The Supreme Court of South Carolina

IN THE MATTER OF REANA R. JOHNSTON, RESPONDENT.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Reana R. Johnston was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 26, 2001, Ms. Johnston submitted her resignation from the South Carolina Bar. We accept Ms. Johnston's resignation.

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

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

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

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
February 8, 2002

The Supreme Court of South Carolina

IN THE MATTER OF MICHELLE F. INGLE, RESPONDENT

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1994, Michelle F. Ingle (formerly Michelle S. Founier), was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 5, 2002, Ms. Ingle submitted her resignation from the South Carolina Bar. We accept Ms. Ingle's resignation.

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

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

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

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
February 8, 2002

The Supreme Court of South Carolina

In the Matter of John A. Gaines, Respondent.

ORDER

By opinion dated January 28, 2002, respondent was disbarred. In the Matter of Gaines, Op. No. 25400 (S.C. Sup. Ct. filed January 28, 2002). The Office of Disciplinary Counsel now petitions this Court to appoint an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James M. Saleeby, Jr., Esquire, has been duly appointed by this Court.

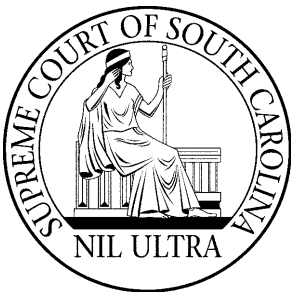
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James M. Saleeby, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Saleeby's office.

IT IS SO ORDERED.

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

Columbia, South Carolina

February 8, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 19, 2002

ADVANCE SHEET NO. 4

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lee Roy Ingle, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25416
Submitted September 27, 2001 - Filed February 19, 2002

REVERSED

Kenneth R. Young, Jr., of Sumter, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Doug Leadbitter, of Columbia, for respondent.

JUSTICE WALLER: Petitioner was convicted of first degree criminal sexual conduct with a minor and lewd act upon a child and was sentenced to consecutive prison terms of thirty and five years, respectively. We granted his petition for a writ of certiorari to review the denial of his application for post-conviction relief (PCR). We reverse.

ISSUE

Did the PCR court err in concluding that trial counsel was not ineffective?

DISCUSSION

Petitioner argues trial counsel undermined his defense in several respects and the PCR court erred in finding that counsel was not ineffective. We agree.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Roseboro, supra.

This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. E.g., Cherry v. State, 300

S.C. 115, 386 S.E.2d 624 (1989). However, the Court will not uphold the findings of a PCR court if no **probative** evidence supports those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

The first degree criminal sexual conduct and lewd act charges against petitioner stemmed from the alleged sexual assault of the nine-year-old daughter (the victim) of petitioner's live-in girlfriend, Jean Afify (Afify). In his defense at trial, petitioner denied molesting the victim. Instead, he testified that the victim entered his bedroom shortly after he and Afify had sexual intercourse and that his semen was transferred to the victim's shorts when she sat on his bed.[1] As his first defense witness, petitioner called Afify. Counsel inquired whether she and petitioner had sex the morning her daughter was allegedly molested. Afify responded: "No, sir, that's wrong."

At the PCR hearing, trial counsel admitted he did not interview Afify before calling her as a defense witness. Counsel explained that he relied solely on petitioner who had "convinced" him Afify was honest and would admit to having intercourse with petitioner on the morning of the alleged assault. Counsel also testified that when Afify was not called as a witness by the State, he presumed her testimony would be favorable to petitioner.

The PCR judge determined trial counsel made a sound strategic decision to question Afify about whether she and petitioner had engaged in sexual intercourse on the morning of the alleged assault. The PCR court further found that, even if counsel's strategy was unreasonable, petitioner failed to establish any prejudice because the State would have called Afify in reply after petitioner testified he and Afify had intercourse that morning.

Petitioner argues counsel was ineffective because he called Afify as a defense witness without interviewing her first. We agree.

---

[1]The State's DNA expert testified the semen on the victim's shorts genetically matched petitioner's blood.

Trial counsel clearly was deficient in presenting Afify as a defense witness without first interviewing Afify to ascertain whether she would support petitioner's theory of the defense. Counsel's reliance on petitioner's assertions that Afify would be honest and his assumption that her testimony would be favorable since she was not called by the State do not amount to reasonable strategy for calling Afify. We find it was objectively unreasonable for counsel to ask such a crucial question of the sexual assault victim's mother without first ascertaining her response. In this instance, trial counsel provided deficient representation. Roseboro v. State, supra (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness).

For several reasons, we conclude petitioner was prejudiced by trial counsel's deficient performance. Afify was **the first witness** called in petitioner's defense. Her testimony, however, was quite damaging to his defense. Moreover, the State was able to capitalize on trial counsel's error, and elicit additional damaging testimony on cross-examination. The effect of Afify's testimony, which totally contradicted petitioner's defense, was heightened by the fact that Afify was called as petitioner's first witness. Therefore, the fact that the State **may** have called Afify in reply does not diminish the prejudicial impact of trial counsel's error. It simply cannot be overstated how damaging Afify's testimony was since it came in as part of what was supposed to be petitioner's defense.

In addition, petitioner's theory that his semen was transferred to the victim's shorts via the bedsheets was not implausible. Without Afify's denial that they had sexual intercourse on the morning in question, reasonable doubt could have been established. Even if the State presented Afify's denial in reply, the impact of the testimony would have been different since it would have been part of the State's case, rather than part of petitioner's defense.

Finally, other evidence called into question the credibility of the victim's allegations. Petitioner testified that the victim was upset with him on the day of the alleged assault because he refused to buy her certain items while they were out shopping. Moreover, Afify testified that although her daughter told her about the assault on the day it happened, Afify did not contact

authorities until ten days later, when a neighbor reported the incident to DSS. During this time, Afify vacationed for a few days with her children at Myrtle Beach.

In sum, there is no **probative** evidence in the record to support the PCR court's finding that petitioner failed to establish prejudice from counsel's unreasonable strategy. We therefore reverse the denial of PCR on this issue.

Petitioner also asserts counsel was ineffective because he permitted two instances of hearsay testimony. In particular, he contends trial counsel should not have elicited testimony from Dr. Elizabeth Baker that the victim identified petitioner as her assailant and should have objected to testimony given by Detective Valerie Williams.

Regarding Dr. Baker, an expert in child sexual assault examinations, trial counsel conducted the following cross-examination:

> Q. What type of information did you receive from whomever before you began to interview [the victim]?
>
> A. I talked to her mother and her mother then told me that on April the 5th that the [victim] was allegedly molested and I don't believe I can say the rest of it.
>
> Q. Why not?
>
> A. I would assume that would be hearsay.
>
> (Solicitor): I have no objection if he's opening the door.
>
> (Witness) Okay. On April 5th, 1993, [the victim] was allegedly molested by her mother's boyfriend.

Detective Williams testified for the State as follows:

> Q. Now, you're limited in your testimony only to the time and place and type of assault. Could you relate what you were told by the victim concerning this assault?
>
> A. To the best of my recollection, I remember [the victim] telling me that she had been at [petitioner's] house and that he had sexually assaulted her. Her words were my privates, his privates and my privates. That's how she put it.

Trial counsel did not object to Detective Williams' testimony.

At the PCR hearing, counsel stated he elicited Dr. Baker's testimony concerning the victim's identification of her assailant because the victim only offered an allegation. He testified he did not recall Williams' testimony.

The PCR court found trial counsel was deficient for eliciting Dr. Baker's testimony and for failing to object to Williams' testimony. The PCR court concluded, however, that petitioner did not establish prejudice because the witnesses' testimony was cumulative to the victim's testimony.

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). A well-settled exception in criminal sexual conduct cases allows **limited** corroborative testimony. Id. When the victim testifies:

> evidence that she complained of an assault may be introduced to corroborate her testimony. . . . This right is limited in nature, however. "The particulars and details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown."

State v. Munn, 292 S.C. 497, 500, 357 S.E.2d 461, 463 (1987) (citations omitted).

Recently, this Court held that witnesses' repeated references regarding the victim's identification of the defendant as the perpetrator of multiple alleged acts of criminal sexual conduct was improper hearsay testimony which should have been objected to by trial counsel. Dawkins v. State, supra. In Dawkins, the Court stated that the failure to object was not valid strategy since the witnesses' testimony "served only to bolster [the victim's] credibility." Id. at 157, 551 S.E.2d at 263. Moreover, the Court found counsel's error prejudicial because "improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. . . . '[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" Id. at 156-57, 551 S.E.2d at 263 (quoting Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569).

Trial counsel in the instant case was deficient for eliciting Dr. Baker's testimony and for not objecting to Detective Williams' testimony. See, e.g., Munn, supra (testimony concerning the victim's identification of the perpetrator goes beyond the time and place of the assault and therefore is inadmissible hearsay). While counsel asserted at the PCR hearing that he wanted Dr. Baker's testimony in because it was merely an allegation, it is our opinion that hearsay regarding a victim's identification of the defendant as the perpetrator of a sexual assault could always be characterized as an "allegation." Therefore, we find counsel's articulated strategy for eliciting this testimony was objectively unreasonable. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313 (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness).

As to the prejudice prong of the Strickland test, we reiterate that improper corroboration testimony that is cumulative to the victim's testimony is harmful since "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Dawkins, supra; Jolly, supra. We hold trial counsel's deficient performance in allowing the hearsay testimony

of both Dr. Baker and Detective Williams clearly prejudiced petitioner. Id.

Accordingly, the PCR court erred in denying relief to petitioner on this issue as well.

CONCLUSION

For the reasons outlined above, the PCR court's decision denying relief is hereby **REVERSED.**

MOORE and PLEICONES, JJ., concur. BURNETT, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE BURNETT: (DISSENTING) I respectfully dissent. The issue before the Court is whether there is any probative evidence which supports the PCR judge's finding counsel was effective. In my opinion, there is evidence which supports the PCR judge's finding and, therefore, we must affirm. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000) (if there is any probative evidence to support the findings of the PCR judge, those findings must be upheld).

