contract is normally determined by the intentions of the actual contracting parties, the relevant intentions in cases falling under the Illinois Bond Act were those of the Illinois Legislature alone. Id. at 955-56. Thus, because the Illinois Legislature intended the bond requirement term in the Illinois Bond Act to protect subcontractors, the bond requirement became a term in every construction contract involving a public entity. Id. at 955. In

view of A.E.I. Music, our supreme court concluded because our Legislature intended the SPPA to bestow a special benefit to subcontractors, the bond requirements of the SPPA are, therefore, incorporated into all construction contracts governed by the SPPA. Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165.

Finally, having found section 29-6-250 gave rise to a private right of action against the government, the court held the government's liability for failure to comply with the SPPA's bonding requirements was not open-ended. Id. at 121, 659 S.E.2d 165. Rather, the government's liability would be limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Id. at 121, 659 S.E.2d at 165-66.

In light of our supreme court's decision in Sloan Construction, the Appellants argue the circuit court erred in granting the City's motion for summary judgment as to its claims in tort, breach of contract, quantum meruit, and violation of section 27-1-15. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the

summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, 381 S.C. at 330, 673 S.E.2d at 803.

II. Motions for Summary Judgment

1. Tort and Third-Party Breach of Contract

As an initial matter, the City concedes, and we agree, that in light of our supreme court's decision in Sloan Construction, the circuit court's grant of summary judgment in favor of the City on the grounds that Appellants have no private right of action against the City for breach of any duties created by the SPPA was in error. However, the City argues even assuming arguendo the consequence of Sloan Construction was Appellants' tort and third-party breach of contract claims were properly brought under the SPPA, summary judgment as to those claims should nevertheless be affirmed because (1) pursuant to Sloan Construction, the City's liability is limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment, Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165; and (2) there is no dispute in this case that the City paid out the remaining contract price after it was notified of the non-payment. We agree.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at

558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

William E. Gilbert stated in his deposition that at the time the City learned some of the subcontractors had not been paid in full, a total of $111,270 remained to be paid to Gilbert on the Contract. Those funds were offered to the unpaid subcontractors, including the Appellants. Ultimately, all of the remaining unpaid subcontractors (except the Appellants) agreed to accept a share of the $111,270 in exchange for releasing the City from further liability. The Appellants refused to grant the City such a release. Thereafter, the portion of the $111,270 that was set aside to pay the Appellants was distributed among the other unpaid contractors. Thus, the record indicates although all of the subcontractors might not have been paid in full for their work, the City has not retained any of the unpaid balance on the Contract.[3] We believe this showing established an absence of evidence of the City's nonpayment such that the burden shifted to the Appellants to present evidence in support of its case (i.e., evidence that the City did not, in fact, pay out in full).

The Appellants, however, do not point to any evidence, either in their Final Brief or in their Reply Brief, that would refute the circuit court's finding that there was no evidence of the City's failure to pay. Rather, the Appellants merely make the conclusory allegation in their Reply Brief, "It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price." The Appellants have shown no specific facts to support this contention; instead, they have rested on the allegations and denials in their pleadings. Under Gauld, this is not sufficient to survive summary judgment.

Consequently, we see no reason to remand this case to determine the extent of the City's liability for the Appellants' SPPA claims because liability

[3] We also note at oral argument on the cross motions for summary judgment, when counsel for the City stated it was "undisputed . . . that the full contract price was ultimately paid out by the City," counsel for the Appellants did not respond.

for such claims is limited to the unpaid balance on the Contract and there is no genuine dispute as to whether the City has already paid out the remaining balance. Thus, we affirm the circuit court's grant of summary judgment on the tort and third-party breach of contract claims.

2. Quantum Meruit

The City argues summary judgment as to the Appellants' quantum meruit claims should be affirmed because there is no evidence tending to show the City has retained any of the contract price. We agree.

To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992). The elements of quantum meruit are the following: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for the defendant to retain the benefit without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The City argues there exists no genuine issue of material fact as to the third element of quantum meruit. At the circuit court, the City maintained it paid out the remaining balance on all subcontracts, and that Appellants failed to present sufficient evidence to the contrary to create a genuine issue of material fact. On this basis, the City now argues summary judgment as to quantum meruit should be affirmed because while the City certainly has been "enriched" by the completion of the Project, such enrichment was not unjust because the City has paid out the full price of the Contract. See Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) ("Courts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor.").

As discussed above, we find there existed no genuine issue of material fact as to whether the City has paid out in full on the Contract. Consequently, we affirm the circuit court's grant of summary judgment as to quantum meruit.

3. Violation of section 27-1-15 of the South Carolina Code

The City argues the Appellants' claim for attorneys' fees under South Carolina Code Section 27-1-15[4] is not preserved for review. We agree.

Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). When an issue or argument has been raised to but not ruled upon by the trial court, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appeal. Id. at 24 n.4, 602 S.E.2d at 780 n.4.

