OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 16, 2001

ADVANCE SHEET NO. 14

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Lynch, III, Appellant.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25281
Heard April 3, 2001 - Filed April 16, 2001

AFFIRMED IN PART;
REVERSED IN PART.

Eleanor Duffy Cleary, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Robert M. Ariail, of Greenville, for respondent.

JUSTICE WALLER: A jury convicted appellant of murder and first degree burglary.[1] The trial court sentenced him to concurrent terms of life imprisonment. On appeal, appellant's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a petition to be relieved. This Court denied the petition, and ordered the parties to brief an issue regarding subject matter jurisdiction over the first degree burglary charge. We reverse the burglary conviction and affirm the murder conviction.

FACTS

At the outset of trial, the State moved to amend the indictment on the first degree burglary charge. The State requested that the words "in the hours during darkness" be replaced with "caused physical injury." Over appellant's objection, the trial court allowed the amendment.

The amended indictment reads:

> COUNT ONE – BURGLARY IN THE FIRST DEGREE (DWELLING)
>
> That James Lynch III did in Greenville County on or about November 11, 1996 willfully and unlawfully enter the dwelling of Pebble Jones without consent and with the intent to commit a crime therein and the defendant ~~did enter during the hours of darkness~~ did cause physical injury to a person who is not a participant in the crime while defendant was effecting entry or while in the dwelling or in immediate flight.

(strikeout indicates deleted language, underline indicates added language). Thus, the original indictment charged appellant with first degree burglary under

[1]The victim, Pebbles Jones, was appellant's former girlfriend. She was stabbed in her home, with fatal wounds to the jugular vein and the heart.

section 16-11-311(A)(3), and the amended indictment charged him under section 16-11-311(A)(1)(b).[2]

ISSUE

Did the trial judge err by allowing the State to amend the indictment for first degree burglary by changing the aggravating circumstance alleged?

---

[2]The statute for first degree burglary provides as follows:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
> (a) is armed with a deadly weapon or explosive; or
> (b) causes physical injury to a person who is not a participant in the crime; or
> (c) uses or threatens the use of a dangerous instrument; or
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
> (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
> (3) the entering or remaining occurs in the nighttime.
> (B) Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years.

S.C. Code Ann. § 16-11-311 (Supp. 2000).

DISCUSSION

Appellant argues that an aggravating circumstance is a required element of first degree burglary, and the aggravating circumstance upon which his burglary conviction was based has never been presented to the grand jury. Therefore, he argues that the amendment to the indictment deprived the trial court of subject matter jurisdiction over the burglary charge. We agree.

A circuit court has subject matter jurisdiction if: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser included charge of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). An indictment is sufficient to confer jurisdiction "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer. . . ." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

An indictment may be amended provided "such amendment does not change the nature of the offense charged." S.C. Code Ann. § 17-19-100 (1985). For example, an amendment which changes an offense to one with increased punishment deprives the circuit court of subject matter jurisdiction. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994); State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990). We note, however, that an amendment may deprive the circuit court of jurisdiction even if it does not change the penalty. See Weinhauer v. State, 334 S.C. 327, 333, 513 S.E.2d 840, 842 (1999) (citing State v. Sowell, 85 S.C. 278, 67 S.E. 316 (1910)).

In Weinhauer, this Court decided that an indictment for second degree burglary was improperly amended when the State added language that the offense was committed at "nighttime." The amendment changed the offense charged from a violation of section 16-11-312(A) ("person enters a dwelling without consent and with intent to commit a crime therein") to a violation of section 16-11-312(B) ("person enters a building without consent and with intent to commit a crime therein, and . . . (3) [t]he entering or remaining occurs in the nighttime"). S.C. Code Ann. § 16-11-312 (Supp. 2000). The amendment

transformed the offense from being classified as non-violent to violent. The Court held that "by amending the indictment, the solicitor changed the nature of the offense charged because the circumstance of 'nighttime' burglary was material to charging Defendant with second degree burglary under subsection (B)." Weinhauer, 334 S.C. at 332, 513 S.E.2d at 842.

The Weinhauer Court relied in part on the reasoning of State v. Sowell, 85 S.C. 278, 284, 67 S.E. 316, 318 (1910). The Court in Sowell held that breaking and entering in the daytime and in the nighttime were distinct offenses, and therefore the "time of its commission" was the "essence of the offense." This was despite the fact that both offenses belonged to the same class of felonies and were punishable in the same way. Because the two offenses were distinct, the Court stated that the amendment substituting nighttime for daytime "not only changed the nature of the offense charged, but substituted an entirely different one for the one charged." Id.

The offense of first degree burglary, as defined by section 16-11-311, occurs when a person enters a dwelling without consent, with intent to commit a crime in the dwelling, and an aggravating circumstance is present. Without an aggravating circumstance, the crime committed would be second degree burglary. See S.C. Code Ann. § 16-11-312(A). Thus, although it is only one element of the crime, the aggravating circumstance is "the essence" of first degree burglary. Sowell, 85 S.C. at 284, 67 S.E. at 318. Moreover, these aggravating circumstances are quite distinct from one another, and thus, the proof required for each aggravating circumstance is materially different from one another. Compare S.C. Code Ann. §§ 16-11-311(A)(1), (2) & (3).

We find that by changing the aggravating circumstance from entering during the darkness to causing physical injury, the amendment to the indictment "substituted an entirely different [offense] for the one charged." Sowell, 85 S.C. at 284, 67 S.E. at 318. The amendment was a material change which modified what the defendant was "called upon to answer." Browning, 320 S.C. at 368, 465 S.E.2d at 359. Accordingly, the amendment deprived the circuit court of subject matter jurisdiction over the burglary charge.

The State argues that the amendment was properly permitted because it came as no "surprise" to appellant. The trial court utilized a similar "prejudice" analysis when it allowed the amendment. However, in testing the sufficiency of an indictment and the propriety of amending an indictment, it is improper to look to other indictments, even if those indictments relate to the same course of conduct. A subject matter jurisdiction analysis is performed on individual charges, not the charges in the aggregate. The appropriate analysis is whether the amendment to the indictment changed the nature of the offense charged, not whether the amendment in any way surprised or prejudiced appellant. See § 17-19-100.[3] We hold the amendment here violated section 17-19-100.

Appellant's murder conviction, however, is unaffected by the resolution of this issue, and therefore, it is affirmed.

CONCLUSION

Because the amendment to the first degree burglary indictment changed the nature of the offense charged, appellant's burglary conviction is reversed.[4] We affirm the murder conviction.

AFFIRMED IN PART; REVERSED IN PART.

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[3]However, if a permissible amendment (i.e., one which does not change the nature of the offense charged) "operate[s] as a surprise to the defendant," then "the defendant shall be entitled, upon demand, to a continuance of the cause." § 17-19-100.

[4]Of course, appellant may be retried on the first degree burglary charge if he is reindicted or waives presentment. See Montana v. Hall, 481 U.S. 400, 402 (1987) ("It is a venerable principle of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge.") (internal alterations, quotes, and citations omitted); State v. Munn, 292 S.C. 497, 499, 357 S.E.2d 461, 463 (1987).

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Calvin Alphonso Shuler, Appellant.

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

Opinion No. 25282
Heard March 7, 2001 - Filed April 16, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

CHIEF JUSTICE TOAL: Calvin Alphonso Shuler ("Shuler") was sentenced to death for killing guard James B. Brooks ("Brooks") during an armed robbery of an Anderson Armored Car. Shuler appeals his murder conviction and death sentence. This opinion consolidates Shuler's direct appeal with the mandatory review provisions of S.C. Code Ann. § 16-3- 25 (1985).

FACTUAL/PROCEDURAL BACKGROUND

On December 3, 1997, three Anderson Armored Car guards, Alton Amick ("Amick"), Sherman Crozier ("Crozier"), and Brooks, were collecting and delivering money to various banks in the Low County area. Amick was the driver, Crozier sat in the front passenger seat, and Brooks sat in the back of the car.

The Anderson Armored Car is a bullet resistant van with a number of security features. A metal wall topped by a steel mesh screen separated Brooks in the back from Amick and Crozier in the cab. The driver and passenger side doors had "double locks" that take two hands to open. The car's side double doors on the passenger side and double doors in the rear were kept locked. Both Amick and Brooks had keys to access the back of the car, but Brooks did not need the key to get out. Brooks also had access to "kill switches" in the rear – one switch would totally disable the car's engine and the other switch would sound a visual and audible alarm.

At 10:45 a.m., the three guards arrived at First National Bank of Harleyville. Amick looked around twice to see if the area was clear. He opened the door and turned his head to grab his clipboard. When he turned around a man wearing army fatigues, a camouflage face mask, and gloves was pointing a semi-automatic pistol in his face. The attacker also had an assault rifle slung over his shoulder. The attacker shouted three times, "Get out of the God d*mn truck." Amick got out of the car. The attacker then climbed in the driver's seat, pointed the gun at Crozier's head, and ordered him out of the car. Crozier exited the car, but left his door open.

Inside the van, the attacker and Brooks engaged in a gun battle through the screen mesh separating the cab and the rear area. Amick stood near the doorway on the driver's side, Crozier ran around the back of the car. After the gunfire stopped, the attacker threw his semi-automatic handgun out of the car's window. The attacker hesitated for a moment as he tried to get the car into gear, and then drove off at a high rate of speed. As the van sped away, Amick fired four shots at the car's tires with his .38 revolver.

Several eye witnesses saw the attacker drive the car down Shortcut Road at a high rate of speed. Deputy Thomas Limehouse initially responded to the call from First National Bank, but was told to go to the dirt road in his four wheel drive police vehicle. Once there, he met other policemen, and they proceeded on the dirt road. After about a half mile, they saw the armored car on the road. They approached and saw Brooks laying in the back of the van. EMS responded to the scene, but Brooks was dead due to his numerous gunshot wounds. The rear compartment of the car contained $1,555,400 in currency, although much of it was shredded by gunfire and soaked in Brooks' blood.

Members of the Charleston County Sheriff's canine team responded to the dirt road location to track the attacker. One of the officers found a SKS assault rife, which fires 7.62 mm ammunition, submerged under water in a canal. The SKS's 30 round clip was found on the bank of the canal. The canine team followed the scent from the canal into the surrounding woods. The officers found a bloody ski mask hanging on a tree branch. After another 75 yards, the officers found a box of 7.62 mm ammunition on the ground. The dogs also found a folded green duffel bag before they lost the attacker's scent.

The armored car guards recovered the pink-handled, Lorcin .25 semi-automatic handgun the attacker threw out of the window at the bank. The police traced the gun and found it was registered to Shuler's mother, who is deceased. The police contacted Shuler, and he agreed to meet police at his residence that afternoon. Shuler claimed he gave the gun to his mother for protection. According to Shuler, he had not seen the gun since he gave it to his mother prior to her death.

The SKS rifle was traced to Demond Jones ("Jones"), Shuler's cousin's fiancé. Since Jones was a convicted felon, it was illegal for him to purchase a SKS, and he was arrested on federal firearm charges. Jones testified he agreed to buy the SKS from Woody's Pawn Shop for Shuler in order to satisfy a debt he owed Shuler for a Cadillac. A week after the purchase, Shuler asked Jones to stand guard while he robbed an armored car in Harleyville. Shuler offered Jones a .44 pistol and $5,000 to help in the robbery. Jones refused.

After further information implicating Shuler was discovered, FBI agents interviewed Shuler concerning the crime. The agent noticed Shuler nervously pulled on his knit hat during the interview. When Shuler's hat was removed, the agent noticed lacerations to the back of his head. A FBI agent then conducted a polygraph examination.[1] Shuler confessed to the murder.

Shuler was a former employee of Anderson Armored Car and had briefly worked with Amick and Brooks. According to Shuler, he knew the guards would be armed, and his .25 pistol would be insufficient firepower, so he gave Jones money to buy the SKS. Shuler's confession revealed he concocted a plan to rob the armored car two weeks prior to the crime. His plan involved hiding underneath a house adjacent to the First National Bank until the armored car made its routine stop. Prior to the murder, Shuler waited patiently underneath the house all night until the armored car arrived the following morning.

Following Shuler's confession, police procured a search warrant for his home. Inside Shuler's home, police found ammunition, Shuler's Anderson Armored Car badge, a pistol pouch, and a .44 magnum pistol in the attic. Inside Shuler's pickup truck they found a pair of camouflage hunting gloves, as well as three other camouflage knit hunting gloves.

The physical evidence overwhelmingly demonstrated Shuler was the attacker. The DNA experts testified at trial Shuler matched the blood taken from the top of the driver's seat and the passenger's sun visor. Shuler also

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[1]The polygraph test was not mentioned to the jury.

matched blood taken from the outside passenger door handle, the double door on the passenger side of the armored car, the top of the cooler between the seats, the SKS clip found on the bank of a ditch, and the ski mask.