First, I disagree with the majority's conclusion trial counsel was deficient for eliciting Dr. Baker's hearsay testimony. On occasion we have deemed counsel deficient for failing to object to hearsay testimony. We have not, however, held counsel is always ineffective for failing to object to hearsay testimony. See Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Instead, as with other assertions of trial strategy, we consider the particular circumstances of the case. See Solomon v. State, Op. No. 25393 (S.C. Sup. Ct. filed December 17, 2001) (Shearouse Adv. Sh. No. 44 at 32) (court considers reasonableness of trial strategy on case-by-case basis). Where trial counsel articulates a valid reason for employing certain trial strategy, he will not be deemed ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

Here, trial counsel explained he intentionally elicited the hearsay testimony from Dr. Baker because he wanted the jury to hear from the expert that the victim only *alleged* petitioner had assaulted her. Trial counsel suggested the testimony implied there was no proof the victim had been assaulted. Under the circumstances of this case where it was questionable whether the victim had been assaulted, this was reasonable trial strategy.[2]

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[2]The defense suggested the victim had not been molested. Petitioner articulated a plausible theory concerning the presence of the semen on the victim's shorts. Further, he suggested the victim had a motive to accuse him of misconduct. Two witnesses testified the victim was in their company after the alleged assault, did not mention the incident, and acted "normally." Moreover, even though the victim told Afify about the alleged assault on the same day as

Accordingly, counsel was not ineffective. Id. I would affirm.

Furthermore, while I agree with the majority that counsel was deficient in failing to object to Detective Williams' hearsay testimony, I nonetheless conclude petitioner failed to establish prejudice. Hearsay testimony which corroborates the victim's testimony as to the details of the sexual assault or identification of the perpetrator is prohibited. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Jolly v. State, 314 S.C. 16, 443 S.E.2d 566 (1994). Detective Williams' testimony was cumulative to that of Dr. Baker's; it did not simply corroborate the victim's testimony. Accordingly, petitioner failed to establish prejudice. Because the PCR judge's findings are supported by the evidence of record, I would affirm. Anderson v. State, supra.

Second, I agree with the majority's conclusion trial counsel's strategy in asking Afify whether she and petitioner had engaged in sexual intercourse without first interviewing her was unreasonable. I conclude, however, that petitioner was not prejudiced by counsel's deficient performance. Had trial counsel *not* asked Afify on direct examination whether she and petitioner had sex the morning of the alleged assault, there is not a reasonable probability the outcome of trial would have been different. At petitioner's trial, the State called Afify in reply and questioned her about having sex with petitioner the morning of the alleged assault. The State would have called Afify in reply even if she had not testified as a defense witness.[3] Contrary to the majority's conclusion, there is probative evidence
in the record which supports the PCR judge's conclusion petitioner was not

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the incident, Afify did not report the crime until ten days later, after a neighbor reported the incident to DSS. For a portion of this ten day period, Afify took her family to the beach for a vacation.

[3]At the PCR hearing, trial counsel stated petitioner desired to testify.

prejudiced. Based on this Court's limited scope of review, I would affirm. Id.[4]

TOAL, C.J., concurs.

[4]In addition, petitioner claims counsel "absolutely destroyed" his theory of defense by eliciting testimony from the forensic serologist that semen could not have been transferred from the bed sheets to the victim's shorts. The Court granted petitioner review of four questions raised in the petition for a writ of certiorari. None of the questions raised in the petition address trial counsel's examination of the forensic serologist. Accordingly, this issue is not preserved for appeal. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) (issue not raised in petition for a writ of certiorari but presented in brief is not preserved for appeal).

The Supreme Court of South Carolina

In the Matter of Michael G. Wyman, Respondent.

O R D E R

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension and having an attorney appointed to protect the interests of his clients.

IT IS ORDERED that respondent's license to practice law in this State is suspended until further order of the Court.

IT IS FURTHER ORDERED that Terry A. Finger, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Finger shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr.

Finger may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Terry A. Finger, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Terry A. Finger, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Finger's office.

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

Columbia, South Carolina

February 14, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Dwayne L. Bullard,

Appellant.

Appeal From Horry County
Sidney T. Floyd, Circuit Court Judge

Opinion No. 3442
Heard December 4, 2001 - Filed February 4, 2002

VACATED

Assistant Appellate Defender Robert M. Pachak, 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 Robert E. Bogan, Assistant Attorney General Toyya Brawley Gray, all of Columbia and Solicitor J. Gregory Hembree, of Conway, for respondent.

HOWARD, J.: Dwayne L. Bullard appeals his conviction for armed robbery, asserting the indictment charged him with attempted armed robbery and therefore, did not confer subject matter jurisdiction on the trial court. We agree and vacate Bullard's conviction.

FACTS/PROCEDURAL HISTORY

Bullard was tried *in absentia* in August 1999 for armed robbery. He was convicted, and upon being apprehended, a sentence of thirteen years in prison was imposed.

The indictment charging Bullard is captioned "Indictment for Armed Robbery." The body of the indictment reads as follows:

> ARMED ROBBERY
>
> (CDR: 0139 16-11-0330(A)[)] [sic]
>
> That DWAYNE LLOYD BULLARD along with a codefendant who was armed did in Horry County on or about December 9, 1998, while armed with a deadly weapon, to wit: a pistol and a hammer, feloniously **attempt to take** from the person or presence of Gloria Hillenburg by means of force or intimidation goods or monies of Executive Video, with intent to deprive Gloria Hillenburg and/or Executive Video permanently of such goods and/or lawful monies of the USA.
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

(emphasis added)

LAW/ANALYSIS

On appeal, Bullard argues the court lacked jurisdiction to try him for armed robbery because the indictment charges him instead with attempted armed robbery. 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." Locke v. State, 341 S.C. 54, 56, 533 S.E.2d 324, 325 (2000). Questions regarding subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998).

"An indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend." Id.; see also Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) ("The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.").

Generally, "[a]n indictment is required to perform two functions: (1) it should inform the accused of the charge against him by listing the elements of the offense charged; and (2) it should be sufficiently specific to protect the accused against double jeopardy." United States v. Young, 376 A.2d 809, 813-14 (D.C. Cir. 1977) (citing Russell v. United States, 369 U.S. 749, 763-64 (1962)). In South Carolina, an indictment

> shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature

> of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20 (1985).

Bullard was convicted of armed robbery, a statutory offense defined as "robbery while armed with a pistol . . . or other deadly weapon." S.C. Code Ann. § 16-11-330(A) (Supp. 2001). "Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995); see also State v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984) (stating robbery requires the felonious taking and carrying away of the goods of another against his will or without consent). Robbery is not defined in section 16-11-330.

Asportation is an element of robbery and, therefore, armed robbery. See State v. Keith, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985). Asportation is the taking of an object with felonious intent. Locke, 341 S.C. at 57, 533 S.E.2d at 325. In Locke, our supreme court held an "indictment . . . alleges the substance of asportation when it reads, 'taking of goods and/or monies from the person or presence of [the victim].'" Id. at 56, 533 S.E.2d at 325.

Section 16-11-330(B) sets forth a lesser punishment for attempted armed robbery. See S.C. Code Ann. § 16-11-330(B) (Supp. 2001). In State v. Hiott, our supreme court found the following definition of attempted armed robbery to be controlling:

> "An attempt to commit robbery has been defined as the doing of acts toward the commission of robbery, and with such intent, but falling short of actual perpetration of the completed offense; . . . ." 77 C.J.S. Robbery § 60.

> "[I]t must appear that the circumstances were such that the crime would have been robbery had the attempt been successful." 77 C.J.S. Robbery § 61.

276 S.C. 72, 80, 276 S.E.2d 163, 167 (1981) (alteration in original). Thus, an attempted armed robbery requires acts toward the commission and intent, but in some manner falls short of successful completion of the offense.

In this case, the body of the indictment delineates armed robbery as the offense and specifically alleges the statutory provision which defines armed robbery. However, the body of the indictment does not contain an allegation of asportation. Instead, it alleges an "attempt to take" from the person or the presence of the victim, which is consistent with a charge of attempted armed robbery rather than armed robbery.

The State argues that the reference to section 16-11-330(A) in the body of the indictment is sufficient to confer jurisdiction, citing the recent case of State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), as authority. We conclude Owens is distinguishable.

In Owens, the defendant was charged with murder, which includes the element of malice aforethought. The indictment did not specifically allege that Owens killed the victim with malice aforethought, but it did allege that Owens killed the victim "in violation of South Carolina Code of Laws § 16-03-10." Owens, 346 S.C. at 649, 552 S.E.2d at 751. That section specifically defines murder as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1985). Therefore, our supreme court held the reference to the statute was sufficient to allege the element of malice aforethought and the indictment conferred subject matter jurisdiction on the trial court. Owens, 346 S.C. at 649, 552 S.E.2d at 751.

However, unlike section 16-3-10, section 16-11-330 defines armed robbery only in relation to robbery: it does not attempt to define robbery. There is no reference to the element of asportation in the language of the statute. Therefore, inclusion of the statute in the body of the indictment is not sufficient to allege asportation. Cf. Locke, 341 S.C. at 56, 533 S.E.2d at 325.

CONCLUSION

Because asportation is an element of armed robbery and was not alleged in this indictment, either by the language of the indictment or by reference to the statute, the indictment is fatally defective. Accordingly, we find the trial court did not have jurisdiction to try Bullard on the charge of armed robbery.

VACATED.

CONNOR and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Florence County School District #2,

Appellant/Respondent,

v.

Interkal, Inc., and United Industrial Syndicate, Inc.,

Respondents/Appellants.

Appeal From Florence County
Cody W. Smith, Jr., Special Referee

Opinion No. 3443
Submitted November 6, 2001 - Filed February 11, 2002

AFFIRMED

Saunders M. Bridges, Jr., of Bridges, Orr & Ervin, of Florence, for appellant/respondent.

R. David Howser, George V. Hanna, IV and Andrew E. Haselden, all of Howser, Newman & Besley, for respondents/appellants.

CONNOR, J.: In this contribution action, Florence County School District #2 (School District) appeals the finding that it was not entitled to contribution from Interkal.[1] Interkal appeals the findings that it would have been liable on the underlying suit absent its affirmative defense and that the School District's negligence did not supersede Interkal's negligence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On February 22, 1991, a bleacher collapsed during a basketball game in the Hannah-Pamplico High School gymnasium seriously injuring eleven-year-old Anthony Altman. Altman suffered fractures to his right femur, tibia, and fibula.