The Appellants asserted claims pursuant to section 27-1-15 in their amended complaint. Thus, the issue of section 27-1-15 was properly raised to the circuit court. However, the circuit court's summary judgment order

[4] South Carolina Code section 27-1-15 (Supp. 2008) states: "Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand."

clearly does not address the question of the Appellants' entitlement to attorneys' fees and interest pursuant to section 27-1-15. Accordingly, it was incumbent upon the Appellants to file a Rule 59(e) motion to secure a ruling from the circuit court and, consequently, preserve this issue for appeal. The Appellants did not file such a motion. We, therefore, need not address this issue because it is not preserved for our review.

CONCLUSION

Accordingly, the decision of circuit court is

AFFIRMED AS MODIFIED

GOOLSBY and GEATHERS, JJ., concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wiley Post James, Appellant.

Appeal From Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 4650
Submitted January 4, 2010 – Filed February 11, 2010

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General A. West Lee, all of

Columbia; Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

WILLIAMS, J.: James appeals his conviction for distribution of cocaine base, arguing the trial court failed to instruct the jury on mere presence because evidence was presented that tended to show James was present but did not sell drugs. We affirm.

FACTS

On September 14, 2005, Officer Beth Foxworth (Foxworth) of the Sumter County police department was working undercover near the Clarendon County line in search of persons selling crack cocaine. A confidential informant (the CI) accompanied Foxworth in her car that day. Wiley Post James (James) was sitting in a yellow and white Oldsmobile across the street from where Foxworth's car was parked. Upon observing James's car, Foxworth hailed James over to her car.

Foxworth asked James if he had "a twenty," to which James responded, "What kind?" At that point, the CI said, "powder," referring to powder cocaine, to which James responded, "No." Foxworth then asked James if he had "twenty hard," referring to crack cocaine, to which James responded, "Yes." At that point, Foxworth handed twenty dollars to James and he handed her a quantity of crack cocaine. Foxworth testified James was the only person around at the scene and that he was the only person who sold her the crack cocaine. Foxworth also testified she distinctly remembered a tattoo of a little girl's face on the inner left arm of the man who sold her the crack. At trial, Foxworth was shown the defendant's left arm and stated it was the same tattoo she saw on the day of the transaction. In addition to Foxworth's testimony, the jury was shown video tape recordings taken by a camera mounted inside Foxworth's patrol car of the alleged transaction.

James was found guilty of distributing cocaine base and sentenced to fifteen years imprisonment. This appeal followed.

ANALYSIS

James admits he walked over to Foxworth's car but denies he distributed crack cocaine to Foxworth. On appeal, James argues the trial court erred by not charging mere presence when the facts of the case warranted such an instruction. We disagree.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and the evidence presented. Id. The defendant is entitled to a mere presence charge if the evidence supports it. State v. Franklin, 299 S.C. 133, 141, 382 S.E.2d 911, 915 (1989). The failure to charge "mere presence" may constitute reversible error. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

In State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996), this court held:

> 'Mere presence' is generally applicable in two circumstances. First, in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. Secondly, mere presence is generally an issue where the state

> attempts to establish the defendant's possession of contraband because the defendant is present where the contraband is found. In such cases, the trial court may be required to charge the jury that the defendant's mere presence near the contraband does not establish possession.

(internal citations omitted)(internal quotations omitted).

We find neither of the two situations described in Dennis is applicable to this case and, therefore, the trial court did not err in refusing to charge mere presence.

A charge of mere presence was not warranted under an accomplice liability theory for two reasons. First, the State's theory of the case did not involve accomplice liability. Foxworth maintained James was the only other person in the area at the time she came into possession of the crack cocaine. Second, we find James's position that he was merely present at the scene of a crime but did not commit the crime untenable considering the fact that defense counsel conceded there was no evidence that anyone other than James was present at the scene. Therefore, because there was no evidence of accomplice liability, a charge of mere presence on that basis was not necessary. See State v. Stokes, 339 S.C. 154, 164, 528 S.E.2d 430, 435 (Ct. App. 2000) (holding where the State's view of the evidence was defendant was the only person present and committed the crime alone, a charge of mere presence on the basis of accomplice liability is unnecessary).

Furthermore, a charge of mere presence was also not warranted under a possession theory. "[M]ere presence instructions are required where the evidence presented at trial reasonably supports the conclusion that the defendant was merely present at the scene where drugs were found, but it was questionable whether the defendant had a right to exercise dominion and control over them." Lee, 298 S.C. at 364-65, 380 S.E.2d at 836. However, "a charge on mere presence is necessary only when the state attempts to establish constructive possession of contraband." State v. Peay, 321 S.C.

405, 411, 468 S.E.2d 669, 673 (Ct. App. 1996). In this case, the State did not seek to establish that James was in possession of cocaine. Therefore, a mere presence charge was not necessary. See Dennis, 321 S.C. at 420, 468 S.E.2d at 678 ("Because the State was not attempting to establish Dennis possessed any contraband by virtue of proximity, the second application of 'mere presence' was not applicable.").

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.[1]

PIEPER and LOCKEMY, JJ., concur.

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