According to the pathologist who conducted Brooks' autopsy, there were three major pre-mortem injuries that could have been fatal. There were also a number of wounds the pathologist theorized were post-mortem. The pathologist opined many of the wounds were consistent with injury from a high-powered rifle, and stated all of the shooting happened quickly.

The ballistics expert matched a bullet fragment removed from the right front of Brooks' neck with the SKS rifle. The SKS also matched three fragments from Brooks' right thigh and buttock, and one fragment from his right lateral torso.

Furthermore, a X-ray of Shuler's head wounds indicated the wounds were consistent with gunshot wounds. The ER doctor who performed the X-rays testified the X-rays reflected gunshot fragments in Shuler's head, and Shuler had shoulder bruising consistent with the recoil from a high-powered rifle.

During the January 1998 term, Shuler was indicted for murder, armed robbery, and kidnapping. On January 28, 1998, the State served a notice of intent to seek the death penalty. The jury found Shuler guilty on each count. The penalty stage commenced on November 11, 1998. The jury recommended a death sentence, and the trial judge sentenced Shuler to death.

The following issues are before this Court on appeal:

I. Did the trial judge err in failing to grant *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) relief where he ruled one of the Solicitor's reasons for striking a juror was a "subterfuge" and not race-neutral?

II. Did the trial judge err by proceeding with the *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) hearing in

Shuler's absence?

III. Did the trial judge err by allowing the Solicitor to question Jones about his duty to tell the truth pursuant to a plea agreement?

IV. Did the trial judge err in refusing Shuler's Request to Charge on a citizen's use of force in arresting a felon?

LAW/ANALYSIS

I. *Batson* Challenge

During jury selection, the trial judge found one of the Solicitor's reasons for striking juror Bettie Dewberry ("Dewberry") was a "subterfuge" and not racially neutral. Shuler contends the trial judge should have granted *Batson* relief under this Court's reasoning in *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998). We disagree. The record indicates the trial judge had a flawed memory during the *Batson* hearing concerning Dewberry's earlier answers during individual *voir dire*. Thus, the trial judge's determination that the Solicitor's reason was a subterfuge was clearly erroneous, and the Solicitor's challenged reason for striking the juror was valid.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one. *See generally State v. Haigler*, 334 S.C. 623, 515 S.E.2d 88 (1999). The proponent of the strike must offer a race or gender neutral explanation. *Id.* The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment. *Id.*

Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record. *Riddle v. State*, 314 S.C. 1, 443 S.E.2d 557 (1994). The opponent of the strike carries the ultimate burden of persuading the trial court the challenged party exercised strikes in a discriminatory manner. *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard. *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994).

The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. *Sumpter v. State*, 312 S.C. 221, 439 S.E.2d 842 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and "evaluation of the prosecutor's mind lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. *State v. Oglesby*, 298 S.C. 279, 379 S.E.2d 891 (1989).

In many circumstances, attorneys attempt to "save" an unconstitutional peremptory strike by offering another non-discriminatory reason for the strike. However, this Court in *Payton*, *supra* held a racially discriminatory preemptory challenge in violation of *Batson* cannot be saved because the proponent of the strike puts forth a non-discriminatory reason. According to this Court in *Payton*, if this "dual motivation doctrine" were adopted,

> [T]his Court would be approving a party's consideration of discriminatory factors so long as the sufficient non-discriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of the purposes of *Batson*, which was to ensure peremptory challenges are executed in a non-discriminatory manner.

Id. at 59-60 , 495 S.E.2d at 210. This Court concluded that, "[o]nce a discriminatory reason has been uncovered – either inherent or pretextual – this reason taints the entire jury selection procedure." *Id.*

This Court reiterated its rejection of the dual motivation doctrine in *Haigler, supra*. In *Haigler,* this Court applied *Payton* to the defendant's claim one of the prosecutor's two reasons for striking a black female juror was pretextual. According to the prosecutor, the main reason he struck the juror was because she was opinionated and polarizing. His secondary reason was because of her prior jury service on an acquitting jury. The Court found the defendant did not prove a *Batson* violation because the struck juror and a seated juror were not similarly situated because their prior jury service was sufficiently different. Furthermore, the prosecutor's seating of other black jurors weighed against a discriminatory intent, and the prosecutor's reasons for striking other black females did not indicate discrimination.

Following *voir dire,* the State struck only two venire persons – Bobby Sarine ("Sarine"), an Indian male, and Dewberry, an African American female. With regards to Sarine, the Solicitor noted on the record his observations of Sarine's hesitation, demeanor, and facial expressions when asked whether he could impose the death penalty. After selection, the defense made a *Batson* motion as to the State's strike of Sarine. The Solicitor reminded the trial court he had noted on the record Sarine's equivocation. The Solicitor also stated he was prosecuting Sarine's cousin in a death penalty trial. The trial court ruled that regardless of Sarine's race, the State's reasons were viable, valid, and race-neutral. Shuler does not appeal this ruling.

The State's strike of Dewberry is more complicated. During Dewberry's individual *voir dire,* the trial judge began by explaining the three types of jurors in a death penalty trial – a Type I juror would always give the death penalty, a Type II juror would always give life imprisonment, and a Type III juror would consider giving the death penalty after considering all the evidence. When asked by the trial judge which type of juror she was, Dewberry hesitated. The following colloquy then occurred:

Court: Could you ever vote for the death penalty?

Dewberry: Yes, sir.

Court: All right. **She's indicated a possible two or three.** That's my understanding of your answer. You feel that you might be able to give due consideration and might be able to vote either way; is that right?

Dewberry: Yes, sir.

Court: But you would lean towards life without parole, correct?

Dewberry: Yes, sir.

(emphasis added). This colloquy indicates the trial judge was confused and Dewberry was equivocating. Basically, Dewberry suggests she can vote for the death penalty, but she leans towards voting for life without parole. The trial judge mistakenly states Dewberry is either a Type II or Type III juror, two very different categories. Type II suggests Dewberry could never vote for the death penalty, while Type III suggests she could consider giving the death penalty in certain circumstances.

Dewberry exhibited further equivocation when questioned by the Solicitor:

Solicitor: Now, I'm not going to ask you to predict what you'd do in this case because you haven't heard the facts, but what we all want to know is if you were picked on a death penalty case like this as a juror, could you ever vote to sentence somebody to death knowing that person is actually going to be executed in the electric chair or by lethal injection because of that jury's vote?

Dewberry: (The juror shrugged her shoulders). Yes.

Solicitor: All right. And I couldn't help but notice you hesitated for maybe about a minute before answering. I know this is an important question, but do you have – I'm not going to ask you to predict what you would do in this case because you haven't heard the facts, but do you have any doubt as to your ability to fairly consider both alternatives?

Dewberry: No, sir.

Solicitor: I'm sorry. I couldn't hear you?

Dewberry: No, sir.

The audio tapes of Dewberry's *voir dire* reveal her answers to both the trial court's and the State's questions about the death penalty were weak, timid, and almost inaudible. When asked by the State if she could vote for death, there was around a twenty second delay before she answered, and the record reveals she merely shrugged her shoulders. These answers contrast greatly with her answers given in response to the defense's question. When asked general questions about her personal background and her job, Dewberry answered in a normal, audible tone, and she seemed confident.

After Dewberry's *voir dire*, the Solicitor asked the trial court to note her equivocation on the record in the event of a later *Batson* challenge:

Solicitor: In regard to the last juror, again, I agree with the Court's assessment that she is qualified under *Wainwright v. Witt* status. I could not hear her initial response to your questions, but you did repeat it. And I just want to check with the court reporter to see if she got all of that down.

And I just wanted the record to reflect that there was – I didn't time it, but a very, very long hesitation where Mrs. Dewberry just stared at me and didn't give the answer for a full minute. She did show – I thought – an undue amount of hesitation on those questions.

Court: Uh-huh. All right, let the record so reflect. Yes, sir.

Solicitor: Your Honor, the reason I'm doing that is – I can't cite the case. There is a case to that effect that there should be some contemporaneous record made if there was some equivocation or hesitation in the event of a later *Batson* problem.

Court: Yes, sir, I understand that.

After the State exercised its second strike on Dewberry, the defense made a *Batson* motion. The trial judge asked the Solicitor for a race-neutral reason for the strike. The Solicitor responded he had two reasons for his strike: 1) Dewberry hesitated when asked about the death penalty; and 2) Dewberry had a prior criminal record she did not report. The primary reason was Dewberry's vacillation or hesitation on the death penalty issue. Acknowledging this could be an appellate issue, the Solicitor cited eight South Carolina cases for the proposition that vacillating responses to death penalty questions are race-neutral reasons for strikes.

The following colloquy then occurred between the Solicitor and the trial judge:

Solicitor: Mrs. Dewberry, Your Honor, was the only one of the jurors that ended up on the list that was potentially able to be passed by either side that at any point indicated she was a possible No. 2 juror. She said she was a 2 or 3, I believe.

Court: No, sir, she said she was a three from the beginning.

Solicitor: All right, sir. Your Honor, I'm just going by my notes and I could be mistaken. I thought she said she was a possible –

Court: No, sir. There was a juror but that was not Mrs. Dewberry.

The Solicitor then told the trial judge two members of his staff took notes during the *voir dire* and noted Dewberry's hesitation. The Solicitor also described how he did not strike two African American jurors and one African American alternate because he felt they did not vacillate. Finally, the Solicitor requested the trial judge look at the court reporter's transcript because it appeared there was a discrepancy between the trial court's and the attorneys' recollection.

The trial judge declined to open the record and determined Dewberry said she was a Type III juror from the beginning. The trial court made the following ruling:

Court: Now, I'm going to make a ruling right now before we go any further.

I'm finding with regard to whether or not she's responded to the questions adequately, timely and quickly enough is a subterfuge and is not race neutral.

I do find, however, that the fact that she has a record and did not report said record on the questionnaire is a race neutral reason that would disqualify her and allow the strike to stand.

Defense counsel objected.

According to this Court's holding in *Payton*, a racially discriminatory

peremptory challenge in violation of *Batson* cannot be saved because the State also puts forth a reason that is not discriminatory. *Payton*, *supra*. Pursuant to *Payton*, if the trial judge erred by failing to quash the jury panel once he found the Solicitor's reason was a subterfuge, Shuler is entitled to a new trial. *See State v. Ford*, 334 S.C. 59, 512 S.E.2d 500 (1999).

The trial court's determination the State's reason was a subterfuge and not racially neutral was clearly erroneous. *See Dyar*, *supra*. A finding is clearly erroneous if it is not supported by the record. *See Haigler*, *supra*. The record demonstrates Dewberry hesitated when asked about the death penalty. The audio transcript also demonstrates her equivocation, undue hesitation, and uneasy demeanor. South Carolina case law recognizes that vacillating or hesitant responses by a potential juror on *voir dire* about the imposition of the death penalty is a racially neutral explanation for a peremptory challenge. *See State v. Forney*, 321S.C. 353, 468 S.E.2d 641 (1996); *Riddle, supra*; *State v. Elmore*, 300 S.C. 130, 386 S.E.2d 769 (1989).

Furthermore, the trial judge's conclusion Dewberry had always claimed to be a Type III juror was not supported by the record. The trial judge, during individual *voir dire*, stated Dewberry was a Type II or Type III juror who favored life imprisonment. The trial judge's recollection at the *Batson* hearing directly conflicts with his statements during *voir dire*. Immediately after Dewberry's *voir dire*, the trial judge agreed without dispute to let the record reflect her hesitation, but later in the *Batson* hearing the trial judge strongly disagreed Dewberry hesitated at all. The trial judge's recollection was clearly flawed with regards to Dewberry, which is understandable considering the voluminous record and the amount of testimony during individual *voir dire*.

Finally, the composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a *Batson* challenge. *Dyar, supra*. Of the twenty six members of the jury panel in the current case, twenty were Caucasian, four were African American, and two were other minorities. The State struck just two jurors, Sarine and Dewberry. The jury was, therefore, comprised of two African Americans, one other minority, and nine Caucasians. Of the two alternates, one

was African American. We find these numbers do not reveal a disproportionate number of Caucasians.

The State had legitimate, non-discriminatory reasons for striking both Sarine and Dewberry. In regards to Dewberry, the trial judge's finding the Solicitor's reason was a subterfuge was not supported by the record, and was clearly erroneous. Because the trial judge's decision was clearly erroneous and the Solicitor's challenged reason is valid, there is no *Batson* or *Payton* violation.

II. *Jackson v. Denno* Hearing

Shuler argues his Sixth Amendment and Due Process rights were violated by his absence during part of a pre-trial *Jackson v. Denno* hearing on the admissibility of his statements to police and FBI agents. We disagree.