Hannah-Pamplico High School is a school within Florence County School District #2. Altman sued the School District and Interkal, the manufacturer and seller of the bleachers, for negligence, breach of warranty, and violations of the consumer protection code. The School District eventually settled the case with Altman. It then sued Interkal to recover a pro rata share of the settlement under the Uniform Contribution Among Tortfeasors Act, South Carolina Code Annotated Section 15-38-10 (Supp. 2000).

The first set of bleachers in the Hannah-Pamplico High School gymnasium was installed in 1969, and the second set was installed in 1971. Interkal designed, manufactured, sold, and distributed the bleachers. In 1979, Interkal became aware of problems associated with the type of bleachers installed at Hannah-Pamplico High School. Interkal sent a safety bulletin to all its customers, including the School District, warning that the bleachers might fall and cause personal injury if they were not properly maintained. The safety

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[1] For purposes of this appeal, Interkal and United Industrial Syndicate, Inc. have stipulated they may be considered as one entity.

bulletin urged customers to inspect the bleachers for particular problems, including bent guides, damaged finger locks, missing or damaged slide stops, and loose or missing bolts. Interkal sent another safety bulletin to the School District in 1985 warning about potential safety problems with the bleachers and giving detailed instructions on how to inspect the bleachers. In 1989 Interkal also sent the School District two copies of a Safety Alert Manual which contained additional warnings that failure to properly maintain and inspect the bleachers could result in a safety hazard. The School District did not retain maintenance records concerning the bleachers, nor did it maintain a regular maintenance schedule.

The School District contacted Mastercraft Renovations Systems in 1990 to inspect the bleachers and submit a proposal for repairing them. Mastercraft representative Martin Rapp inspected the bleachers and submitted a proposal for repair which included replacing the truck assembly for the bleachers on the home side of the gymnasium and repairing the bleachers on the visitor's side with parts from the home side which were still safe and operable. Harvey Putnam, the School District's maintenance director, was concerned with the cost of the proposal and requested that Rapp re-inspect the bleachers. After another inspection, Rapp submitted a second proposal in July 1990, which suggested realigning the trucks and welding the stress fractures on the bleachers. Neither proposal was submitted to the school board for consideration.

James Samuel McKnight, Ph.D., testified via deposition for Interkal that the collapse of the bleachers was caused by the School District's failure to follow the recommendations in the safety bulletins provided by Interkal, failure to follow Mastercraft's proposals for renovations, and failure to establish a regular maintenance program.

Melvin Richardson, Ph.D., an engineering expert, was also deposed. Richardson admitted that performing the repairs to the bleachers as suggested by Mastercraft and following a regular maintenance schedule may have reduced the chances for bleacher collapse. However, he opined that because the bleachers were not "precisely restrained," the hooks would not line up and would not always latch. According to Richardson, the bleachers were

defectively designed and the design defects caused the latch failures which led to the collapse.

The School District's action for contribution was referred to a special referee with finality. Interkal argued recovery against it was barred by the South Carolina Statute of Repose because the action was brought more than thirteen years after the installation of the bleachers. Alternatively, Interkal argued the School District's negligence rendered it solely responsible for the injury to Altman.

The special referee considered, among other things, the parties' oral arguments and the depositions of McKnight and Richardson in rendering his decision. He found the settlement with Altman was reasonable and fair under the circumstances. He further found Interkal was negligent in designing the bleachers and breached its warranty regarding the bleachers. However, the special referee also held the South Carolina Statute of Repose provided an absolute defense to the School District's contribution action and protected Interkal from liability because the bleachers were improvements to real property and the lawsuit was not brought within the statutorily required thirteen-year period. Finally, the special referee held any negligence on the part of the School District in failing to inspect or maintain the bleachers was not an intervening act of negligence and Interkal's defective design was the contributing proximate cause to Altman's injury. Thus, absent the Statute of Repose defense, the special referee found Interkal would have been liable for the injuries to Altman.

Both parties now appeal.

STANDARD OF REVIEW

Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C. Code Ann. § 15-38-30 (Supp. 2000). In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the

preponderance of the evidence, though it is not required to disregard the findings of the special referee. See Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001); Wilder Corp. v. Wilke, 324 S.C. 570, 479 S.E.2d 510 (Ct. App. 1996).

DISCUSSION

The School District argues the special referee erred in finding that where the underlying liability of a joint tortfeasor is barred by the Statute of Repose, the joint liability under the Uniform Contribution Among Tortfeasors Act is also time-barred. The School District urges us to adopt the findings of other jurisdictions that the existence of a cause of action, rather than the right to enforce the cause of action, is the trigger for the right of contribution.

Initially, we are not convinced this issue is preserved for review. The special referee's order states the parties argued their positions on the right to contribution. However, the School District did not include the transcript of the oral arguments before the special referee in the Record on Appeal. Furthermore, it appears from the special referee's order that the only issue in controversy was whether the bleachers constituted "improvements to real property," thereby triggering the Statute of Repose. The School District's current argument, that it may recover under the Uniform Contribution Among Tortfeasors Act despite the operation of the Statute of Repose, was never ruled upon by the special referee. Because we are unable to discern what arguments were actually raised before the special referee and because the special referee did not rule upon the School District's current argument, it does not appear that this issue is preserved for review. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (issue must have been raised to and ruled upon by the lower court in order to be preserved for appellate review). However, because of the equitable nature of the proceedings and the uncertainty regarding the issues actually raised and ruled upon, we address this issue. See State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671 (1937) (equity looks beneath the rigid rules of the law to seek justice).

When interpreting statutes, we are concerned with ascertaining and effectuating legislative intent if it reasonably can be discovered in the language when construed in light of its intended purpose. Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct. App. 1994). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Lester v. South Carolina Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999).

The Uniform Contribution Among Tortfeasors Act provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." S.C. Code Ann. § 15-38-20(A) (Supp. 2000). A right of contribution exists in favor of a tortfeasor who pays more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(B) (Supp. 2000).

The South Carolina Statute of Repose provides that no action to "recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement." S.C. Code Ann. § 15-3-640 (Supp. 2000). The definition of an action "based upon or arising out of the defective or unsafe condition of an improvement to real property includes: . . . an action for contribution or indemnification for damages sustained on account of an action described in this subdivision." S.C. Code Ann. § 15-3-640(6) (Supp. 2000).

In this case, the parties do not dispute that Altman's personal injury action arose more than thirteen years after the installation of the bleachers. The School District concedes the Statute of Repose applies to the underlying personal injury action against Interkal. Because the Statute of Repose specifically applies to actions for contribution, it is clear the General Assembly intended that persons who improve real property should be given the statutory right to protection from claims for contribution after the statutory period. We note that neighboring jurisdictions have similarly held a statute of repose bars

any action for contribution after the statutory time period. See Standard Fire Ins. Co. v. Kent & Assocs., Inc., 501 S.E.2d 858 (Ga. Ct. App. 1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statue of repose); Krasaeath v. Parker, 441 S.E.2d 868 (Ga. Ct. App. 1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); New Bern Assocs. v. Celotex Corp., 359 S.E.2d 481 (N.C. Ct. App. 1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real property also governs actions for contribution arising out of the improvements).

The cases cited by the School District do not address statutes of repose. These cases do not reflect the difference between a statute of limitations and a statute of repose and merely stand for the proposition that the running of a statute of limitations against one tortfeasor does not affect another tortfeasor's ability to sustain a contribution action. Our Supreme Court stated:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. . . . [A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.

Langley v. Pierce, 313 S.C. 401, 403-404, 438 S.E.2d 242, 243 (1993) (quoting First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865-866 (4th Cir. 1989) (internal citations omitted).

The Statute of Repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than thirteen years after the completion of an improvement to real property. Accordingly, there is

no error in the special referee's finding that the Statute of Repose bars the School District's action for contribution.[2]

CONCLUSION

For the foregoing reasons, the judgment below is

AFFIRMED.

ANDERSON and HOWARD, JJ., concur.

[2] Because of our disposition of this issue we need not address Interkal's cross-appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lori Tarnowski,

Respondent,

v.

Maizie Lieberman,

Appellant.

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3444
Heard January 10, 2002 - Filed February 11, 2002

AFFIRMED

Dan A. Collins, of Dan A. Collins & Associates, of Greenville; and James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for appellant.

David E. Turnipseed and Jason P. Boan, both of Turnipseed & Boan; and Charles A. Rice, Jr., all of Spartanburg, for respondent.

HEARN, C.J.: The estate of John Robert Harley, III appeals from the probate court's determination, as affirmed by the circuit court, that Harley and Lori Tarnowski were married at common law. It contends the probate court erred in finding a common law marriage absent a showing of cohabitation. We affirm.

FACTS

Harley and Tarnowski met in June 1998. At that time, Tarnowski was employed as a park ranger at Jones Gap State Park. As part of her employment, she was required to spend most nights at the park. Nevertheless, she and Harley began dating, and within a few months, she was spending most of her free time at his home. She moved many of her personal effects to Harley's home, including clothes and furniture.

Harley purchased an engagement ring and a wedding ring in late November 1998. The couple went to Charleston on the weekend of December 11 -13. During that time, Harley gave Tarnowski both rings, and her testimony is that the two considered themselves married from that point forward. Tragically, Harley died intestate on January 16, 1999.

Both before and after Harley's death, the couple behaved inconsistently with respect to their marital status. Tarnowski continued to live at Harley's farm when she was not working. Each told their respective best friend that they were married. However, to the rest of the world, the couple maintained that they were engaged. They told their parents they were engaged and began planning a May wedding. Tarnowski testified she did not tell her co-workers at the park about her marriage for fear her job would be jeopardized. The couple's wedding announcement appeared in the newspaper the same day as Harley's obituary. Following Harley's death, Tarnowski introduced herself to several people as his fiancee, including the personnel department at Harley's job and the minister who conducted the funeral. Moreover, Tarnowski did not change her name or mailing address after the Charleston weekend.

Later, after seeking the advice of counsel, Tarnowski brought this action in the probate court seeking to be declared Harley's wife and the sole heir at law to his estate. The probate court found that Harley and Tarnowski were married at the time of his death, and the circuit court affirmed. This appeal followed.

DISCUSSION

The estate contends on appeal that the probate court erred in finding a common law marriage because Tarnowski failed to present any evidence of marital cohabitation. The estate contends Tarnowski and Harley could not have cohabited because she was required to spend the majority of her nights at work. We disagree.