On October 5, 1998, the trial court held a *Jackson v. Denno* hearing on the admission of Shuler's statements and confession. The trial judge required Shuler's presence during the hearing because a *Jackson v. Denno* hearing is part of the "critical process" in preparation for a death penalty case. Before the hearing started, Shuler fought with the guards because he did not want to attend the hearing. Law enforcement agents were forced to restrain Shuler in order to transport him to the hearing. While in transport, the officers had to put a protective mask over Shuler's face to prevent him from spitting on them.

Immediately before the hearing, Shuler severely "rapped" his head on the table. Defense counsel was concerned Shuler suffered a concussion and wanted to call EMS. The trial judge notified EMS and stated, in part:

> Let the record reflect I'm going to go forward regardless of Mr. Shuler's condition at this point in time because even though I find these motion to be a critical part of the trial process and the charges Mr. Shuler is facing, it is necessary for me to go forward.
>
> If in fact Mr. Shuler cannot proceed, I am going to proceed on this discovery type motions. I will certainly move him to a position

> that's in his best interest both from a security, safety, and medical standpoint.

When asked if he had any objection, defense counsel responded "no," although he did want his client's constitutional rights protected. In other words, he wanted his client to be present during this critical process. The trial judge responded:

> In essence, if we reach that point in time, Mr. Cummings, I will make a ruling on the record regarding his constitutional right to be present, obviously, and whether or not he has intentionally or unintentionally waived that right pursuant to conduct and condition.

At the conclusion of Barbara Walters' expert testimony during the hearing, Shuler was examined by EMS. At the EMS's suggestion, the trial judge ordered guards to strap Shuler to a stretcher and transport him to the hospital because of his elevated blood pressure. The trial court then stated:

> Let the record reflect at this point in time, I do not find that his actions are voluntary or involuntary, but there is no critical phase regarding the *Jackson v. Denno* hearing that is being waived.
>
> Therefore, we are going to proceed with the hearing and the motions.
>
> Obviously, if it needs to be repeated at trial, you're going to have to cross the – (Defendant Shuler yelling) – cross the. We will have to cross that bridge when we get there.

Defense counsel thanked the trial court for removing Shuler, and did not make a contemporaneous objection.

At the conclusion of FBI agent Espie's testimony during the *Jackson v. Denno* hearing, defense counsel stated to the trial court he had no way to present anything to contradict the testimony because Shuler was not present. The trial

judge stated:

> Now, let the record reflect that the *Jackson v. Denno* hearing is continued for the purposes of allowing the Defense to put forward Mr. Shuler, assuming that they will.
>
> I do not believe anything else would be warranted other than Mr. Shuler's testimony, correct?

Defense counsel agreed and stated the defense had no other way to confirm the signature on the confession.

The trial judge noted their objection and found Shuler voluntarily absented himself from the *Jackson v. Denno* hearing. The trial judge also noted Shuler was given the opportunity to testify when he was present on October 18, 1998. According to the trial judge, "Of course, there was ample time and opportunity at that time to present anything else other than Mr. Shuler's testimony vis-a-vis the *Jackson v. Denno* issue. So, I need to simply explain and put that on the record in response to your notation. I note your motion. I note your objection. I note for the record it was timely made and you are protected on the record."

A. Shuler's Right to Attend the *Jackson v. Denno* Hearing

Shuler argues his Sixth Amendment right to confrontation was violated by his absence from the *Jackson v. Denno* hearing. We disagree.

The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross examination. *Starnes v. State*, 307 S.C. 247, 414 S.E.2d 582 (1991) (citing *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)). The right to confrontation has been referred to as a "trial right." *Id.* (citing *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)). The appropriate question under Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross examination at trial. *Kentucky v. Stincer*, 482

U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Any questions asked during the *Jackson v. Denno* hearing were presented before the jury at trial when Shuler was present. Therefore, Shuler's right to confrontation was not adversely effected.

Shuler also alleges he had a due process right to be present during the *Jackson v. Denno* hearing because it is a critical stage of the trial. We disagree.

Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Stincer*, 482 U.S. at 745, 107 S. Ct. at 2667. A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *Starnes, supra*. A defendant's exclusion, or absence, will be reviewed in light of the whole record. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Both Shuler and the State agree a *Jackson v. Denno* hearing on the admissibility of a defendant's statements is critical to the outcome of the criminal proceeding. However, Shuler's presence would not have contributed to the fairness of the procedure.

First, Shuler was not cooperating with the trial court and was disruptive during the October 5, 1998, hearing. Shuler banged his head on the table prior to the hearing and was wearing a protective mask to prevent him from spitting on the guards. Second, the only prejudice claimed by defense counsel was he could not ask Shuler if the signature on the *Miranda* form was his. The trial judge held the hearing open to allow the defense to present evidence from Shuler. During that time, defense counsel could have shown the document to Shuler, explained the law enforcement officer's testimony to him, and further interviewed the testifying officer. Finally, Shuler declined to testify or offer any evidence in the *Jackson v. Denno* hearing. Thus, Shuler has not alleged or demonstrated knowledge of any facts not known to his attorneys that would have been relevant to the voluntariness determination. *See Stincer, supra.*

Finally, a defendant can waive his right to be present at a crucial stage of

the trial by disruptive conduct. *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). A defendant may be properly excluded when his conduct is disruptive or is interfering with the progress of the trial. *Id.* (citing *In re Dwayne M.*, 287 S.C. 413, 339 S.E.2d 130 (1986)); *see Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 253 (1970) (holding defendant waived his right to be present where he continued to behave in a disorderly manner and continued to interrupt the trial judge after he was warned about his conduct). Although the right to be present is a substantial one, no presumption of prejudice arises from a defendant's exclusion. *Bell, supra.* (citations omitted).

The State argues Shuler's conduct was disruptive because he fought with the guards prior to the hearing, had to be restrained during transport to the court, slammed his head on the table prior to the hearing, and yelled during court. In *Bell*, the defendant waived his right to be present during trial when he stood twice in closing argument, objected to holding trial on the Sabbath, repeatedly interrupted the judge, and told the judge he would insist on obstructing the trial. In *Bell*, we found that even without Bell's candid admission he would impede the trial if he remained in the courtroom, his disruptive conduct clearly constituted a waiver of his right to be present at trial. *Bell*, 293 S.C. at 402, 360 S.E.2d at 712. In this case, Shuler was removed from the hearing because of his elevated blood pressure, which the trial judge concluded was the result of malingering. However, Shuler's pattern of disruptive conduct on the day of the *Jackson v. Denno* hearing is no different than the conduct in *Bell*. The trial judge, therefore, correctly found Shuler's conduct at the *Jackson v. Denno* hearing disruptive, his mental and physical condition to be the result of malingering, and he voluntarily absented himself from the hearing.

B. Harmless Error

Although we find Shuler voluntarily absented himself from the hearing, we also find Shuler did not suffer any prejudice as a result of his absence from the *Jackson v. Denno* hearing**.** His absence was, at most, harmless error.

Denials of a defendant's right to be present, as well as other constitutional violations, are subject to a harmless error analysis. *State v. Williams*, 292 S.C.

231, 355 S.E.2d 861 (1987). Although the right to be present is a substantial right, no presumption of prejudice arises from a defendant's exclusion. *Bell*, *supra*.

On October 20, 1998, the hearing reconvened and the trial judge advised Shuler of his right to testify during the *Jackson v. Denno* hearing. After explaining the Fifth Amendment ramifications of testifying, the trial judge advised Shuler he had the opportunity to testify to the voluntariness of his statements to law enforcement officers. Initially, Shuler indicated he wanted to testify. Defense counsel then requested an attorney-client conference. When the hearing resumed, Shuler told the trial judge he wanted to exercise his Fifth Amendment rights and did not want to testify.

The trial judge did everything in his power to preserve Shuler's right to be present at the *Jackson v. Denno* hearing. The hearing was held open until Shuler could be present. As discussed above, Shuler exercised his Fifth Amendment right and declined to testify when given the opportunity. He has not alleged either at trial or on appeal any facts not known to his counsel that would have been of consequence in the hearing. Finally, the evidence in this case overwhelming inculpates Shuler. Shuler could have added nothing more at the hearing that was not established by the other evidence presented at trial.

Therefore, we find there is no merit to Shuler's *Jackson v. Denno* argument, and any error was harmless.

III. Plea Agreement

Shuler argues the trial judge erred by allowing the Solicitor to question the State's witness, Jones, about his plea agreement, which instructed him to testify truthfully in court. Jones was the State's chief witness who testified Shuler knew Brooks would be in the back of the armored car when the robbery occurred. According to Shuler, this testimony was highly prejudicial because it was key to impugning Shuler's statement he was surprised by Brooks' presence. We disagree.

In a pre-trial motion, defense counsel attempted to prevent the Solicitor from bolstering the testimony of Jones, their key witness. The Solicitor noted Jones was testifying pursuant to a federal plea agreement to receive a lighter sentence. The plea agreement contained a provision to tell the truth. According to the Solicitor, if he did not reveal the plea agreement to the jury it would appear they were hiding something. The trial judge agreed but noted neither side could personally vouch for the veracity of the witness in their argument. The Solicitor, therefore, asked Jones if the plea agreement with the United States attorney dropped several pending charges against him. The Solicitor also asked if the plea agreement required him to testify truthfully at trial. Jones responded "yes" to both questions. Jones stated he was testifying truthfully during the current trial.

Defense counsel made two objections to the State's line of questioning regarding Jones' truthful testimony. Defense counsel made the first objection after the State questioned Jones about lying to the FBI when he was interviewed concerning his purchase of the SKS rifle for Shuler. The following occurred on direct examination by the Solicitor:

Solicitor: Was that statement to the FBI at that time was that true or a lie?

Jones: A lie.

Solicitor: The part about where you put the rifle was a lie?

Jones: Yes.

Solicitor: Why did you lie to FBI on December the 5th?

Jones: Because I was scared.

Solicitor: Okay. Is what you testified to the jury here today as far as what happened to that rifle the truth?

Jones: Yes.

Defense Counsel: Objection, Your Honor, that's bolstering the witness.

Court: Sustained.

On cross examination, defense counsel repeatedly asked Jones if he made a deal with the United States attorney for his testimony at trial. Defense counsel's cross examination was extensive and focused on Jones' legal troubles and deals with law enforcement. The cross examination effectively impeached Jones by demonstrating he had incentive to testify in order to cut time off of his sentence. Defense counsel characterized Jones' deal with law enforcement as "selling his soul" and "receiving a little carrot" from the State. However, Jones claimed neither the United States attorney nor his attorney promised any reduction in his federal sentence for his cooperation in the case. Defense counsel's cross examination successfully impugned Jones' character by: (1) eliciting Jones had repeatedly spoken with State and federal police officers, but refused to talk with defense investigators; (2) showing Jones was on probation for assault and battery with the intent to kill when he was arrested on federal charges, and he had not had a State probation revocation hearing; (3) demonstrating Jones admitted lying on his federal firearms application for the SKS rifle; and (4) demonstrating Jones had not been charged by the Solicitor in connection with this case, and had not been charged with lying to the FBI.

On re-direct examination, the Solicitor asked Jones if any law enforcement officer asked him to testify to anything that was not true. Defense counsel repeated his earlier objection to this testimony. The Solicitor responded that Jones' credibility had been challenged, and the trial judge overruled defense counsel's objection. The Solicitor then asked Jones four more times if he was telling the truth. Specifically, the Solicitor asked Jones if the plea agreement required him to testify truthfully. Jones claimed it did.

Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the

inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury. Most courts generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness.[2] However, the Fourth Circuit Court of Appeals has found this freedom is not unlimited. *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998) *cert. denied*, 525 U.S. 1141, 119 S. Ct. 1032, 143 L. Ed. 2d 40 (1999). The Fourth Circuit Court of Appeals allows the government to elicit testimony regarding a plea agreement on direct examination only if the prosecutor's questions do not imply the government has special knowledge of the witness' veracity, the trial court gives a cautionary instruction, and the prosecutor's closing argument contains no improper use of the witness' promise of truthful cooperation. *Id.* at 369.

At no point during cross examination or closing argument did the Solicitor imply special knowledge or guarantee Jones' veracity. During direct examination the Solicitor merely asked if a plea agreement existed, he did not go into the details of the agreement until Jones' credibility was severely attacked on cross examination. Although no cautionary instruction was given by the trial judge, the Solicitor did not pursue the plea agreement until re-direct examination.[3]

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[2]*See generally United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (permitting the prosecution on direct examination to introduce the witness' cooperation agreement in its entirety, and adopting majority rule that admission of plea agreements containing "truthtelling" and perjury provisions did not result in improper bolstering); *Massachusetts v. Rivera*, 712 N.E.2d 1127, 1132 (Mass. 1999) ("On direct examination the prosecution may, of course, properly bring out the fact that the witness has entered into a plea agreement and the witness generally understands his obligations under it.").