The issue of common law marriage sounds in law. Richland Mem'l Hosp. v. English, 295 S.C. 511, 513, 369 S.E.2d 395, 396 (Ct. App. 1988). Our review in this case is limited to a determination of whether or not there is any evidence to support the findings of the trial judge. Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct. App. 1987). Because this action sounds in law, and the existence of a common law marriage is a question of fact, this court is bound by the probate court's factual findings, and its credibility determinations. Barker v. Baker, 330 S.C. 361, 370, 499 S.E.2d 503, 508 (Ct. App. 1998). "[T]he question is not what conclusion this Court would have reached had it been the fact-finder, but whether the facts as found by the probate court have evidence to support them." Id. Therefore, we must affirm if any evidence supports the probate court's findings.

In South Carolina, a common law marriage is formed when two parties have a present intent to enter into a marriage contract. Id. "It is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife." Johnson v. Johnson, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960).

> The difference between marriage and concubinage . . . rests in the intent of the cohabiting parties; the physical

> and temporal accompaniments of the cohabitation may be the same in both cases, but the intent in the two cases is widely apart always. The intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary; the intent may exist though never public and formally declared; nevertheless the intent must exist. . . . It is true that when the intent has not been formally and publicly declared, . . . it may yet rest in circumstances.

Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978) (quoting Tedder v. Tedder, 108 S.C. 271, 276, 94 S.E. 19, 20 (1917)).

Two lines of South Carolina common law marriage cases have emerged over the years. Barker, 330 S.C. at 367, 499 S.E.2d at 506. The first provides that a common law marriage may be proved by a preponderance of the evidence. Kirby, 270 S.C. at 140, 241 S.E.2d at 416; Ex parte Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937). The second line is based on "a strong presumption in favor of marriage by cohabitation, apparently matrimonial, coupled with social acceptance over a long period of time." Barker, 330 S.C. at 367, 499 S.E.2d at 506. Perhaps because of the brief time these parties cohabited, the probate court did not refer to the presumption in his order. Instead, he found that the parties cohabited as Tarnowski's work schedule allowed and that the "mutual intention of the parties was to establish a marital relationship as and of the time of the exchange of their vows in Charleston, South Carolina."

As noted earlier, intent to live together as husband and wife may be proven by circumstances even if never publicly declared. Id. Here, there is evidence of marital cohabitation. Tarnowski testified that she lived with Harley when she was not required to be at work. We do not accept the estate's argument that the couple could not have been cohabiting because Tarnowski's job required her to spend many nights at the state park. She testified that she lived there. She moved her things into the home, and there was testimony that her car was often seen there. Moreover, the probate court specifically found

Tarnowski's witnesses highly credible and found that some of the estate's witnesses were less credible given their financial interests in the outcome. Although we acknowledge that there is conflicting evidence in the record as to the couple's marital status, we find the probate court's findings are supported by evidence in the record. Accordingly, the judgment below is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jerry Rosemond,

Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 3445
Heard January 8, 2002 - Filed February 11, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, 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 Robert E. Bogan, Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

ANDERSON, J.: Jerry Rosemond was convicted of strong arm robbery, resisting arrest, and assault and battery with intent to kill (ABIK). He appeals his conviction for strong arm robbery, arguing the trial court erred in failing to grant a directed verdict because there was no evidence he committed a larceny by using violence or intimidation. We affirm.

FACTS/PROCEDURAL BACKGROUND

This appeal arises out of the alleged robbery of the Sphinx filling station, located on Pendleton Street in Greenville, South Carolina, on November 18, 1997. A witness to the event was Barbara Murray, a cashier working the second shift from 2:00 p.m. to 10:00 p.m.

According to Murray, a man walked into the store around 9:00 p.m. and went directly to the restroom. He stayed in the restroom for approximately five minutes and then came out and walked straight to the counter. Murray was just a few feet away on the other side of the cash register, sweeping in order to get ready for the next shift to take over.

Murray testified she did not think anything was unusual at first when the man walked up to the counter, as customers did that all the time, but she became frightened when he walked behind the counter:

The Solicitor:	And when he came out of the … bathroom, where was the first place that he went?
Murray:	He just walked straight up to the counter.
The Solicitor:	Straight up to the counter?
Murray:	Uh-huh.
The Solicitor:	And what did you do at that point?

Murray: At the time, I didn't think nothing about it because people do it all the time. And then when he came behind the counter, I just stood there and looked and I ran behind the freezer door and went back where they cook.

The Solicitor: **And why did you run behind the freezer door?**

Murray: **I was scared.**

The Solicitor: You were scared?

Murray: (Witness nods.)

The Solicitor: **And what was it that scared you?**

Murray: **Just the way he looked.** I mean, he didn't say anything. He didn't move toward anybody, he just looked, that's all, **it was like a glare.**

(emphasis added).

Murray testified the man proceeded to flip the cash register up in the air and slam it to the ground while she stood a few feet away:

The Solicitor: What did he do when he came there?

Murray: Well, coming up -- like I said, he stumbled over the step. He got -- he caught hisself (sic), he came around. He still did not say anything at all. He walked over to the register, he just pushed on the buttons, couldn't get it open. So he grabs the bottom of it, it's a two piece register. **He grabbed the bottom of it and just flips it up in the air. [It] fell on the floor. He picked it up**

and just slammed it down and it pops open. He grabbed the money and run back out to the left side of the -- well, I think the left side and ran out of it.

The Solicitor: **How close were you to this person when this happened**?

Murray: About —

The Solicitor: And you can use objects in the courtroom to say how close you were?

Murray: About from this end to that end right there.

The Solicitor: From the end of the witness box?

Murray: Yeah, this corner right here to the beginning of that piece of wood right there.

The Solicitor: To the beginning of the jury box?

Murray: Yeah.

The Solicitor: **So just a few feet?**

Murray: **Yeah.**

(emphasis added).

Murray explained she was frightened by the man's actions in slamming the cash register to the ground:

The Solicitor: When you said he took the cash register drawer and - - tell me again what he did with that?

Murray: He just put his hands on the bottom side and picked it up. He just picked it up and it still wasn't open at that time, so he picked it up and slammed it on the floor and it popped open.

The Solicitor: **And did that frighten you?**

Murray: **Yeah, they're pretty heavy registers.**

The Solicitor: **They were pretty heavy registers?**

Murray: **Yeah**.

(emphasis added).

Murray stated she ran outside and saw the perpetrator running out of the side door and by the store. Murray acknowledged she was intimidated by the man:

The Solicitor: Ms. Murray, did you feel intimidated when the defendant came behind the cash register?

. . . .

Murray: When I seen him flip the register up in the air, that's when it scared me.

The Solicitor: It scared you?

Murray: Yeah.

Murray identified Rosemond at trial as the perpetrator. In contrast, Rosemond admitted he walked into the Sphinx on the evening in question, but testified he turned around and walked back out because he did not see anyone in the store. Rosemond stated he was arrested as he walked down the street. He

denied committing the robbery or attacking the arresting officers.

Defense counsel moved for a directed verdict on the strong arm robbery charge, arguing there was no evidence that Rosemond acted with force or intimidation based on Murray's testimony that the perpetrator did not brandish a weapon and did not make any threats or comments directly towards her or anyone else. The trial court denied the motion.

Rosemond was convicted of strong arm robbery, resisting arrest, and ABIK. He received concurrent sentences of six years in prison on each of the charges. In addition, he was ordered to successfully complete a drug diversion program. Rosemond appeals his conviction for strong arm robbery.

STANDARD OF REVIEW

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (citation omitted). "On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight." State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). "If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to the jury." Id.

"On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." McHoney, 344 S.C. at 97, 544 S.E.2d at 36 (citation omitted). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury." Id. (citation omitted).

LAW/ANALYSIS

Rosemond contends the trial court erred in denying his motion for a directed verdict on the charge of strong arm robbery because there was no evidence from which a jury could find that he committed a larceny with force

or intimidation. We disagree.

Initially, a question arises as to whether this issue is preserved for review as defense counsel did not specifically renew his directed verdict motion on the strong arm robbery charge at the close of all the evidence.

When the prosecution rested, defense counsel first stated he "would like to renew all of [his] previous objections." Defense counsel next moved for a directed verdict as to strong arm robbery, which was denied. After the defense presented evidence, the trial court specifically asked defense counsel whether he had any motions, and counsel responded: "Just renew my previous objections." The court then asked for any requests to charge. Although defense counsel did request that larceny be charged as a lesser included offense, Rosemond sets forth no argument on appeal concerning the court's denial of the request to charge a lesser included offense.

Based on the foregoing, it is arguable the directed verdict issue is not preserved as defense counsel did not specifically renew his directed verdict motion at the conclusion of the evidence. Rather, he made only a general reference to renewing his "previous objections," a statement he made earlier which did not include his directed verdict motion. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (finding defense counsel's statement at the end of all the evidence that he was making the "standard motions" did not preserve the issue of directed verdict for appeal); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (noting a general or nonspecific objection presents no issue for appellate review); see also State v. Parler, 217 S.C. 24, 59 S.E.2d 489 (1950) (holding, under former Circuit Court Rule 76, the denial of the defendant's directed verdict motion was not preserved for appeal where he failed to renew the motion after presenting evidence); Note to Rule 19, SCRCrimP (stating the rule "is substantially the substance of Circuit Court Rule 76"); State v. Adams, 332 S.C. 139, 144, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (finding appellant's directed verdict motion was not preserved where the argument raised on appeal was not presented to the trial court, and "[m]oreover, the record does not reflect that Adams renewed the motion at the close of his case") (citing, inter alia, State v. Parler, 217 S.C. 24, 59 S.E.2d 489 (1950) and the Note to Rule 19, SCRCrimP); State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App.

1996) ("A motion for a directed verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence, because once the defense has come forward with its proof, the propriety of a directed verdict can only be tested in terms of all the evidence.") (alteration in original) (citation omitted).

Because the issue was probably preserved by reference to the original motion for directed verdict, we elect to address the merits.

Common law robbery and "strong arm" robbery are synonymous terms for a common law offense whose penalty is provided for by statute.[1] See Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).

"Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence **or by putting such person in fear**." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (emphasis added) (citation omitted); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) ("Strong arm robbery is defined as the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'") (quoting State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987)). Thus, "[r]obbery is larceny from the person or immediate presence of another by violence **or intimidation**." Dukes v. State, 248 S.C. 227, 231, 149 S.E.2d 598, 599 (1966) (emphasis added); see also State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979) ("The common-law offense of robbery is essentially the commission of larceny with force [or intimidation].") (citation omitted).

"A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."

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[1] S.C. Code Ann. § 16-11-325 (Supp. 2001) ("The common law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years.").

Commonwealth v. Homer, 127 N.E. 517, 520 (Mass. 1920).

> Generally the element of force in the offense of robbery may be actual or constructive. Actual force implies physical violence. **Under constructive force are included "all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking * * *. No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished**, if the transaction is attended with such circumstances of terror, such as threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, **the victim is put in fear**." 46 Am. Jur. 146.

North Carolina v. Norris, 141 S.E.2d 869, 872 (N.C. 1965) (emphasis added) (quoting North Carolina v. Sawyer, 29 S.E.2d 34, 37 (N.C. 1944)).

The trial court charged Rosemond's jury that "for the purpose of robbery, a thing is in the presence of a person if it be within his or her reach, inspection, observation or control so that he or she could retain possession of it if not overcome by violence or prevented by fear."

In the current appeal, Rosemond contends he was entitled to a directed verdict on the charge of strong arm robbery because there was no evidence that he made any direct threats or committed any acts of violence against Murray or anyone else. However, strong arm robbery may be accomplished by **either** force **or** intimidation. Murray made numerous references during her testimony to being frightened of the perpetrator during this incident. She specifically noted she was scared by both the man's "glare" as he walked to the counter and the force he used in flipping the heavy cash register into the air and slamming it to the ground. Murray was obviously intimidated by the man's appearance **and** his actions, and thus acquiesced in the robbery because she had an apprehension of danger. She was standing only a few feet away as Rosemond wrestled with the cash register and it is readily apparent from her testimony that

the cash register was sufficiently within her reach, inspection, observation, or control that she would have, if not prevented by fear, retained her possession of it, and that Murray was put in fear sufficient to suspend the free exercise of her will or to prevent resistance to the taking.

Murray's fears of being harmed by the perpetrator were reasonable based on the record before us. The arresting officers responding to the call testified Rosemond punched and struggled with them, at one point attempting to take the weapon of one of the officers. Rosemond lifted the second officer about three feet in the air and then slammed him violently to the ground. Rosemond was obviously a man of some size and strength and was capable by his actions of creating fear in Murray, as evidenced by her express testimony to this effect. We conclude there was sufficient evidence on all of the necessary elements to submit the offense of strong arm robbery to the jury.

CONCLUSION

We hold the element of force in the offense of strong arm robbery may be **actual** or **constructive**. Actual force implies physical violence. Constructive force includes all demonstrations of force, menaces, and all other means by which the person robbed is put in fear sufficient to overcome the free exercise of the person's will or prevent resistance to the taking. Regardless of how slight the cause creating the fear is or by what other circumstances the taking is accomplished, if the transaction is accompanied by circumstances of terror, such as threatening by word or gesture, as in the common everyday experiences of life are likely to create an apprehension of fear and induce a person to give up the property, the victim is placed in fear.

The trial court did not err in denying Rosemond's motion for directed verdict. Rosemond's conviction for strong arm robbery is

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond O. Simmons,

Respondent,

v.

City of Charleston and Sedgwick of the Carolinas, Inc.,

Appellants.

Appeal From Charleston County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 3446
Heard December 5, 2001 - Filed February 19, 2002

AFFIRMED

William B. Regan and Carl W. Stent, both of Regan, Cantwell & Stent, of Charleston, for appellants.

A. Elliott Barrow, Jr., of Charleston, for respondent.

PER CURIAM: Raymond Simmons, a captain with the City of Charleston Fire Department, sustained a brown recluse spider bite to his right

leg while preparing to respond to a fire call. Simmons suffered from various medical conditions which, combined with the spider bite, required the amputation of his left leg. Simmons filed a workers' compensation claim. The single commissioner granted Simmons total disability under the general disability statute. The full commission and circuit court affirmed. The City of Charleston and Sedgwick of the Carolinas, Inc. (collectively "the City") appeal. We affirm.

FACTS/PROCEDURAL HISTORY

Simmons worked as a firefighter for the City of Charleston for twenty-five years, attaining the rank of captain. On August 24, 1995, Simmons's firefighting unit received a call to respond to the Holiday Inn. When Simmons placed his fireman's boots on, a brown recluse spider bit his right leg. Over a period of several days, the wound inflicted by the spider worsened and Simmons sought treatment from his regular physician. Simmons's physician referred him to Dr. Robert Cathcart, a surgeon.

After examining the wound, Dr. Cathcart advised Simmons to remain out of work. Simmons, a chronic sufferer of diabetes and hypertension, had poor circulation to his extremities, which hampered his recovery. Dr. Cathcart attempted three skin graft surgeries. The first two attempts failed, in part, due to Simmons's diabetic condition. Finally, the third surgery, accompanied by hyperbaric therapy, was successful.

Simmons also suffered from poor peripheral nerve function in his extremities, resulting in a decreased ability to sense pain. Simmons, a large man, favored his right leg and put increased weight and pressure on his left leg during his lengthy recovery. The pressure on his left leg resulted in blisters, which Simmons did not realize were developing. The blisters burst and became infected. Dr. Cathcart could not stem the infection and eventually amputated Simmons's left leg below the knee. Dr. Cathcart assigned a 100 percent disability to Simmons's left leg.

Simmons filed a claim for workers' compensation. The City denied his

claim. The single commissioner held a hearing on March 5, 1999. At the time, Simmons was fifty-eight years old.

The commissioner admitted the "Employability Evaluation" of Jean R. Hutchinson, a vocational consultant. Hutchinson opined Simmons suffered a substantial impairment to his earning capacity due to the injury, his age, and his ninth grade education level. The single commissioner found Simmons totally and permanently disabled, and entitled to receive compensation for five hundred weeks. The commissioner also awarded payment for reasonable and necessary medical, prosthetic, and other related services throughout Simmons's lifetime. The full commission and the circuit court affirmed. The City appeals, raising four issues.

ISSUES

I. Whether the circuit court erred by holding that the City's failure to appeal the strike of the City's Form 58 prevented the City from arguing a "greater risk" defense.

II. Whether the circuit court erred by not recognizing that South Carolina requires an employee to demonstrate a "greater risk" of an injury from a spider bite than the general public's risk.

III. Whether the circuit court erred by not requiring Simmons to support his claim of total and permanent disability under the general disability statute with medical testimony.

IV. Whether the circuit court erred by not limiting Simmons's recovery to the scheduled loss when the only assigned impairment rating was to a scheduled member and there was no evidence of injury to an unscheduled member.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for

decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the commission, this court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(6)(Supp. 2000). Our review is limited to deciding whether the commission's decision is supported by substantial evidence. See Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) (stating appellate review of the commission's factual findings is governed by the substantial evidence standard). Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached. Id., 544 S.E.2d at 844.

LAW/ANALYSIS

I.

The City argues the circuit court erred in holding its failure to appeal the striking of the Form 58 prevented it from raising its "greater risk" or "increased risk" defense first advanced in its Form 58. The City filed its Form 58 less than ten days prior to the date of the hearing, in violation of 25A S.C. Code Ann. Regs. 67-611(B)(1) (Supp. 2000). Accordingly, the single commissioner struck the Form 58.

The commissioner, however, alternatively ruled on the "greater risk" argument and concluded the doctrine did not apply to spider bites. In its appeals to the commission and the circuit court, the City did not address the striking of the Form 58 but did raise the "greater risk" argument. The commission "considered all issues raised in the briefs" and affirmed the single commissioner. The circuit court concluded that because the City failed to appeal the striking of the Form 58, the commission's ruling was the law of the case. However, the court alternatively addressed the arguments raised by the City in the Form 58, including the "greater risk" argument, and found it "not the law of the State of South Carolina and . . . not an adequate defense."

Because the commissioner, the commission, and the circuit court considered the merits of the City's "greater risk" defense and found the defense inadequate, we need not determine if the circuit court erred in finding the City waived the argument by failing to appeal the commissioner's ruling on the Form 58. We agree the City fails to demonstrate a right to relief based on the merits of its "greater risk" defense.

II.

The City argues Simmons must prove he was exposed to a greater risk of a spider bite than the general public and his failure to do so precludes him from compensation under the Workers' Compensation Act. We disagree.

Entitlement to compensation under the South Carolina Workers' Compensation Act requires a claimant to suffer an injury by accident arising out of and in the course of employment. S.C. Code Ann. § 42-1-160 (Supp. 2000). There are three lines of interpretation of the term "arising" currently in use: 1) the increased-risk doctrine; 2) the positional-risk doctrine; and 3) the actual-risk doctrine. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 3.01 (2001) ("Larson").[1]

The increased-risk doctrine is the prevalent doctrine in the United States. Id. at § 3.03. Under this doctrine, an injury arises out of the employment if some risk inherent to the employment was a contributing cause of the injury. The risk must be one to which the general public would not be equally exposed. Roberts v. Burlington Indus., Inc., 364 S.E.2d 417, 422-23 (N.C. 1988). The employment must increase the risk of the injury. Id. at 423.

A growing number of courts have adopted the positional-risk doctrine. 1 Larson § 3.05. Under this doctrine, "[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations

[1] There are two other obsolete lines of interpretation: the peculiar-risk doctrine and the proximate cause doctrine. 1 Larson § 3.01.

of the employment placed claimant in the position where he was injured." Id.

The actual-risk doctrine ignores whether the risk is common to the public and focuses on whether it is a risk of the particular employment. 1 Larson § 3.04. "It is a more defensible rule than the [increased-risk rule], since there is no real statutory basis for insisting upon a peculiar or increased risk, as long as the employment subjected claimant to the actual risk that caused the injury." Id.

The City argues spider bites should be subjected to the increased-risk doctrine. South Carolina has applied the increased-risk doctrine to cases of exposure to climatic conditions. In Hiers v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211 (1952), the claimant, a carpenter and a supervisor of construction sites, worked one day while suffering from a cold and several days later died from pneumonia-induced complications. His estate argued that his exposure to harsh weather conditions while on the job exacerbated his condition and contributed to his death. The court stated:

> The test as to whether the injury or death arose out of or in the course of employment when caused or hastened by atmospheric conditions, is whether, under all the circumstances, the employee was exposed to a greater risk by reason of his employment and duties than was imposed upon an ordinary member of the public.