[3]The practice in this situation is for the Solicitor to pose general questions in direct examination to establish the witness knows and understands his obligations pursuant to his plea agreement. The Solicitor should reserve questions intending to elicit the actual nature of those obligations, specifically the obligation to testify truthfully, until the defendant has attacked the witness'

The Solicitor's questions on re-direct examination do not constitute impermissible bolstering or vouching. A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. *Elmer v. Maryland*, 724 A.2d 625 (Md. Ct. App. 1999). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. *See State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A AM. JUR. *Trial* § 700 (1991). Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. *Missouri v. Wolfe*, 13 S.W.3d 248 (Mo. 2000).

In *Kelly*, this Court found an assistant solicitor improperly bolstered a witness' credibility through improper questioning. While the assistant solicitor in *Kelly* did not assert he had personal knowledge his witness was testifying truthfully, he improperly phrased his questions in the first person. *Kelly*, 343 S.C. at – , 540 S.E.2d at 861 n.12. The solicitor asked a witness, "*What did I tell you* that *I* absolutely required regarding your testimony to this jury today?" and "Did *I* tell you to tell the truth to this jury?" *Id.* at – , 540 S.E.2d at 860 (emphasis added). We found the jury could have perceived the assistant solicitor held the opinion the witness was, in fact, telling the truth. *Id.* at – , 540 S.E.2d at 861. The witness' testimony, therefore, carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about the witness. *Id.* The instant case is distinguishable from *Kelly* because the Solicitor did not comment he had personal knowledge Jones was telling the truth. The Solicitor merely asked general questions, not in the first person, about the truthtelling provision in the plea agreement.

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credibility on cross examination on the ground his testimony is pursuant to agreements. *See generally Rivera, supra* (finding questions concerning a witness' obligation to tell the truth should await re-direct examination because such procedure would tend to mitigate the appearance of prosecutorial vouching that similar questions on direct might create).

A witness' testimony concerning a plea agreement with the prosecution does not necessarily constitute improper vouching. In a recent Missouri case, the Missouri Supreme Court found a prosecutor's questioning of his own witness in a capital murder trial concerning an agreement in which a witness received immunity in exchange for her truthful testimony did not amount to improper vouching. *Wolfe, supra.* The jury had all the facts about the agreement giving the witness full immunity. Furthermore, the prosecutor never elicited details of the negotiation nor stated the witness' immunity was subject to his independent judgment of whether the witness was telling the truth. *Id.* According to the Missouri Supreme Court, "an immunity agreement not only supports the witness' credibility by showing an interest to testify truthfully, but also impeaches the witness' credibility by showing an interest in testifying favorably for the government regardless of the truth. By the end of [the witness'] testimony, the jury could consider her credibility in light of the agreement." *Id.* at 256 (citations omitted).

In this case, the Solicitor made no overt statement of his personal belief as to the truth of Jones' testimony, and made no insinuation he knew better than the jury what the truth was. "By calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity." *United States v. Creamer*, 555 F.2d 612, 617-618 (7th Cir. 1977) (citations omitted). Moreover, the Solicitor's questions during re-direct examination which asked Jones if he was telling the truth did nothing more than reference what Jones agreed to do when he was sworn by the clerk before testifying.

Overall, we find no merit to Shuler's argument the Solicitor improperly questioned Jones concerning his plea agreement. The majority of the Solicitor's questions occurred after the defense attacked Jones' credibility. Furthermore, the Solicitor never personally vouched for the truthfulness of Jones' testimony.

IV. Jury Charge on Voluntary Manslaughter

Shuler argues the trial judge erred in failing to charge the jury on the use

of deadly force in an attempt to thwart the commission of a felony, theft, or to apprehend a felon. We disagree.

First, as a matter of law, Brooks' attempt to defend himself and resist Shuler's crimes is not sufficient legal provocation and does not justify a charge on voluntary manslaughter. Second, there was neither error nor prejudice from the trial judge's refusal to charge deadly force. This case does not involve a citizen's arrest. This case concerns a guard who was trying to defend himself during an armed robbery and kidnapping. Regardless, the trial judge charged the jury that excessive force by a victim during an arrest could constitute sufficient legal provocation for voluntary manslaughter. Had the jury accepted the defense's theory the victim was attempting to arrest Shuler, the jury could have found Shuler guilty of voluntary manslaughter under the trial judge's charge.

A. Voluntary Manslaughter

The trial judge determines the law to be charged on the presentation of evidence at trial. *State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989). The trial judge must charge the correct and current law of the State. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *cert. denied*, – U.S. – , 121 S. Ct. 345, 148 L. Ed. 2d 277(2000). If there is any evidence to support a charge, the trial judge should grant the request. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999).

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998). Both heat of passion and sufficient legal provocation must be present at the time of killing to constitute voluntary manslaughter. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) *cert. denied*, – U.S. –, 121 S. Ct. 817, 148 L. Ed. 2d 701 (2001). Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation. *Id.*

A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter. In *State v.*

Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), this Court held evidence of a struggle between the victim and defendant during an armed robbery was not enough evidence to warrant a voluntary manslaughter charge. This Court found there was absolutely nothing to support finding sufficient legal provocation at the time of the killing because it was clear the victim was simply defending himself against an armed robber, and was killed in that attempt. *See also State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) (finding voluntary manslaughter charge not required when there was evidence the victim, who was a law enforcement officer, was acting lawfully and had a right to defend himself); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (holding voluntary manslaughter charge not required if victim attempted to grab defendant's gun to resist burglary and armed robbery). Similar to the victim in *Tyson*, Brooks was simply defending himself from an armed robbery and kidnapping when he fired at Shuler. Consequently, there was no sufficient legal provocation, and a charge on voluntary manslaughter was not required.

Furthermore, there was no prejudice from the trial judge's refusal to charge deadly force because other examples of sufficient legal provocation where charged by the trial judge. The trial court charged the jury:

> Certain acts of provocation committed by a victim are sufficient under our law to negate malice and constitute by law sufficient legal provocation.
>
> Some examples are acts which constitute legal provocation, negate malice, legally adequate to reduce the entire act of manslaughter include a threat of imminent danger – imminent deadly assault by the victim upon the defendant, an assault upon the defendant by the victim, *the use of excessive force by the victim to effectuate an otherwise lawful arrest.*

(emphasis added).

Assuming Shuler's theory is true and Brooks was attempting to arrest Shuler, the examples the trial judge provided of sufficient legal provocation

would encompass this scenario and the jury could have found voluntary manslaughter.

B. Shuler's Request to Charge

At the close of the evidence, defense counsel moved for a directed verdict, arguing the evidence only established voluntary manslaughter because Brooks used excessive force and assaulted Shuler during a citizen's arrest. The trial judge denied the motion, but charged voluntary manslaughter. The trial judge reasoned the jury could find voluntary manslaughter if they determined the guard fired first. After the charge, defense counsel argued the trial judge should have charged the following:

> Upon view of a felony committed or upon view of a larceny committed, any person may arrest a felon or thief and take him to a judge or magistrate to be dealt with according to law. Such arrest, however, must be made with the use of reasonable force.
>
> In making an arrest, it is unlawful to use deadly force in an attempt to thwart the commission of the felony or theft or to apprehend the felon.

The trial judge stated it did not find Shuler's charge "to warrant merit under the circumstances and the facts as presented in the trial of this case."

According to the defense, this charge was based on S.C. Code Ann. §§ 17-13-10 to -20 (1976) and *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995).[4] In *Cooney*, this Court held it was reversible error not to charge the jury on the common law of citizen's arrest and the use of reasonable force. In that case, two

[4]Shuler also argues *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) in support of his proposition that excessive force in an arrest can result is sufficient legal provocation for voluntary manslaughter. *Linder* is distinguishable because it involved a police officer trying to effect an arrest.

defendants attempted to arrest the victim for robbing their store. The unarmed victim confessed to the robbery and began to flee the scene. The two defendants shot and killed the victim. *Id.* According to the Court, in order to invoke the defense of justifiable killing in apprehending a felon, the defendant, at a minimum, must show he had certain information a felony had been committed and he used reasonable means to effect the arrest. *Id.* at 109, 463 S.E.2d at 599. This Court found whether reasonable force was used to apprehend a fleeing felon is a factual question left to the jury, and the jury should have been charged on the common law of citizen's arrest.

Shuler's argument is without merit because *Cooney* is distinguishable from the instant case. In *Cooney*, the defendant was attempting to argue citizen's arrest as a defense to murder. Moreover, Shuler was the initiator of this crime, and his actions directly put Brooks in danger. No evidence was presented at trial indicating Brooks was attempting an arrest rather than simply trying to protect himself during a robbery and kidnapping. Because there was no evidence to support Shuler's citizens arrest defense, the trial judge did not err in refusing to charge Shuler's Request to Charge.

CONCLUSION

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Further, the death penalty is neither excessive nor disproportionate to that imposed in similar cases. *See State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999) *cert. denied*, 528 U.S. 1172, 120 S. Ct. 1199, 145 L. Ed. 2d 1103 (2000); *State v. Ivey*, 331 S.C. 118, 502 S.E.2d 92 (1998) *cert. denied*, 525 U.S. 1075, 119 S. Ct. 812, 142 L. Ed. 2d 671 (1999); *State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821 (1997). Based on the foregoing, we **AFFIRM** Shuler's convictions and death sentence.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

IN THE MATTER OF DANIEL L. BLAKE, RESPONDENT

ORDER

Respondent was suspended on December 11, 2000, for a period of four months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

April 11, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Consumer Affairs,

Appellant,

v.

Rent-A-Center, Inc., a/k/a Thorn Americans, Inc.,

Respondent.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3329
Heard March 7, 2001 - Filed April 16, 2001

AFFIRMED

Helen Fennell, of South Carolina Department of Consumer Affairs, of Columbia, for appellant.

Thomas H. Pope, III, of Pope & Hudgens, of Newberry, for respondent.

HOWARD, J.: The South Carolina Department of Consumer Affairs ("Department") brought this action to prevent Rent-a-Center, Inc. a/k/a

Thorn Americans, Inc. from charging a "liability damage waiver fee" in connection with consumer rental-purchase transactions regulated by Part 7, Chapter 2 of the South Carolina Consumer Protection Code ("SCCPC"). S.C. Code Ann. §§ 37-2-701 to -714 (1989 & Supp. 2000). A special hearing officer determined the fee was authorized by the SCCPC. The circuit court affirmed. We also affirm.

FACTS/PROCEDURAL HISTORY

Rent-A-Center is a "lessor" as that term is defined in Part 7, Chapter 2 of the SCCPC. S.C. Code Ann. § 37-2-701(4) (1989). Rent-A-Center offers consumers the option of paying a monthly fee entitled "Liability Damage Waiver," in return for which Rent-A-Center relieves the consumer from the contract obligation to pay the fair market price of the rented item in the event it is damaged, destroyed, or lost during the course of the rental contract through fire, lightning, windstorm, flood, smoke, or theft. The purchase of this waiver is optional.

The consumer rental-purchase form used by Rent-A-Center provides in its heading that the liability damage waiver is optional, and a space is provided for the customer to accept or decline it. The amount of the waiver fee is separately displayed on the rental-purchase form, and the form states that the customer may cancel the waiver protection at any time and still continue the rental-purchase agreement.

In 1990, the Department took the position that liability damage waiver fees were not permitted under the SCCPC. Rent-A-Center disagreed and continued to assess the fee. The Department brought this action to enjoin these assessments.

A hearing was ultimately held before a specially appointed hearing officer based upon stipulated facts. The hearing officer concluded that the SCCPC contained no express or implied prohibition against liability damage waiver fees in consumer rental-purchase agreements. The special hearing officer also concluded Rent-A-Center's liability damage waiver fees were not default charges and were not prohibited. The Department appealed to the

circuit court, and the circuit court affirmed the decision of the special hearing officer.

ANALYSIS

The Department asserts that liability damage waiver fees are not specifically allowed by the SCCPC and are, therefore, prohibited by negative implication.[1] We disagree.

A consumer rental-purchase agreement is defined in section 37-2-701(6) as follows:

> "Consumer rental-purchase agreement" means an agreement for the use of personal property by an individual primarily for personal, family, or household purposes, for an initial period of four months or less (whether or not there is any obligation beyond the initial period) that is automatically renewable with each payment and that permits the consumer to become the owner of the property. The term does not include a consumer credit sale as defined in § 37-2-104, or a consumer loan as defined in § 37-3-104, or a refinancing or consolidation thereof, or a consumer lease as defined in § 37-2-106.

S.C. Code Ann. § 37-2-701(6) (1989). It is distinguishable from a consumer lease by the length of the obligation. A consumer lease, by definition, exceeds four months, whereas a rental-purchase lease obligation is for an initial period of four months or less, automatically renewable with each payment. Unlike lease-purchase agreements, the term rental-purchase agreement does not include "consumer credit sales" under the SCCPC. See S.C. Code Ann. § 37-2-701(6) (1989); cf. S.C. Code Ann § 37-2-105(4) (1989) (defining "sale of goods" in a lease situation).

This distinction is significant, because Part 2 of Chapter 2, regulating consumer credit sales, contains a provision expressly delineating charges

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[1]There is no claim by the Department that the liability damage waiver fee is unconscionable. See S.C. Code Ann. § 37-5-108 (2) (Supp. 2000).

which a creditor is permitted to include in addition to a credit service charge. S.C. Code Ann. § 37-2-202 (1989 & Supp. 2000). This provision has been interpreted as limiting additional charges allowable under the SCCPC in a consumer credit sale to those set forth in section 37-2-202. See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 402, 472 S.E.2d 242, 244 (1996) (finding that procurement fee was not a charge allowable under section 37-2-202, but was permissible because it was an element of the negotiated purchase price of the vehicle charged to all customers and, therefore, was not an additional fee).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Generally, parties are free to contract for terms upon which they agree. Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."). However, it "is well settled that the right to contract is not without limitations, but is subject to reasonable regulations in order to protect an overriding public interest." Rowell v. Harleysville Mut. Ins. Co., 272 S.C. 108, 111-12, 250 S.E.2d 111, 113 (1978), overruled on other grounds by G-H Ins. Agency, Inc. v. Cont'l Ins. Co., 278 S.C. 241, 294 S.E.2d 336 (1982).

There is no counterpart to section 37-2-202 in Part 7 of Chapter 2. Nevertheless, the Department argues the failure of the Legislature to specifically authorize liability damage waiver fees should be interpreted as their intention to exclude them. "The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Rainey, 341 S.C. at 86, 533 S.E.2d at 582 (quoting Black's Law Dictionary 602 (7th ed. 1999)); see Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000). The maxim should be used to accomplish legislative intent, not defeat it. See Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 321, 194 S.E. 139, 142 (1937). The maxim "is a rule of statutory construction; it is not a rule of substantive law. Accordingly, [it] 'should be used with care.'" Rainey, 341 S.C. at 96 n.1, 533 S.E.2d at 587 n.1 (Burnett, J., dissenting) (quoting

Norman J. Singer, Sutherland Statutory Construction § 47.25 at 234 (5th ed. 1992)).

There is no provision specifying allowable charges in a rental-purchase contract, such as section 37-2-202 dealing with consumer credit sales. Neither is there a provision prohibiting liability damage waiver fees or generally prohibiting fees not explicitly authorized. Furthermore, as to those charges specifically described in connection with a consumer lease-purchase agreement, there is no language indicating they were intended to be exhaustive.

Within Part 7 of Chapter 2, several code sections place limitations and disclosure requirements on specific charges. See S.C. Code Ann. § 37-2-705 (1989) (delinquency charges); S.C. Code Ann. § 37-2-706 (1989) (deposits, delivery charges, and pick-up charges). Default charges are expressly prohibited, except as provided in Part 7. S.C. Code Ann. § 37-2-707 (1989). Therefore, the Department's conclusion that by naming specifically allowable charges, the Legislature intended to exclude all others, has no logical basis. The opposite conclusion is equally plausible; that is, by specifically listing prohibited charges, the Legislature intended to allow others unless found to be fraudulent or unconscionable.

Moreover, section 37-2-702, dealing with disclosure requirements in a rental-purchase contract, states that a contract must contain "[a] statement that the total of payments does not include other charges, such as late payment charges, and that the consumer should see the contract for an explanation of these charges." S.C. Code Ann. § 37-2-702 (1)(d) (1989) (emphasis added). This provision indicates that disclosure is the only requirement, so long as the additional charge is not specifically prohibited or limited within the SCCPC or found to be unconscionable as defined in section 37-5-108. Furthermore, we note that the only charges specifically enumerated in Part 7 of Chapter 2, SCCPC, are those dealing with the delivery of items, pick-up of payments, deposits, and default. See S.C. Code Ann. §§ 37-2-706 to -707 (1989). Had the Legislature intended those to be the only allowable charges, those charges could easily have been identified by name in section 37-2-702(1)(d). To the contrary, the phrase "other

charges, such as late payment charges," implies that the Legislature intended to encompass all possible charges of a like nature which might be included in a rental-purchase contract.

For these reasons, we find no error in the decision of the circuit court to affirm the special hearing officer's ruling on this issue.

As an alternative argument, the Department contends liability damage waiver fees are default charges prohibited under section 37-2-707.[2] We disagree.

The liability damage waiver fees charged by Rent-A-Center are not assessed against the customer as a result of a default; instead, they are paid at a time when there is no default, thereby allowing a consumer to avoid liability in the event of certain kinds of default. Default occurs if the consumer fails to make a payment as required and fails to return the rented property when required by agreement or if the prospect of payment, performance, or realization of collateral is significantly impaired. See S.C. Code Ann. § 37-5-109 (Supp. 2000). If a customer accepts the option of paying the fee, Rent-A-Center collects the fee for the liability damage waiver provision even though the property may not suffer damage or be lost through theft or other disaster. The customer is still obligated to return non-purchased goods at the end of the rental period, even though the fee has been paid. The fee is paid even in the absence of events triggering default. Therefore, the circuit court correctly affirmed the conclusion of the special hearing officer that the fees do not constitute default charges.

[2]Section 37-2-707 provides: "Except as specifically provided for in this part, a consumer rental-purchase agreement may not provide for any charges as a result of the default of the lessee. A provision in violation of this section is unenforceable." S.C. Code Ann. § 37-2-707 (1989).

CONCLUSION

For the foregoing reasons, the decision of the circuit court is

AFFIRMED.

CONNOR, and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ann B. Bowen,

Respondent,

v.

Richard W. Bowen,

Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-in-Equity
and Special Circuit Court Judge

Opinion No. 3330
Heard November 7, 2000 - Filed April 16, 2001

AFFIRMED

Morris D. Rosen and Donald B. Clark, both of Rosen, Goodstein & Hagood, of Charleston, for appellant.

Peter L. Fuge, of Beaufort, for respondent.

STILWELL, J.: In this declaratory judgment action, Ann B. Bowen (Wife) asked the circuit court to declare her the owner of an undivided one-half

interest in four parcels of real estate or the proceeds resulting from their sale. Richard W. Bowen (Husband) appeals the order of the trial court granting Wife's requested relief and denying Husband a resulting trust over the property or the proceeds thereof. We affirm.

BACKGROUND

The parties were married in May 1985. Prior to their marriage, they entered into an extensive antenuptial agreement in an attempt to predetermine the financial consequences of any later separation, divorce, or death, and basically preserve each party's separate property. Insofar as this action is concerned, the most pertinent language is contained in paragraphs three through six of their agreement, the relevant parts of which read as follows:

> 3. All property owned or income earned or accumulated by either of the parties at the time of their marriage or which the parties may acquire, earn or accumulate hereafter, or during their marriage, from any source whatever shall be the separate property of the respective party now owning, earning, accumulating or hereafter acquiring such property, free and clear of any rights, interest, claims or demands of the other . . . .
>
> 5. [E]ach party specifically waives any and all right of [sic] claim that such party may at any time have to take any share of the property of the other party under any circumstances whatsoever, with the same force and effect as though single persons before any marriage.

During the marriage, Husband purchased four parcels of real estate, admittedly using nonmarital funds. At Husband's direction, all four lots were titled in the names of Richard W. Bowen and Ann B. Bowen. Two of the deeds granted title to the Bowens as joint tenants with right of survivorship, and the two remaining deeds titled the property to the Bowens "as tenants by the entirety, with the right of survivorship."

In July 1992, Wife commenced an action against Husband seeking, among other things, a divorce and equitable apportionment of marital property. In a September 1994 order, the family court determined the agreement was enforceable and, applying the plain language of the agreement, found the four parcels of property in dispute were nonmarital in nature. Nevertheless, the family court determined Wife owned a one-half interest in the properties.

On appeal, this court vacated the family court's determination as to the parties' respective interests in the disputed properties, holding:

> Once the family court determined the properties were nonmarital, it had no jurisdiction to address their ownership or deal with them in any way. See S.C. Code Ann. § 20-7-473 (Supp. 1996) ("The [family] court does not have jurisdiction or authority to apportion nonmarital property."). The parties' respective interests in the real estate in question must be handled as if the parties were not married. Therefore, that determination must be left for another day.

Bowen v. Bowen, 327 S.C. 561, 566, 490 S.E.2d 271, 273 (Ct. App. 1997).

Thereafter, Wife filed this declaratory judgment action. Husband answered and counterclaimed, denying any intention to make a gift to Wife by jointly titling the property and essentially arguing that the facts and circumstances of the transactions created a resulting trust entitling Husband to ownership of all the properties or the proceeds from their sale.

In a March 1999 order, the trial court found Wife was entitled to a one-half interest in the net proceeds from the four disputed properties.[1] In so finding, the trial court reasoned that while Husband purchased the properties with nonmarital funds, he made a gift to Wife of one-half interest in the properties. The parties' agreement did not alter this result, the court reasoned,

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[1] All four of the properties in dispute have been sold, and the funds are being held in escrow.

since "[n]othing in the antenuptial agreement prevent[ed] [Husband] from being more generous than he contracted to be."

Husband moved to alter or amend the judgment, arguing the trial court failed to make an express finding on the issue of whether "the prenuptial agreement operated to reverse the usual presumption of a gift where a husband supplies all the consideration but causes real estate being acquired to be titled jointly between himself and his wife, the theory being that the Defendant had no duty to support the Plaintiff outside of the contractual obligation set forth in the prenuptial agreement and such finding should be made."

In the order on reconsideration, the trial court found as follows:

> I did not expressly make the suggested finding. I do not believe the suggested finding is necessary in order for the findings I made to support the conclusions I reached, but I, upon reconsideration find that, if it is necessary for me to expressly deal with the presumption, I find the testimony supports my conclusion of a gift in that I find the credible evidence overcomes any such presumption.[2]

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). This action was commenced to determine the parties' respective rights in certain real property in view of their antenuptial agreement. In the final analysis, therefore, this is an action to interpret the parties' written agreement, or contract, and when a contract is clear and unambiguous, the construction thereof is a question of law for the court. Pearson v. Church of God, 325 S.C. 45, 53-54, 478 S.E.2d 849, 853 (1996);

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[2] We note that given the nature of the judge's discussion of the presumption in the order on reconsideration, it is not clear whether he applied the presumption of a gift between spouses in reaching his initial decision.

Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999). When construing a contract's terms, the foremost rule is that the court must give effect to the intentions of the parties by examining the language of the contract. Moser, 334 S.C. at 430, 513 S.E.2d at 125 (stating that if the language is clear, explicit, and unambiguous, the language alone determines the contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning).

DISCUSSION

On appeal, Husband contends that although the disputed properties were titled in both parties' names, he furnished all the consideration for their purchase and did not intend to make a gift of the properties to Wife; therefore, the trial court erred in not imposing a resulting trust on the properties in question. Moreover, Husband asserts that the usual presumption of a gift from one spouse to another does not apply when the parties have entered into a valid antenuptial agreement, whereby they expressly waive any claims or demands on the other's property and agree to be treated in the eyes of the law as though they were unmarried people.

The principles of a resulting trust are set forth in Hayne Federal Credit Union v. Bailey:

> Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another. McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct. App. 1987). The general rule is that when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. Caulk v. Caulk, 211 S.C. 57, 43 S.E.2d 600 (1947). The presumption, however, may not be in accord with the truth. It may be rebutted and the

> actual intention shown by parol evidence. Larisey v. Larisey, 93 S.C. 450, 77 S.E. 129 (1913).

327 S.C. 242, 248-49, 489 S.E.2d 472, 475 (1997). See also Donnan v. Mariner, 339 S.C. 621, 628, 529 S.E.2d 754, 758 (Ct. App. 2000).

However, the Hayne court also addressed another presumption that arises in such situations and rebuts the presumption of a resulting trust, explaining:

> But when the conveyance is taken to a spouse or child, or to any other person for whom the purchaser is under legal obligation to provide, no such presumption attaches. On the contrary, the presumption in such a case is that the purchase was designated as a gift or advancement to the person to whom the conveyance is made. Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987). This presumption, however, is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention. Legendre v. South Carolina Tax Comm'n, 215 S.C. 514, 56 S.E.2d 336 (1949).

327 S.C. at 249, 489 S.E.2d at 475-76. See also Donnan, 339 S.C. at 628, 529 S.E.2d at 758.

Thus, in situations in which there is no clear understanding between the parties as to the ownership of conveyed property, two competing legal presumptions generally arise, the presumption of a resulting trust and the presumption of a gift between spouses.