Hiers, 221 S.C. at 230, 70 S.E.2d at 219. In affirming the award of benefits, the court further stated: "Where the work and the method of doing the work exposes [sic] the employee to the forces of nature to a greater extent than he would be if not so engaged, the industry increases the danger from such forces, and the employer is liable." Id. at 232, 70 S.E.2d at 220.

South Carolina, although not formally adopting or rejecting any of these doctrines, has not applied the increased-risk doctrine in determining the compensability of injuries due to spider bites and bee stings. In Schrader v. Monarch Mills, 215 S.C. 357, 55 S.E.2d 285 (1949), the claimant was bitten by

a black widow spider while on a bathroom break at work. The court stated: "An injury arises in the course of employment . . . when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto." Id. at 360, 55 S.E.2d at 287. The court did not address whether a claimant needs to prove that he was at a greater risk of spider bites than the general public. The court affirmed the award of benefits to claimant, finding that the spider bite took place while he was acting within the scope of his employment. Schrader, 215 S.C. at 364, 55 S.E.2d at 288. See also Eagles v. Golden Cove, Inc., 260 S.C. 113, 116, 194 S.E.2d 397, 398 (1973) (finding a bee sting suffered while cutting grass arose out of and in the course of employment).

An accident arises out of employment when the employment is a contributing proximate cause of the accident. Lee v. Wentworth Mfg. Co., 240 S.C. 165, 168, 125 S.E.2d 7, 9 (1962). "To be entitled to compensation, an employee need not necessarily be engaged at the time of injury in the actual performance of his work; it is sufficient if he is upon the employer's premises, 'occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment.'" Id. (quoting McCoy v. Easley Cotton Mills, 218 S.C. 350, 356, 62 S.E.2d 772, 774 (1950)).

Under Schrader, we find Simmons is entitled to an award of benefits. The spider bite occurred while Simmons was employed, at a place where he reasonably needed to be in the performance of his duties, and while he was fulfilling those duties or engaged in doing something incidental thereto. Clearly, the nature of his job as a firefighter required Simmons to wear fireman's boots. Placing those boots on his feet fulfilled a task incidental to his employment. Under Schrader, Simmons satisfied the requirements necessary to recover for an injury caused by a spider bite.

III.

The City next argues that Simmons must offer medical evidence demonstrating he is disabled in order to recover for total disability under S.C. Code Ann. § 42-9-10 (Supp. 2000). We disagree.

"South Carolina's workers' compensation law represents a combination of two competing models of workers' compensation, one economic and the other medical." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996). Under the more traditional economic theory, the goal of worker's compensation law is to compensate workers for reductions in their earning capacity caused by work-related injuries. Id. This is the criterion for compensation under the Workers' Compensation Act. See S.C. Code Ann. § 42-1-120 (1985) ("The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.").

> Notwithstanding the definition of disability in section 42-1-120, South Carolina's workers' compensation law also recognizes a competing concept of disability that is tied to medical impairment rather than to wage loss or to any reduction in earning capacity. The schedule injuries, which typically provide for fixed awards of workers' compensation based on degrees of medical impairment to certain listed body parts, are compensable without regard to whether the employee is able to continue working at the same job. In other words, with schedule injuries, the fact the employee still is able to work constitutes no bar to compensation.

Stephenson, 323 S.C. at 117, 473 S.E.2d at 701. Under the medical theory, the focus is on the medical impairment of the employee. Id.

When an employee is not statutorily deemed totally disabled according to the type of injury suffered, the economic model is generally used to prove total disability. Id. at 118, 473 S.E.2d at 702. Under the economic model, "the Commission may predicate a finding of total disability on the claimant's complete loss of earning capacity as a result of a work-related injury." Id. The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability. Id.

We do not think a medical doctor's testimony is necessary to prove total disability under the economic model. We are guided by South Carolina cases that have allowed claimants who were similarly situated to recover under the economic theory without the introduction of medical testimony. In Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965), the court allowed a fifty-eight-year-old heavy equipment operator with a sixth grade education to recover relying solely on the claimant's testimony offered to support his lack of earning capacity. Also, in McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989), the court affirmed the full commission's finding that a fifty-year-old machine operator was totally disabled based on a vocational consultant's averment that the employee was totally disabled.

Hutchinson, the vocational consultant, testified that Simmons suffered a substantial impairment to his earning capacity and is now unable to compete in the job market. We find the testimony is sufficient under the Coleman and McCollum cases and conclude Simmons was not required to provide medical evidence of total disability.

IV.

The City argues also that Simmons cannot recover total disability when his injuries occurred only to a scheduled member of the body. Under the facts of this case, we disagree.

Simmons suffered an amputation of his left leg which led to an assignment of 100 percent impairment of that leg. Testimony was adduced during the hearing showing the right leg, which was the leg bitten by the spider, also continued to suffer injury. This testimony led the Commissioner to find that Simmons suffered swelling and impairment in his right leg.

The City cites Brown v. Owen Steel Co., 316 S.C. 278, 450 S.E.2d 57 (Ct. App. 1994) to support its argument that the injury to the scheduled member must also cause injury to an unscheduled member to recover under the economic model. Brown suffered a thirty-five percent permanent partial disability to the back. The commission awarded Brown disability to the back under the

scheduled member Section 42-9-30 of the South Carolina Code. See S.C. Code Ann. § 42-9-30 (1985 & Supp. 2000). Brown argued he should have been permitted to seek benefits under the general disability statute § 42-9-20 instead of under § 42-9-30. The Commission and the circuit court both held that if a specific member included in the schedule set forth in § 42-9-30 is implicated, the award must be made pursuant to that section. This court concluded the commission misstated the law:

> Under our Worker's Compensation Act, a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability; *alternatively*, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing.

Brown, 316 S.C. at 279, 450 S.E.2d at 58 (quoting Fields v. Owens Corning Fiberglas, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990)). See also Green v. City of Columbia, 311 S.C. 78, 80 n.2, 427 S.E.2d 685, 687 n.2 (Ct. App. 1993) (citing Fields as holding claimant may proceed under § 42-9-10 or 42-9-20 (general disability) or under § 42-9-30 (scheduled disability) to prove a general disability).

Brown, however, did not argue that his back injury affected other parts of his body or that it had contributed to an impairment beyond the scheduled member. Accordingly, this court, finding Brown showed no prejudice resulting from the commission requiring him to proceed under the scheduled member section, affirmed.

"The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of

the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." Brown, 316 S.C. at 280, 450 S.E.2d at 58. When a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive. Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) ("Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation. . . .").

All that is required is that the injury to a scheduled member also affect another body part. Here, Simmons presented evidence his right leg remained swollen and painful as of the date of the hearing before the single commissioner. We agree that substantial evidence supports the commission's finding that Simmons suffered additional complications to another part of the body, other than the amputated left leg, and was thus entitled to proceed under the general disability statute.

CONCLUSION

Accordingly, for the foregoing reasons, the order on appeal is

AFFIRMED.

CURETON, STILWELL and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Harold G. Strickland,

Appellant,

v.

Keenan J. Galloway,

Respondent.

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

Opinion No. 3447
Heard February 4, 2002 - Filed February 19, 2002

AFFIRMED

Karen Creech, of Covington, Patrick, Hagins, Stern & Lewis, of Greenville, for appellant.

Robert D. Moseley, Jr., of Leatherwood, Walker, Todd & Mann, of Greenville, for respondent.

GOOLSBY, **J.:** Harold G. Strickland sustained injuries when he was struck by an automobile driven by Keenan J. Galloway. Both men were volunteer firefighters arriving at the scene of a fire. Strickland received workers' compensation for the injury and sued Galloway in tort to recover damages. The trial court granted summary judgment in favor of Galloway. Strickland appeals. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Harold G. Strickland brought this action against Keenan J. Galloway seeking to recover damages for personal injuries sustained by Strickland in an automobile accident in January 1998. At the time of the accident, both men were serving as volunteer firefighters with Anderson County and were responding to a fire. Strickland had parked his vehicle on the shoulder of the road and was putting on his fire-fighting gear. It was raining heavily. As Galloway pulled off the highway onto the shoulder, his car slid into Strickland, causing him injuries.

Strickland received workers' compensation benefits from the Anderson County Fire Department. He then sought compensation from Galloway individually under a negligence theory.

ANALYSIS

In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer.[1] The exclusive remedy doctrine was enacted to

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[1] S.C. Code Ann. section 42-1-540 (1985) states in pertinent part:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept

balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee.[2]

The immunity is conferred not only on the direct employer, but also on co-employees.[3] Under South Carolina Code Ann. section 42-5-10 (1985),[4] a co-employee who negligently injures another employee while in the scope of employment is immune under the Workers' Compensation Act and cannot be held personally liable.[5]

> compensation on account of personal injury . . . by accident, shall exclude all other rights and remedies of such employee . . . as against his employer . . . .

[2] Burnet R. Maybank et al., The Law of Workers' Compensation Insurance in South Carolina XV-1 (2nd ed. 1998).

[3] Id.

[4] S.C. Code Ann. section 42-5-10 (1985) states as follows:

> Every employer who accepts compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter. While such security remains in force he or **those conducting his business** shall only be liable to any employee who elects to come under this Title for personal injury . . . by accident to the extent and in the manner specified by this Title.

(emphasis added).

[5] Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 222, 428 S.E.2d 700, 702 (1993).

In the present case, if Galloway was acting within the scope of employment, he would be afforded immunity by the Workers' Compensation Act. Having conceded his own status of employee at the time of the accident, Strickland is arguing Galloway was not yet conducting the business of the fire department at the time of the accident. The only apparent distinction is Galloway had just arrived at the scene of the fire, while Strickland had already donned his gear when the accident occurred.