However, in the case at hand, the parties did have a clear understanding as to their respective rights involving property acquired by each during the marriage. The parties' agreement expressly provides in paragraph three that "[a]ll property owned . . . by either of the parties at the time of their marriage or which the parties may acquire . . . hereafter, or during their marriage, from any source whatever shall be the separate property of the respective party now

owning . . . or hereafter acquiring such property, free and clear of any rights, interest, claims or demands of the other . . . ."

Therefore, Wife expressly waived any right she may have had to rely on the presumption of a gift normally applicable between spouses, and to the extent the trial court can be deemed to have employed this presumption in reaching its decision, that reliance was misplaced. However, just as Wife would be unable to rely on the gift between spouses presumption to support her claim, Husband cannot rely on a resulting trust presumption to bolster his own argument. In short, since the parties executed an antenuptial agreement to express their intent regarding rights in property acquired by each during the marriage, there is no need to employ either presumption in this case.

Since neither presumption applies and the parties' agreement controls, we must examine the plain language of the agreement to give effect to the intention of the parties. The agreement clearly and unambiguously states that property acquired by a party during the marriage remains that party's separate property. Therefore, since Wife acquired a one-half interest in the four disputed properties during the marriage, that one-half interest remains her separate property.

Husband also contends that the trial court erred in finding he intended to make a gift to Wife of an undivided one-half interest in the disputed properties. While there is sufficient evidence in the record to sustain such a factual finding, under our view of the impact of the parties' agreement, it is not necessary for us to address this issue. We therefore affirm the finding that Wife owns a one-half interest in the proceeds from the properties, and the order on appeal is

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wade M. Jenkins,

Appellant/Respondent,

v.

Janna Grooms Watkins Jenkins,

Respondent/Appellant.

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3331
Heard March 7, 2001 - Filed April 16, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Ben F. Mack and Jane McFadden, both of Charleston, for appellant/respondent.

Cynthia B. Castengera, of Columbia and D. Dusty Rhoades, of Charleston, for respondent/appellant.

HEARN, C.J.: This is a cross-appeal in a divorce action. We affirm in part, reverse in part, and remand.

FACTS

Wade M. Jenkins (Husband) and Janna Grooms Watkins Jenkins (Wife) were married in March 1987 and separated in October 1997. They have no children together.

Husband instituted this action against Wife in January 1998 seeking an order of separate maintenance and support, identification and equitable apportionment of marital property and debts, and attorney fees and costs. Wife answered and counterclaimed, seeking alimony, exclusive use and possession of the marital home, equitable apportionment of marital property and debts, and attorney fees and costs.

The family court entered a temporary relief order requiring Husband to pay Wife's car insurance premiums and any mortgage arrears on the marital home. The family court specifically noted in the order that it would "take into consideration any payments made by [Husband], pursuant to this Order, in its determination of a Final Order in this matter in balancing any equities or obligations . . . ."

At the final hearing, Wife moved to amend her pleadings to include a plea for divorce on the ground of one year's continuous separation. Husband acquiesced, and the family court granted the motion. The family court granted Wife a divorce on the ground of one year's continuous separation; ordered Husband to pay Wife $2,700 per month in rehabilitative alimony for one year; identified, valued and equitably apportioned marital property and debts; and awarded Wife $9,301.61 in attorney fees and costs.

Husband moved for reconsideration, averring in part that the family court's order failed to reimburse him for car insurance and house mortgage payments he made during the pendency of litigation "in order to keep property

from foreclosure due to [Wife's] undisclosed failure to pay past due mortgage payments." The family court issued an order amending the divorce decree in part by apportioning to Wife $4,222.61 in fees and costs associated with the car insurance and mortgage expenses referenced in Husband's motion. After Husband filed his notice of appeal, the family court issued a supplemental order allowing the record to be supplemented with an affidavit submitted by Husband's attorney regarding fees and costs incurred in bringing the motion for reconsideration. Wife cross-appealed.

SCOPE OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

DISCUSSION

I. Rehabilitative Alimony

Both parties appeal the award of rehabilitative alimony to Wife. Husband asserts Wife failed to establish entitlement to rehabilitative alimony and the family court failed to set forth facts sufficient to support the award. Wife asserts the family court erred in failing to award her permanent periodic alimony. We agree the award of rehabilitative alimony was improper.

Although rehabilitative alimony may be an appropriate form of spousal support in some cases, permanent periodic alimony is favored in South Carolina. See Gill v. Gill, 269 S.C. 337, 237 S.E.2d 382 (1977); Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988). If a claim for alimony

is well-founded, the law favors the award of permanent periodic alimony. See O'Neill v. O'Neill, 293 S.C. 112, 359 S.E.2d 68 (Ct. App. 1987).

Rehabilitative alimony may be awarded only upon a showing of special circumstances justifying a departure from the normal preference for permanent periodic support. The purpose of rehabilitative alimony is to encourage a dependent spouse to become self-supporting after a divorce. Johnson, 296 S.C. at 301, 372 S.E.2d at 114; Toler v. Toler, 292 S.C. 374, 377, 356 S.E.2d 429, 431 (Ct. App. 1987). It permits former spouses to develop their own lives free from obligations to each other. Johnson, 296 S.C. at 301, 372 S.E.2d at 114; Toler, 292 S.C. at 377, 356 S.E.2d at 431. However, it should be approved only in exceptional circumstances, in part, because it seldom suffices to maintain the level of support the dependent spouse enjoyed as an incident to the marriage. See Johnson, 296 S.C. at 301, 372 S.E.2d at 114; Toler, 292 S.C. at 377, 356 S.E.2d at 431; Voelker v. Hillock, 288 S.C. 622, 626-27, 344 S.E.2d 177, 180 (Ct. App. 1986).

The factors to be considered in awarding rehabilitative alimony include: (1) the duration of the marriage; (2) the age, health, and education of the supported spouse; (3) the financial resources of the parties; (4) the parties' accustomed standard of living; (5) the ability of the supporting spouse to meet his needs while meeting those of the supported spouse; (6) the time necessary for the supported spouse to acquire job training or skills; (7) the likelihood that the supported spouse will successfully complete retraining; and (8) the supported spouse's likelihood of success in the job market. There must be evidence demonstrating the self-sufficiency of the supported spouse at the expiration of the ordered payments for rehabilitative alimony to be granted. Johnson, 296 S.C. at 301-02, 372 S.E.2d at 114; Toler, 292 S.C. at 377-78, 356 S.E.2d at 431.

At the time of trial, Wife was 52 years old, and Husband was 58 years old. Both parties are in relatively good health. Husband has a tenth-grade education. Wife obtained a four-year college degree. Husband maintained stable employment throughout the marriage, although a heart attack kept him from his job for six weeks in 1994. At the time of trial, he was employed as a

sales representative with a gross monthly income of $6,285.50, excluding biannual commissions. In addition, Husband receives rental income of $567 per month. Wife, on the other hand, has been out of the work force since 1990. Prior to 1990, Wife was employed as a bookkeeper. In 1986, when Wife was last employed full-time, she earned an annual salary of $28,000. In 1990, when she was working only part-time, Wife earned approximately $13,000. According to Wife, Husband acquiesced in her decision to stop working outside the home.

In awarding Wife rehabilitative alimony, the family court reasoned:

> [Wife's] employment and earning potential is far less certain [than Husband's] and she has been virtually unemployed since 1990. [Husband] disputed [Wife's] reasons for being unemployed, which she has asserted were because of [Husband's] direction to remain in that status to deal with some of his personal affairs, including property dispute, litigation, taking care of the home and the financial affairs of the marriage. This Court gives more weight and credibility to [Wife's] testimony in light of the credibility factors reviewed as to Husband's credibility overall. As noted otherwise in these findings, [Wife] would need to be retrained with additional software training to accommodate possible employment as a bookkeeper.

The family court further found that the parties enjoyed a comfortable standard of living during the marriage, but Husband spent excessive amounts of money and time on trips to gambling casinos and playing video poker.[1]

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[1] The family court found Husband spent at least $367,000 since 1994 on gambling at one casino alone. Husband verified that, since 1994, he had made at least 123 trips just to that one casino and lost $22,755. These figures do not include Husband's other casino activity in New Jersey or Nevada, or

In our view, the facts and circumstances of this case do not warrant a departure from the well-established preference for permanent periodic alimony. We are particularly concerned here because Wife has been absent from the work force for an extended period of time, having foregone opportunities for advancement in favor of being a homemaker. The record does not contain evidence showing that Wife will, after a year of retraining, be able to maintain a lifestyle approaching that which she enjoyed during the marriage or even meet her basic expenses.

Accordingly, we reverse the award of rehabilitative alimony and remand the issue to the family court for determination of an appropriate award of permanent periodic alimony.

II. Identification of Marital Property

A. Oconee Property

Husband argues the family court erred in finding that a parcel of real estate located in Oconee County is marital in nature. We find no error.

S.C. Code Ann. section 20-7-473 (Supp. 2000) defines marital property as:

> [A]ll real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held, except the following, which constitute nonmarital property: (1) property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse . . . ."

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the local gambling Husband verified he took part in frequently.

The burden of showing an exemption under section 20-7-473 is upon the party claiming that property acquired during the marriage is nonmarital. Pool v. Pool, 321 S.C. 84, 89-90, 467 S.E.2d 753, 757 (Ct. App. 1996).

As part of his financial declaration, Husband supplied the family court with a Marital Assets Addendum, which identified as a marital asset:

> One (1) lot located on Lake Hartwell in Oconee County, S.C. Titled Owner, [Husband]. Acquired in 1987, $6,000 est. Estimated present market value $3,000.

At trial, Husband asserted his cousin deeded him the property in 1992 or 1993 in exchange for loans Husband made to the cousin over an extended period. Wife identified the property as a marital asset on her financial declaration, but asserted the property was purchased between 1990 and 1991. She assigned a value of $17,000 to the property.

The family court found the property was "purchased in 1992 for $3,000 during the marriage." As well, the court found Wife made significant contributions to the acquisition of the property since it was acquired with marital funds.

The record amply supports the family court's determination that the property was purchased during the marriage with marital funds. Husband made no showing that the property is subject to an exception under section 20-7-473. As such, the property was properly included in the marital estate for purposes of equitable distribution.

B. Wife's Inherited Property

Husband also asserts the family court erred in failing to identify, value, and award him an interest in certain items of real and personal property inherited by Wife during the marriage and titled in her name. We find no merit in this argument.

Generally, property acquired by either party by inheritance or by gift from a party other than the spouse is nonmarital property. § 20-7-473(1). In certain circumstances, however, nonmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. Pool, 321 S.C. at 86, 467 S.E.2d at 756. Transmutation is a matter of intent to be gleaned from the facts of each case. The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage. Id.

It is undisputed Wife acquired the disputed property through inheritance. Husband offered no evidence at trial establishing transmutation of the property. Moreover, Husband also admitted at trial that he was not claiming an interest in any property titled solely to Wife with the exception of the marital home. The family court properly found the property retained its separate nature.

We also reject Husband's assertion the family court erred in failing to award him a special equity in Wife's inherited property. It is well-established that a spouse has an equitable interest in appreciation of property to which he contributed during the marriage, even if the property is nonmarital. Webber v. Webber, 285 S.C. 425, 428, 330 S.E.2d 79, 81 (Ct. App. 1985). Here, Husband offered no evidence he contributed in any way during the marriage to the appreciation of Wife's inherited property.

C. Georgetown Properties

Husband asserts the family court erred in finding that a 35-acre farm and rental home Husband acquired from his mother were marital property subject to equitable distribution and in awarding Wife an equal share in the properties. We disagree.

The family court found the parties used Husband's farm as a second home, and planned to make the farm their primary residence when Husband

retired. They attempted to generate income from the property hoping to defer some of the costs for maintaining and improving the property. Primarily through Husband's direct contributions, the parties spent over $115,000 on the home and over $20,000 on improvements to the property. Wife was primarily responsible for the general care and maintenance of the property from 1987 until 1995, and she worked to improve the aesthetic appearance of the property. Moreover, Husband executed a will leaving all of his property, including the Georgetown property, to Wife.

Based on these facts, we agree with the family court that the parties treated the Georgetown farm and home in such a manner during the marriage as to evidence their intent that it become their common property. The court properly included the property in the marital estate for purposes of equitable distribution.

Further, we find no reversible error in the family court's award to Wife of a one-half interest in the Georgetown properties. S.C. Code Ann. section 20-7-472 (Supp. 2000) vests in the family court, not the appellate court, the discretion to decide what weight should be assigned to the various factors of equitable apportionment. On review, we look to the fairness of the overall apportionment; if the end result is equitable, it is irrelevant that we might have weighed specific factors differently than the family court. Morehouse v. Morehouse, 317 S.C. 222, 229, 452 S.E.2d 632, 636 (Ct. App. 1994). This court will affirm the family court judge if it can be determined that the judge addressed the factors under section 20-7-472 sufficiently for us to conclude he was cognizant of the statutory factors. Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996).

D. Sampit Mills Property

Husband further asserts the family court erred in including a tract of land referred to as the Sampit Mills property in the marital estate, valuing the property, and awarding Wife a half-interest in the property. We find no error.

Husband purchased the Sampit Mills property during the marriage.

Generally, property acquired by either spouse during the marriage is marital property unless the acquisition falls under one of several exceptions. § 20-7-473. One such exception is that property acquired during the marriage in exchange for nonmarital property is nonmarital. Id. The burden to show an exemption under section 20-7-473 rests on the party who claims the property is nonmarital. Pool, 321 S.C. at 89-90, 467 S.E.2d at 757.

Husband asserts the Sampit Mills property is nonmarital, despite being purchased during the marriage, because he obtained the purchase money by refinancing the Georgetown rental home. This argument is unavailing. The family court found, and we agree, that the Georgetown property was transmuted into marital property. Thus, Husband cannot claim this exception.

Further, we find the court properly valued the asset. Wife's expert, an experienced appraiser, testified the Sampit Mills property had a value of $110,000 at the time of trial. The court acted within its discretion in adopting the value assigned by Wife's expert. Woodward v. Woodward, 294 S.C. 210, 215, 363 S.E.2d 413, 416 (Ct. App. 1987) (stating the family court's valuation of property will be affirmed if it is within the range of the evidence); Smith v. Smith, 294 S.C. 194, 198, 363 S.E.2d 404, 407 (Ct. App. 1987) (holding the family court may accept one party's valuations of marital property over those of the other party).

We find no abuse in the award to Wife of a one-half interest in the Sampit property. It is imminently clear from the order that the family court judge carefully weighed the statutory factors in arriving at the award. Walker v. Walker, 295 S.C. 286, 288, 368 S.E.2d 89, 90 (Ct. App. 1988) ("This court will affirm the family court judge if it can be determined that the judge addressed the factors under section 20-7-472 with sufficiency for us to conclude he was cognizant of the statutory factors.").

E. Wife's Individual Retirement Account

Husband contends the family court erred in failing to award him an equitable interest in Wife's Individual Retirement Account (I.R.A.). We agree and remand this issue to the family court for reconsideration.

Wife submitted a financial declaration indicating her State Farm I.R.A. was titled in her name and acquired by her in April 1984, approximately three years prior to the date of marriage. The I.R.A. was valued at $8,675 as of February 1999.

The family court determined the I.R.A. was nonmarital since it was acquired prior to the marriage. Wife did testify, however, that she contributed $1500 per year for three years to her I.R.A. after her marriage. An addendum to Wife's financial declaration indicates Wife paid $1500 per year in annuity premiums from the time of marriage through 1991.

Contributions to an I.R.A. during the term of marriage constitute marital property subject to division. §§ 20-7-472 & -473; Calhoun v. Calhoun, 331 S.C. 157, 175, 501 S.E.2d 735, 744-45 (Ct. App. 1998) (stating annuity in which wife invested during marriage was part of marital estate and was subject to equitable distribution in divorce action); Pool, 321 S.C. at 89, 467 S.E.2d at 756 (holding contributions of $6000 which husband made to an I.R.A. during the marriage constituted marital property for purposes of property division at divorce proceeding); Hickum v. Hickum, 320 S.C. 97, 99, 463 S.E.2d 321, 322 (Ct. App. 1995) (stating retirement plans are marital property subject to division). Accordingly, the trial court erred in failing to award Husband an equitable share of Wife's I.R.A. Because the record is unclear as to the total amount of Wife's contribution to her I.R.A. during the marriage, we remand this issue to the family court for determination.

III. Equitable Division of Marital Home

Husband contends the family court erred in failing to award him a greater than fifty-percent share in the marital home. We disagree.

The apportionment of marital property is within the family court judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Bungener v. Bungener, 291 S.C. 247, 251, 353 S.E.2d 147, 150 (Ct. App. 1987). By statute, the family court must consider fifteen factors in making an equitable apportionment of the marital estate. § 20-7-472. The statute vests in the family court the discretion to decide what weight should be assigned to the various factors. This court looks to the overall fairness of the apportionment; if the end result is equitable, that this court might have weighed specific factors differently than the family court is irrelevant. Johnson, 296 S.C. at 300-01, 372 S.E.2d at 113.

Wife purchased the marital home from her father for $54,000 immediately following the parties' marriage. Wife's father fully financed the purchase. Wife made the mortgage payments on the home without contribution from Husband. When her father died, Wife partially satisfied the estate's mortgage with her separate property. In 1992, the parties refinanced the remaining $22,000 mortgage balance and obtained additional financing to make repairs to the home. As noted by the family court, Husband made direct contributions to the maintenance of the home from August 1992 forward, including paying for utilities, repairs, maintenance, taxes, insurance, and the like. It is undisputed Husband paid the mortgage on the home after the refinancing.

Our review of the record convinces us the family court properly apportioned the marital home. Both parties made substantial direct and indirect contributions to the marital home. While Husband made greater direct contributions to the home than Wife following the 1992 refinancing, the funds he contributed were marital in nature. We are not persuaded Husband has established an abuse of discretion by the family court in failing to award him a greater share of the marital home.

IV. Wife's Separate Property

Husband argues the family court erred in failing to give consideration to the parties' nonmarital property in arriving at an award of

equitable distribution. We disagree. Our reading of the family court's order convinces us the court was well aware of the parties' nonmarital assets. In fact, the court specifically found Wife's separate property was valued at over $250,000. Walker, 295 S.C. at 288, 368 S.E.2d at 90 (stating appellate court will affirm family court judge's award of equitable distribution if judge addressed section 20-7-472 factors with sufficiency to conclude he was cognizant of them).

V. $30,000 Loan Debt

Husband asserts the family court erred in requiring him to repay one-half of a $30,000 debt to Wife's mother. Specifically, Husband asserts the money was a gift to the parties. We agree.

Debts incurred for marital purposes are subject to equitable distribution. § 20-7-472(13). Section 20-7-472 creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is a marital debt and must be factored into the totality of equitable apportionment. Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1992).

Here, Wife's mother, Martha H. Grooms, testified that she loaned the parties $30,000 in 1992 for which she expected reimbursement. Wife, too, testified her mother loaned the parties $30,000 in 1992. Neither Wife nor her mother, however, introduced into evidence a promissory note or cancelled check as proof that the payment was a loan. In fact, Grooms acknowledged Husband and Wife never signed any kind of note or I.O.U. because Grooms never asked them to do so. Moreover, Wife failed to list the $30,000 as a debt on her financial declaration.

Husband confirmed Grooms gave him and Wife $30,000 in 1992 which they used to pay house renovation expenses. Husband also characterized the disbursement as being interest-free, and testified there had been no requests to him from Grooms or Wife for repayment.

Loans from close family members must be closely scrutinized for legitimacy. Allen v. Allen, 287 S.C. 501, 507, 339 S.E.2d 872, 876 (Ct. App. 1986). Our own review of the record convinces us Grooms gave Husband and Wife $30,000 with the possible expectation they would repay her. In Wife's own words, "It's one of those things where you look at things one way, and you see it one way. And you look at it a different way, and you see it another way." Here, the evidence presented by Wife and her mother was insufficient to establish the existence of a legally enforceable loan. At most, the evidence established a moral obligation on the part of Husband and Wife to repay Grooms. Accordingly, we reverse that portion of the order which requires Husband to reimburse Grooms $15,000.[2]

VI. Apportionment of Marital Debt

Wife asserts the family court erred in reducing her share of the marital estate by apportioning to her certain debts incurred by Husband during the pendency of the case. We agree.

At the hearing on Husband's motion for reconsideration, his counsel requested that the court consider expenditures Husband made after the merits hearing in an attempt to preserve marital assets. Specifically, he stated Husband paid arrears on the marital home mortgage after Wife ceased paying the mortgage. Counsel for Wife objected to the request on the ground the issue was not raised during the final hearing. The court overruled the objection. Husband's counsel then recited several figures representing amounts Husband allegedly paid for her car insurance and in redeeming the marital home from foreclosure. Wife's attorney objected on the ground Husband failed to offer any proof of the allegations. Nonetheless, the family court ruled from the bench: "I find [Wife is] receiving those properties [the marital home and her automobile]. And taking into consideration those sums [Husband's attorney]

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[2] Since Grooms was not a party to this action, our resolution of this issue does not prevent Grooms from attempting to enforce this alleged obligation in a civil action.

published in the record, do an affidavit on the fees for your time involved, and deduct all that from the equitable distribution."

In its order on reconsideration, the family court reduced the amount of Wife's share in marital estate by $4,222.61. We agree with Wife this was error. The arguments of Husband's counsel did not constitute competent evidence of the amount of any debt Wife may have owed Husband. See Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 508, 443 S.E.2d 401, 406 n.7 (Ct. App. 1994) ("Ordinarily, arguments of counsel may not be considered as evidence in deciding factual issues."). In the absence of any other evidence establishing the existence or amount of the debt, we reverse that part of the order on reconsideration which reduces Wife's award of equitable distribution and remand this issue for determination by the family court.

VII. Attorney Fees

Both Husband and Wife argue the family court erred in awarding Wife $9301.61 in attorney fees. Husband asserts the court should have denied Wife's plea for attorney fees based on her ability to pay the fees from assets she received as a result of the court's award of equitable distribution. Wife asserts the family court erred in awarding her fees in an amount less than she actually incurred. Given our partial reversal of the family court's order, we remand the issue of attorney fees for reconsideration.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Mutual Insurance Company,

Respondent,

v.

William A. Kelly and Edward Glenn Kelly,

Defendants,

of whom William A. Kelly is,

Appellant.

Appeal From Anderson County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3332
Heard March 6, 2001 - Filed April 16, 2001

AFFIRMED

Richard E. Thompson, Jr., of Thompson & King Law Firm, of Anderson, for appellant.

Amy G. Richmond and Jack D. Griffeth, both of Love, Thornton, Arnold & Thomason, of Greenville, for respondent.

HEARN, C.J.: In this declaratory judgment action, William A. Kelly (Kelly) appeals the grant of summary judgment to South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The summary judgment order permits Farm Bureau to recover payment made on Kelly's homeowners' insurance policy for two fires at his residence. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On July 19, 1994, a fire began in the master bedroom of the home where Kelly lived with his wife and adult son, Glenn. Glenn was the only family member at home when the fire started.

When questioned about the fire, Glenn told Farm Bureau investigators that he was in the shower when he heard a popping sound. He got out of the shower and saw his parents' bedroom in flames. Glenn went across the street to his uncle's house and called the fire department. Glenn opined that lightning struck the house, starting the fire.

Kelly filed a claim for the fire damage under his Farm Bureau homeowners' policy. Farm Bureau paid Kelly policy benefits of $61,299.24 for damage to the residence's structure and contents.

On May 30, 1995, there was a second fire in the home which began in Glenn's bedroom. When interviewed by Farm Bureau regarding this fire, Glenn stated that his mother was the last person to leave the house before the fire. Glenn denied setting the fire and denied knowing anyone else who had

keys to the house or would want to burn it. Kelly filed another claim, and Farm Bureau paid $46,185.97 in policy benefits.

In June 1997, there was a third fire in the home. Within days, Glenn signed a written confession admitting to arson in connection with all three fires. Glenn stated he started the third fire in the attic, and in December 1997 he pled guilty to three counts of arson.

Farm Bureau filed this action in May 1998 to recover the money it paid Kelly on the first two fire claims. Farm Bureau moved for summary judgment, and the circuit court granted that motion. Kelly appeals.

DISCUSSION

Kelly argues the circuit court improperly granted summary judgment because: (1) the action was barred by the statute of limitations; (2) the claim payments were accords and satisfactions; (3) insurers may not recover payments and void policies after claims have been paid; and (4) Glenn was not an insured and did not commit an intentional loss as defined by the policy.

"Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); see also Rule 56(c), SCRCP. In reviewing a grant of summary judgment, the evidence and inferences therefrom must be viewed in the light most favorable to the nonmoving party. See Lanham v. Blue Cross & Blue Shield of S.C., 338 S.C. 343, 347, 526 S.E.2d 253, 255 (Ct. App. 2000). A court should not grant a motion for summary judgment if the evidence and reasonable inferences therefrom indicate a genuine issue of material fact. Id.

A. Statute of Limitations

Kelly raised the statute of limitations as an affirmative defense to Farm Bureau's action. On appeal, Kelly argues the trial court erred in declining to dismiss Farm Bureau's action pursuant to the statute of limitations found in S.C. Code Ann. § 15-3-530 (1976 & Supp. 1999). This section mandates that an action on a fire insurance policy on account of a loss be brought within three years. Id. Kelly contends Farm Bureau failed to file its action within three years of the first fire, and therefore the action should have been dismissed. We disagree.