Basing his argument on the "going and coming rule," Strickland maintains Galloway had not yet conducted fire department business at the time of the accident. Under this rule, "an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of employment."[6]

South Carolina courts have not addressed this somewhat unique issue of whether or not a volunteer firefighter is acting within the scope of employment while responding to a fire. The issue was addressed in a 1977 Attorney General's opinion:[7]

> Since the furnishing of transportation to and from the scene of a fire saves the fire department the expense of transporting the volunteer fireman to and from a fire and also enables the fireman to proceed promptly and directly to and from the scene of the fire, it is self-evident that such a journey represents a substantial part

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[6] Maybank at V-2 (citations omitted); this rule originated in South Carolina in Gallman v. Springs Mills, 201 S.C. 257, 260, 22 S.E.2d 715, 718 (1942).

[7] The Attorney General's opinion treats the volunteer firefighter as being an exception to the "going and coming" rule; our result is the same, but we hold the firefighter to be outside the rule, not an exception to it.

> of the volunteer fireman's service to the fire department and the community. Therefore it appears that the volunteer fireman's furnishing of his own transportation directly to and from the scene of the fire is incidental to his duties, and injuries sustained thereby arise out of and in the course of employment so as to be compensable under the South Carolina Workmen's Compensation Act . . . .[8]

The Attorney General's opinion concluded "injuries sustained by a volunteer fireman while on the way directly to . . . a fire are compensable under the South Carolina Workmen's Compensation Act . . . . "[9]

Courts in other jurisdictions have held the going and coming rule does not apply in the context of a volunteer firefighter responding to a fire.[10] The general reasoning followed by these courts is the volunteer firefighter is not "going to work" when responding to the call but is "at work" when responding to the emergency call. Because these volunteers must respond immediately and

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[8] S.C. Op. Atty. Gen. 142 (1977).

[9] Id.

[10] Soupene v. Lignitz, 960 P.2d 205, 211 (Kan. 1998) ("Responding to emergency calls . . . entails a special degree of inconvenience and urgency . . . [and] is an activity contemplated by and causally related to the employment of a volunteer firefighter . . . . [H]e [the firefighter] had assumed the duties related to his employment when he began responding [to] the emergency call."); Matlock v. Hankel, 707 So.2d 1016, 1019 (La. Ct. App. 1998) (concluding the response of a volunteer firefighter to a fire is not equivalent to an ordinary commute to work); DeLong v. Miller, 426 A.2d 1171, 1172 (Pa. 1981) ("[B]ecause the unique character of the employment requires prompt reaction to an alarm, a volunteer fireman is in the course of his employment when he leaves his home in response to an alarm.").

expeditiously, they are performing the fire department's business when they embark on their response to a fire.

We hold Galloway was conducting the fire department's business at the time of the accident. Thus, the exclusive remedy doctrine of section 42-1-540 bars Strickland from suing co-employee Galloway for his alleged negligence in the accident.

AFFIRMED.

HEARN, C.J, and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Corey L. Reddick,

Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3448
Heard January 10, 2001 - Filed February 19, 2002

AFFIRMED

Chief Attorney Daniel T. Stacey, 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 Robert E. Bogan, Assistant Attorney General Christie Newman

Barrett; and Solicitor Warren B. Giese, all of Columbia, for respondent.

ANDERSON, J.: Corey Reddick, an inmate, was convicted of throwing bodily fluids on a correctional officer. He was sentenced to ten years imprisonment, consecutive to the sentence he was already serving. He raises two issues on appeal. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Reddick was convicted of five counts of kidnapping and five counts of armed robbery and sentenced to fifty years imprisonment. He was housed at the Broad River Correctional Institute at the time of the incident underlying this action.

In the cell block where Reddick was housed, prisoners ate meals in their respective cells. At the end of meal time, an officer would go from cell to cell collecting meal trays from the prisoners. The prisoners passed their tray to the officer through the food service flap located in the center of the cell door.

On April 1, 1999, Officer Keith Haynes approached Reddick's cell to collect his dinner tray. When Officer Haynes requested Reddick pass him the food tray, Reddick refused and demanded to see Sergeant John Rivera. Officer Haynes called Sergeant Rivera and continued collecting trays. As Sergeant Rivera approached Reddick's cell, he pulled out his can of mace as a precautionary measure and attempted to ask Reddick what was wrong. Reddick tossed the liquid contents of a Styrofoam cup through the open food service flap at Sergeant Rivera, striking the officer directly in the face. Officer Haynes, who was standing next to Sergeant Rivera, was also hit with the liquid. The yellow liquid smelled of urine and both officers believed the substance to be urine. Sergeant Rivera removed his yellow-stained shirt, placed it in a plastic bag, and provided it to his supervisor.

Reddick was indicted for throwing bodily fluids on Sergeant Rivera. The

jury convicted Reddick. This appeal follows.

LAW/ANALYSIS

I. VALIDITY OF THE INDICTMENT

Reddick argues his indictment was invalid and the Circuit Court did not have subject matter jurisdiction over the matter. We disagree.

Reddick was charged with violating S.C. Code Ann. § 24-13-470. The statute states, in pertinent part:

> An inmate who attempts to throw or throws bodily fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state or local correctional facility is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years.

The caption of the indictment returned by the Richland County Grand Jury stated "Throwing Bodily Fluids by Prisoner on Correctional Employee." The body of the indictment provided:

> That COREY L. REDDICK did in Richland County on or about April 1, 1999, wilfully and knowingly threw [sic] or attempted to throw urine on Sergeant John Rivera an employee of the South Carolina Department of Corrections, Broad River Correctional Institute.

Reddick argues this was insufficient to confer jurisdiction on the Circuit Court. The defect asserted by Reddick is the failure of the indictment to specify Reddick's status as an "inmate."

An indictment passes legal muster if it "charges the crime substantially in the language of the … statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood …." S.C. Code Ann. § 17-19-

20 (1985). The indictment must state the offense 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, 465 S.E.2d 358 (1995); Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995); State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Beam, 336 S.C. 45, 50, 518 S.E.2d 297, 300 (Ct. App. 1999) (citation omitted).

In State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980), appellants Crenshaw and Ligon were police officers tried for bribery, blackmail, and criminal conspiracy for extorting $5,000 from a doctor in exchange for promises to drop criminal charges against his son. The jury found appellants innocent of all charges except bribery. On appeal, the appellants asserted the indictment failed to charge the crime of bribery substantially in the language of the statute. They further contended the indictment did not set forth with sufficient certainty and particularity how appellants could have exercised their judgment as police officers in order that the criminal charges against the son be dropped or dismissed. The Court commenced its review with the following annunciation:

> An indictment is adequate if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction.

Id. at 477, 266 S.E.2d at 62 (citation omitted).

To determine if the appellants were on notice and apprised of the charges against them, the Court examined the indictment "on its face," **and** considered the events at trial:

> As the indictment bears the specific code section on its face and

there was lengthy discussion concerning that code section throughout the trial, appellants obviously knew for what crime they were being prosecuted. Further, an indictment charging a statutory crime need not use the precise language of the statute in describing the offense, if the words used are equivalent to those employed by the statute, Livingston v. Commonwealth, 184 Va. 830, 36 S.E.2d 561 (1946), as was the case in this instance.

Id.

In State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the Supreme Court employed the phrase "**practical eye**" to define its comprehensive analysis of indictments for legal sufficiency:

> The indictment sufficiency tests noted above must be viewed with a practical eye ….

Id. at 125, 283 S.E.2d at 588.

Like Crenshaw, the Adams Court examined the totality of the circumstances to determine if the appellant was cognizant of the crimes for which he was charged:

> [A]ll the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached. State v. Hiott, supra; State v. Shoemaker, supra; State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950).
>
> In this case the statement signed by Adams itself described his mens rea. He was indicted for the crimes accompanying the housebreaking-kidnapping and murder. In addition, he was accorded a preliminary hearing. Under all the circumstances, the contention that the indictment failed to fulfill its purposes is not

> supported. There is no indication that the appellant was unfairly prejudiced since he obviously knew the crimes for which he was being tried.

Id. at 125-26, 283 S.E.2d at 588.

Numerous cases have adopted the "**practical eye**" or common sense standard articulated within Crenshaw and Adams. See, e.g., State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993); State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999).

In State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001), an inmate stabbed a correctional officer with a homemade knife and was indicted for the crime of the unlawful possession of "contraband" by a prisoner in violation of § 24-3-950. Section 24-3-950 specifies that "contraband" includes items pre-determined to be contraband by the Director of the Department of Corrections and published by the Director in a public place. The indictment in Hamilton did not specify that the defendant's knife had been declared contraband by the Director. The defendant argued the indictment failed to sufficiently state the offense and the trial court lacked subject matter jurisdiction to try the case. This Court found the following:

> Viewing the indictment "**with a practical eye**," we find it stated the charge with sufficient certainty to enable both the trial court and Hamilton to know what crime it alleged. The indictment specifically identified the contraband involved, incorporated the statute, section 24-3-950, by reference, and named the offense in the title. Under the circumstances of this case, we determine the indictment vested the trial court with subject matter jurisdiction.

Id. at 365, 543 S.E.2d at 597 (emphasis added).

In State v. Williams, 346 S.C. 424, 552 S.E.2d 54 (Ct. App. 2001), the appellant was a prisoner convicted of possession of contraband. On appeal, he argued the indictment was defective because it failed to allege an essential element of the offense. Specifically, the appellant asserted the indictment failed to allege the essential element that the item in his possession had been declared to be contraband by the director of the Department of Corrections. Relying upon Hamilton, the Court concluded the indictment was legally sufficient:

> State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001), is the most recent statement of this court relative to the issues surrounding this indictment. In Hamilton, this court held that an indictment charging an inmate with possession of contraband in violation of S.C. Code Ann. § 24-3-950 was sufficient to vest the trial court with subject matter jurisdiction, even though it did not allege the item possessed by the accused had been declared contraband by the director of the Department of Corrections. This court found the indictment was sufficient where it specifically identified the contraband involved, incorporated S.C. Code § 24- 3-950 by reference, and named the offense in the title of the indictment. Id. at 72, 543 S.E.2d 586. In the case before us, the indictment specifically identifies the contraband as marijuana, cites § 24-3-950 of the South Carolina Code, and includes the name of the offense in the title of the indictment. Accordingly, we find that the language of the indictment is sufficient to confer on the trial court subject matter jurisdiction in this case.

Id. at 433, 552 S.E.2d at 59.