The first fire occurred on July 19, 1994. The second fire occurred on May 30, 1995. Farm Bureau filed this action on May 22, 1998. Here, the statute of limitations is subject to the discovery rule and runs not from the date of injury but rather from the date the injured party knew or should have known a cause of action existed. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); Tollison v. B & J Mach. Co., 812 F. Supp. 618, 619 (D. S.C. 1993).

To claim the protection of the discovery rule, the injured party must have been reasonably diligent in discovering whether a cause of action existed. Grillo v. Speedrite Prods., Inc., 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000). Reasonable diligence requires that "the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Dean, 321 S.C. at 363-64, 468 S.E.2d at 647 (citation omitted). "The date on which discovery should have been made is an objective, not subjective, question." Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995).

Regardless of when the cause of action accrued under the discovery rule for the second fire, Farm Bureau clearly filed to recover for its second payment within three years. We therefore affirm the circuit court's dismissal of Kelly's statute of limitations argument regarding the claim for the second fire

and look to whether Farm Bureau's action with respect to the first fire and claim was timely under the statute.

In support of its motion for summary judgment, Farm Bureau submitted transcripts of interviews it conducted with Glenn and Joyce Kelly, and a sworn statement from Glenn Kelly dated August 8, 1995. In the statement, Glenn denied any responsibility for the second fire.

The trial judge found:

> In the present case, the Plaintiff conducted a thorough investigation into the facts surrounding the cause of the fires. The Plaintiff went to the scene of the incident and interviewed witnesses, took recorded statements of Edward Glenn Kelly, examined the physical evidence at the scene, took photographs and even sought the advise [sic] of an attorney concerning how to handle the claim. At the conclusion of the Plaintiff's investigation, the Plaintiff was unable to conclude that the fires had been intentionally set by an insured resident relative of the household, and therefore it paid the claim.

In opposition to the motion for summary judgment, Kelly submitted his own affidavit stating Glenn was not an insured under the policy, did not have an insurable interest in the property, and did not receive payment for the loss. Kelly's affidavit also stated that Farm Bureau should not be allowed to recoup money already paid to Kelly and the statute of limitations defense should prevent summary judgment. He also contends summary judgment was inappropriate because he and Farm Bureau reached an agreement regarding payment under the terms of the policy.

Examining the evidence in the light most favorable to Kelly, we do not find any evidence in the record that Farm Bureau's investigation was anything but reasonably diligent. There was evidence that Farm Bureau went

to Kelly's home after each fire, took sworn statements from Glenn, examined the physical evidence at Kelly's home, took photographs, and sought the advice of an attorney about handling the claim. At the conclusion of these investigations, Farm Bureau was unable to conclude the fires had been intentionally set and paid the claims. Kelly put forth nothing to dispute this evidence other than his own statements that Farm Bureau should have had notice that the fires were intentionally set.[1] Because Kelly had the burden of putting forth specific facts to show there was a genuine issue of material fact for trial and he did not do so, the trial judge properly granted summary judgment to Farm Bureau on this issue.

B. Accord and Satisfaction

Kelly next argues the circuit court erred in granting summary judgment because the policy release was an accord and satisfaction, and thus a complete defense.

We initially note that this defense was waived and is therefore not properly before us.[2] Accord and satisfaction is an affirmative defense which must be pleaded and proved. Rule 8(c), SCRCP; Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (stating that the defense of accord and satisfaction must be pleaded in a party's answer to be before the trial court); Borg Warner Acceptance Corp. v. Darby, 296 S.C. 275, 279, 372 S.E.2d 99, 101 (Ct. App. 1988) (stating that an affirmative defense must be pleaded in a party's answer). Kelly failed to plead accord and satisfaction as a defense in his answer; therefore, this defense was waived.[3]

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[1] The fallacy in this argument is readily apparent. Kelly, who was living in the home at the time, ostensibly had no notice of his son's actions in setting the fire, yet he asserts that Farm Bureau should have had notice.

[2] The circuit court addressed the merits of this issue despite the waiver.

[3] Even if we were to reach the merits of this argument, we would still affirm the trial court's grant of summary judgment. "An accord and satisfaction

C. Kelly's Status as an Innocent Insured

Kelly argues the intentional loss provision of the policy is ambiguous and he, as an innocent insured, should be permitted to recover under the policy. Citing McCracken v. Government Employees Insurance Co., 284 S.C. 66, 325 S.E.2d 62 (1985), Kelly contends he is entitled on fairness grounds to retain the payments as an innocent insured. The trial court did not address or rule on this issue; therefore, it is not preserved for our review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").[4]

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occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement." Tremont Constr. Co. v. Dunlap, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992); Mercury Marine Div. v. Costas, 288 S.C. 383, 386, 342 S.E.2d 632, 633 (Ct. App. 1986).

Viewing the evidence in the light most favorable to Kelly, there is no evidence in the record that Farm Bureau paid Kelly less than the amount Kelly claimed under the policy. This is an essential element of an accord and satisfaction. Tremont Constr. Co., 310 S.C. at 180, 425 S.E.2d at 793. Because Kelly has failed to prove this element of accord and satisfaction, the trial court properly granted summary judgment to Farm Bureau as to this issue.

[4] Even if treated on the merits, Kelly's argument is unavailing. McCracken stands for the proposition that "in the absence of any statute or specific policy language denying coverage to a co-insured for the arson of another co-insured, the innocent co-insured shall be entitled to recover his or her share of the insurance proceeds." 284 S.C. at 69, 325 S.E.2d at 64. Unlike McCracken, Kelly's policy specifically denies coverage for any loss arising from an intentional act by or at the direction of any insured. We take instruction from our unpublished opinion of State Farm Fire & Casualty Co. v. Mitchell, Op.

D. Glenn's Status as an Insured

Kelly further asserts Glenn was not an insured under the policy because Glenn had no insurable interest under the policy. We disagree. The policy defines "insured" as "**you** and residents of **your** household who are: **your** relatives . . . ."[5] This policy language is clear and unambiguous; therefore, we need not look beyond the policy to determine its meaning. MGC Mgmt. of Charleston v. Kinghorn Ins. Agency, 336 S.C. 542, 548-49, 520 S.E.2d 820, 823 (Ct. App. 1999) (stating that the court must give insurance policy language its plain, ordinary, and popular meaning); Nationwide Mut. Ins. Co. v. Commercial Bank, 325 S.C. 357, 359, 479 S.E.2d 524, 526 (Ct. App. 1996) (stating that an insurer's obligation under an insurance policy cannot be enlarged by judicial construction). Analyzing the definition of "insured" provided in the insurance policy, it is immaterial whether Glenn has an insurable interest. Glenn is an insured if he is the named insured or a resident relative of the household. It is uncontested that Glenn is Kelly's son and that Glenn was a resident in Kelly's home. Under the policy language, and viewing the record in the light most favorable to Kelly, Glenn qualifies as an insured under the policy.

Kelly also contends Glenn's actions do not trigger the intentional loss section of the insurance policy because Glenn did not start the fires to obtain insurance benefits. We disagree. The policy exclusion for intentional losses states: "**We** do not insure for loss caused directly or indirectly . . . out of any act committed by any insured with the intent to cause a loss." This policy language is clear and unambiguous, so we will not look outside the policy to determine its meaning. MGC Mgmt. of Charleston, 336 S.C. at 548-49, 520

No. 98-UP-100 (S.C. Ct. App. filed Feb. 19, 1998). In Mitchell, this court held that an innocent co-insured was barred from recovery under the insurance policy because that policy had specific language denying recovery if that insured or any other insured caused or procured the loss for the purpose of obtaining insurance benefits. Id. at 2. This is the exact language of the insurance policy Farm Bureau issued to Kelly.

[5] The rest of this definition does not apply in this case.

S.E.2d at 823; Nationwide Mut. Ins. Co., 325 S.C. at 359, 479 S.E.2d at 526. According to the language of the policy, Glenn's actions triggered the exclusion for intentional losses because Glenn acted with an intent to cause a loss. When asked why he started the fires, Glenn stated: "[T]here are just too many memories of my sister in that house and I couldn't stand to live there anymore." Glenn intended to burn the home to rid himself of his sister's memories. Viewed in the light most favorable to Kelly, Glenn's actions fall within the policy exclusion for intentional losses, and the circuit court properly granted summary judgment to Farm Bureau on this issue.

E. Farm Bureau's Recovery of Claims Paid

Kelly contends the policy does not permit Farm Bureau to recover money for claims paid. He specifically argues that the insurer may not void the policy after paying a claim, and he cites case law for the proposition that this court must give the policy language its plain and ordinary meaning rather than extending or defeating coverage beyond that which the parties anticipated. See Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 440 S.E.2d 367 (1994); State Auto Prop. & Cas. Co. v. Brannon, 310 S.C. 388, 426 S.E.2d 810 (Ct. App. 1992). Examining the policy language under its plain and ordinary meaning convinces us that, contrary to Kelly's assertions, Farm Bureau may bring an action to recover claims it has previously paid.

Section I, paragraph 15, provides: "If **you** or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and **we** will not pay **you** or any other **insured** for this loss." The policy further states: "If **you** or any other **insured** under this policy has intentionally concealed or misrepresented any material fact or circumstance, or made false statements or engaged in fraudulent conduct relating to this insurance, whether before or after a loss, then this policy is void as to **you** and any other **insured**." We have already found Glenn to be an insured under section 15 of the policy; accordingly, we find these sections of the policy also apply to Glenn.

South Carolina case law provides little guidance on this issue; however, it has been treated in other jurisdictions. When an insurer has paid a claim as a result of fraud, a false statement by an insured, or mistake, courts have permitted the insurer to recover its payment.[6] See S. Farm Bureau Life Ins. Co. v. Burney, 759 F.2d 658, 658 (8th Cir. 1985); Lindsey Mfg. Co. v. Hartford Accident & Indem. Co., 911 F. Supp. 1249, 1259-60 (D. Neb. 1995), rev'd on other grounds, 118 F.3d 1263 (8th Cir. 1997). The Lindsey court stated that "it would be unwise to discourage insurers from making payments, even if the payments were made in error, by refusing to permit later adjustments." 911 F. Supp. at 1259 (citing Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 977 (7th Cir. 1991)).

We find the case of Tyler v. Fireman's Fund Insurance Co., 841 P.2d 538 (Mont. 1992), particularly instructive. In Tyler, an insurance company brought an action to recover on a claim it had already paid the insureds, after learning that a fire was intentionally set by one of them. Id. The court held that an insurer could recover for claims paid due to fraud even if one insured was not aware of any fraud. Id. at 541. As in the instant case, the language of the insurance policy specifically stated that it would be void if the insured willfully concealed or misrepresented any material fact or circumstance concerning this insurance policy. Id. The court stated that a party is entitled to recover money which it paid by mistake of fact or law and which the receiver ought not to retain in equity and good conscience. Id. (quoting McDonald v. Northern Benefit Ass'n, 131 P.2d 479, 486 (Mont. 1942)).

There is precedent in this state for allowing an insurance company to recover for amounts paid as a result of a mistake of fact. In Pilot Life

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[6] Some courts nonetheless permit an insured to retain money paid due to mistake when the insured can demonstrate he or she significantly changed position such that it would be inequitable to require restitution. See U.S.F.& G. Co. v. Newell, 505 So. 2d 284, 287-88 (Miss. 1987); Western Cas. & Sur. Co. v. Kohm, 638 S.W.2d 798, 800-01 (Mo. Ct. App. 1982). Kelly, however, does not contend that he has detrimentally changed his position due to receipt of the payments; thus, that particular issue is not before us.

Insurance Co. v. Cudd, 208 S.C. 6, 36 S.E.2d 860 (1945), Pilot Life paid the beneficiary's claim and returned a premium payment made after the date of the insured's presumptive death. Id. at 12-13, 36 S.E.2d at 863. Pilot Life later learned that the insured was alive and requested the return of the money it paid on the death claim. Id. at 13-14, 36 S.E.2d at 863. The court found Pilot Life was entitled to recover this money. Id. at 19, 36 S.E.2d at 865.

Kelly asserts Pilot Life is not controlling because he suffered property loss while the insured in Pilot Life did not suffer any property loss. We disagree. The Pilot Life court did not base its decision on the absence of property loss. The court instead held that Pilot Life's payment was based on a mistake of fact and that the beneficiary must therefore return the money paid. Id. at 18, 36 S.E.2d at 865. Therefore, we find no support for Kelly's argument that Pilot Life is not controlling and that Farm Bureau may not file an action to recover money paid under the policy.

For the foregoing reasons, the judgment of the circuit court is hereby

AFFIRMED.

CURETON and SHULER, JJ., concur.