In the recent case of State v. Wilkes, 346 S.C. 67, 550 S.E.2d 332 (Ct. App. 2001) cert. granted, the appellant sought reversal of his conviction for assaulting two corrections officers. The statute under which the appellant was convicted — § 16-3-630 — states: "A person convicted of assault upon an employee of a state or local correctional facility performing job-related duties must serve a mandatory minimum sentence of not less than six months nor more than five years." The appellant argued the indictments returned by the grand

jury were invalid because they did not identify the persons assaulted as "corrections officers" in the charging portion. The Court determined articulation of the term "correctional officer" was necessary and held its omission within the charging portion of the indictment was a fatal defect, notwithstanding the language of the caption, which read "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE § 16-3-630"; consequently, the conviction was vacated. Id. at 69-71, 550 S.E.2d at 333-34 (relying upon, inter alia, State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974), North Carolina v. Bennett, 156 S.E.2d 725 (N.C. 1967), and 42 C.J.S. Indictments and Informations § 113 (1991)).

We find the present case is distinguishable from Wilkes. In Wilkes, the issue presented was whether the indictments sufficiently identified the status of the assaulted officers as "correctional officers." In light of the fact that arresting officers, who were not "correctional officers," were also involved with the defendant that day, the indictments did not sufficiently inform the defendant of the facts he should be prepared to defend. In the instant case, however, the defect alleged is the failure to specify the status of Reddick as an inmate. In contrast to the possible confusion associated with the several officers in the Wilkes case, there was no similar confusion in regard to Reddick's status as an inmate in the case at bar. The charging portion of the indictment sufficiently stated the elements of the crime by alleging Reddick threw urine on an employee of the Department of Corrections; therefore, Reddick was informed of the circumstances he was called upon to defend.

Reviewing the present case with a "**practical eye**," we believe the facts are substantially similar to those in Hamilton. The elements of the crime charged in the present case include: (1) the throwing of bodily fluids, including urine; (2) by an inmate; (3) on a correctional officer. The charging portion of the indictment identified Reddick by name and alleged he threw urine, a bodily fluid, on a correctional officer. Furthermore, the caption identified the accused as a "prisoner." Clearly, the indictment provided allegations as to all of the elements of the crime and sufficiently informed the trial judge and the defendant as to what crime was being alleged.

This indictment is a paradigm of a charging paper that survives subject matter jurisdiction scrutiny, but evinces a "lackadaisical scrivener product." The Latin phrase abundans cautela non nocet[1] is **edifying** and **instructive**.

II. REDDICK'S CLOSING ARGUMENT

Reddick asserts he had the right to argue in closing the evidence presented at trial that tended to show bias on the part of the prison guards. Reddick argues the trial court erred by limiting his closing arguments regarding bias. We disagree.

During cross-examination of Officer Rivera, Reddick's counsel elicited the following:

Defense Counsel:	[Y]ou understand how much time [Reddick] is doing in the Department of Corrections, correct?
Officer Rivera:	Yes, sir.
Defense Counsel:	He's doing a 50-year sentence?
Officer Rivera:	I believe so.
Defense Counsel:	And he's not getting any work credits or educational credits or good time?
Officer Rivera:	No, sir.

During Reddick's closing arguments, the following exchange occurred:

Defense Counsel:	Corey Reddick gives inmates a hard time,

[1] Abundant or extreme caution does no harm.

gives officers a hard time at the Department of Corrections. He is doing a 50-year sentence. And I'm not telling you that to lessen this or make us think that this doesn't matter. It does matter. It does matter to Mr. Reddick. That's why he's here today.

But they know how much time he's doing in the Department of Corrections. They know that he mouths off, becomes insubordinate. They can't do nothing to him. He doesn't get the good time. They can't take that away. He's not getting educational credits or work credits. They can't take that away.

The Solicitor: Objection, your honor. I mean, I wish he would stay within the facts of the record. I mean, he's testifying to stuff that has not been brought up before this jury.

Defense Counsel: Yes, it has, your honor. I'd asked Officer Rivera that. He said that himself, your honor.

The Court: I ask you again to conform comments to the evidence that's been presented in this particular matter.

Reddick's counsel continued his closing arguments. Counsel noted Officer Rivera approached Reddick's cell with mace before knowing what Reddick was complaining about and referred to prison guards getting away with ill treatment of inmates because the guards were more likely to be believed.

The trial judge is vested with broad discretion in dealing with the range and propriety of closing argument. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990); State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998). An appellate court will not disturb the trial court's ruling regarding closing argument where there is no abuse of discretion. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995). We must review the argument in the context of the entire record. Brown, 333 S.C. at 191, 508 S.E.2d at 41. The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. Id.

We find Reddick was correct in his assertion that he was arguing matters in evidence. Officer Rivera clearly testified regarding Reddick's status as an inmate without the ability to earn, and without the ability to have taken away as punishment, work or educational credits. However, we disagree with Reddick's argument that the trial judge improperly limited his closing arguments regarding bias. In our view, the trial judge's comments were merely a reminder to stay within the record, not an order to refrain from pursuing a particular line of argument. Further, a careful review of counsel's closing argument fails to convince us that Reddick was limited in any way by the trial judge's comments. Reddick's counsel continued to argue the prison guards were biased because they disliked Reddick and could get away with concocting a story of Reddick's misbehavior in order to punish him. Reviewing the entire record, we find Reddick was not limited by the trial judge's comments and he failed to meet his burden of showing he was deprived of a fair trial.

CONCLUSION

Accordingly, Reddick's conviction is

AFFIRMED.

CONNOR, J., concurs.

HOWARD, J., dissents in a separate opinion.

HOWARD, J., (dissenting): I respectfully disagree with the majority as to the sufficiency of the indictment. The body of the indictment does not allege that Reddick is an inmate, nor does the indictment allege his status as an inmate in any similar language. Consequently, I would hold that the court did not have jurisdiction to try Reddick for this offense.

The caption of the indictment cannot be used to expand or contract the allegations, because it is not a part of the findings by the grand jury. State v. Lark, 64 S.C. 350, 353, 42 S.E. 175, 176-77 (1902); State v. Knuckles, (S.C. Ct. App. filed Jan. 28, 2002) (Shearouse Adv. Sh. No. 2 at 67, 72).

Furthermore, in my opinion the cases relied upon by the majority are inapposite. In each of the cases in which our courts have examined the language in the indictment with a practical eye in view of the surrounding circumstances, the question presented was whether or not there was prejudice to the defendant. In State v. Crenshaw, the defendant challenged the indictment, alleging that it failed to charge the crime of bribery substantially in the language of the statute. 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980). The Court found the indictment sufficient, stating that an indictment charging a statutory crime "need not use the precise language of the statute in describing the offense, *if the words used are equivalent to those employed by the statute."* Id. (emphasis added). Therefore, Crenshaw does not aid the majority, because identifying the defendant by name in the body of the indictment is not equivalent to identifying his status as an inmate.

In State v. Hiott, the indictment charged the defendant with armed robbery by "feloniously tak[ing] . . . goods or monies of the said John Nates Druggist, Inc., such goods or monies being described: a toothbrush." 276 S.C. 72, 79, 276 S.E.2d 163, 167 (1981) (alteration in original). Factually, the attempted escape of the pharmacist had thwarted the robbery before completion. At trial, the allegation that a toothbrush was the target of the robbery was stricken from the indictment by the trial court because of a lack of evidence. On appeal, the defendant challenged the indictment, arguing the phrase "goods or monies" was insufficient. The supreme court disagreed, viewing the indictment with a practical eye. Id. at 82, 276 S.E.2d at 168 (stating "[i]t is not necessary . . . to

describe the property the accused intended to take" (quoting 17 C.J.S. Robbery § 68)). Again, unlike this case, the indictment in Hiott contained a general allegation of the element in question.

In State v. Adams, the defendant was charged in an indictment with breaking and entering a house "with intent to commit a crime therein." 277 S.C. 115, 125, 283 S.E.2d 582, 587 (1981). He was also separately indicted for murder and armed robbery in connection with the same incident. On appeal, he argued the indictment was insufficient because it did not allege the crime he was accused of intending to commit upon breaking and entering. Our supreme court dismissed this argument, viewing the indictment and all of the circumstances with a practical eye and noting that he admitted his intentions in his statement to police, he was indicted for the accompanying crimes of murder and armed robbery, and he was afforded a preliminary hearing. Id. at 125-26, 283 S.E.2d at 588. Here again, the indictment alleged the element of intent to commit a crime; it simply did not identify the specific crime.

In State v. Gunn, the indictment charged that the defendant, along with other named defendants, did

> knowingly, unlawfully and willfully conspire, confederate, agree and have tacit understanding with each other and/or other persons, whose names are both known and unknown to the State Grand Jurors, for the purpose of selling, delivering, or bringing into this State in Cherokee and York counties, or providing financial assistance or otherwise aiding and abetting the sale, delivery or bringing into this State in Cherokee and York counties, or the knowing actual or constructive possession in Cherokee and York counties of more than 28 grams of Dilaudid, a narcotic, a derivative of morphine, which is a controlled substance under provisions of Section 44-53-210, Code of Laws of South Carolina (1976), as amended, such conduct not having been authorized by law.

313 S.C. 124, 129, 437 S.E.2d 75, 78 (1993).

On appeal, the defendant challenged the sufficiency of the indictment because it set forth few facts in support of the allegations. Once again, the supreme court reviewed the sufficiency of the indictment by looking at the issue with a practical eye in view of the surrounding circumstances. The court noted that in a statewide grand jury proceeding, the testimony before the grand jury is recorded and may be accessed by the defendant. Thus, the court found the indictment sufficient. Id. at 130, 537 S.E.2d at 78.

In each of these cases, the question before the court was whether or not there was prejudice to the defendant as a result of insufficient factual allegations contained within the indictment. See State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (ruling the word "contraband" in the indictment was sufficient to allege that the defendant possessed an item pre-determined by the Director of the Department of Corrections to be contraband). This is a different question than that which is presented in this case.

Our supreme court has made it clear that an indictment is not sufficient to confer jurisdiction on the court if it does not allege each of the elements of the offense. See State v. Owens, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001). To say that the element of Corey Reddick's status as an inmate is sufficiently alleged by identifying him by name is to totally engraft an allegation of the element into the body of the indictment and essentially nullifies this fundamental inquiry. I disagree with the majority's conclusion on this point and would vacate the conviction based upon the fatally flawed indictment.