The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who have failed to pay their license fees for 2022. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by March 24, 2022.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James Jr. J.

Columbia, South Carolina
February 24, 2022

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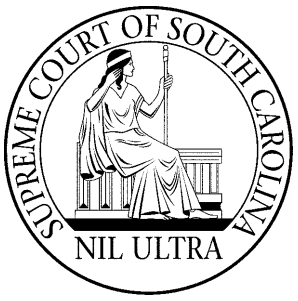

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
March 2, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Martha M. Fountain and Curtis Fountain, Plaintiffs,

v.

Fred's, Inc. and Wildevco, LLC, Respondents,

v.

Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC, Third-Party Defendants,

of whom Tippins-Polk Construction, Inc. is the Petitioner.

Appellate Case No. 2020-000651

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Barnwell County
Doyet A. Early III, Circuit Court Judge

Opinion No. 28086
Heard December 9, 2021 – Filed March 2, 2022

REVERSED

Morgan S. Templeton, of Wall Templeton & Haldrup, PA, of Charleston, for Petitioner Tippins-Polk Construction, Inc.

Matthew Clark LaFave, of Crowe LaFave, LLC, of Columbia, for Respondent Fred's, Inc.

Randi Lynn Roberts and Regina Hollins Lewis, both of Gaffney Lewis LLC, of Columbia, for Respondent Wildevco, LLC.

JUSTICE KITTREDGE: We issued a writ of certiorari to review the court of appeals' decision affirming the trial court's finding that Respondents Fred's, Inc. (Fred's) and Wildevco, LLC (Wildevco) were entitled to equitable indemnification from Petitioner Tippins-Polk Construction, Inc. (Tippins-Polk). Specifically, Tippins-Polk argues the court of appeals erred in finding a special relationship existed between it and Fred's and in finding Respondents proved they were without fault as to the underlying premises liability claim. Because we find Respondents failed to establish they were without fault in the underlying action, we reverse.

I.

Respondent Fred's was a Tennessee corporation that operated a chain of discount general merchandise stores in several states, including South Carolina. Respondent Wildevco is a South Carolina limited liability company that owned a tract of undeveloped commercial property in Williston, South Carolina. In February 2005, Wildevco and Fred's entered into a lease agreement in which Wildevco agreed to construct a 16,000-square-foot commercial space located in Williston, South Carolina, according to Fred's conceptual design specifications. In turn, Fred's agreed to lease the property for ten years.

Wildevco, and specifically partner Tad Barber, managed the construction process, including hiring engineers, architects, and a general contractor. In April 2005, Wildevco entered into a contract with general contractor Tippins-Polk for the construction of the Fred's store and adjoining strip center. Barber testified at trial that he selected Tippins-Polk as the general contractor primarily because Tippins-

Polk offered a "good price" but also because Tippins-Polk had experience constructing other Fred's stores.

The construction contract between Wildevco and Tippins-Polk included drawings prepared by an architect, as well as site plans prepared by an engineer. The contract specifically stated that Tippins-Polk was responsible for "All Site Work," including "[g]rading, concrete curbing, utilities & paving [p]er site plans."

Wildevco provided Tippins-Polk with two sets of construction drawings—the architectural drawings, which established the design elements including the sidewalk surrounding the store, and the site plans, which controlled the grading, elevations, pavement, and underground utilities. However, there was conflicting evidence at trial as to the intended design of the curbing at the entrance of the Fred's store—specifically, whether the architectural drawings and/or site plans called for the presence of a curb ramp for wheelchair accessibility. In any event, Tippins-Polk constructed the entrance to have a curb ramp at the entrance door. In front of the door, the ramp was flush with the parking lot, and on either side, it sloped upward to adjoin the rest of the curbing surrounding the building. Fred's opened the Williston store in October 2005.

Pursuant to the lease agreement between Wildevco and Fred's, Wildevco was the party responsible for "keep[ing] and repair[ing] the exterior of the [] Premises, including the parking lot, parking lot lights, entrance and exits, sidewalks, ramps, curbs," and various other exterior elements. Fred's was responsible for maintenance of the interior of the premises. Wildevco claimed it periodically inspected the parking lot and parking lot lighting but never conducted or hired anyone to conduct an inspection around the perimeter of the store to look for tripping hazards. However, Barber acknowledged that if an inspection had taken place, it would have been "vis[ible] to the naked eye" that an elevation change in the sidewalk existed and was not painted yellow.

Five years after the Fred's store opened, on March 10, 2010, Martha Fountain went to the Williston Fred's to purchase light bulbs. It was a sunny day, and as she approached the store entrance around noon, her toe caught the sloped portion of the ramp at the entrance of the store, causing her to trip and fall. Ms. Fountain hit her head and hand on the glass door and fell to her knees. She sustained serious injuries to her hand, wrist, and arm and has undergone five surgeries to alleviate her pain and injuries. Ms. Fountain also suffered nerve damage in her shoulder and neck from the blow to her head, and she continues to have problems lifting and

gripping things due to numbness and neuropathy in her right hand, which is her predominant hand.

In May 2010, Ms. Fountain and her husband filed a premises liability suit against Fred's and Wildevco, alleging Respondents breached their duty to invitees by failing to maintain and inspect the premises and failing to discover and make safe or warn of unreasonable risks. Ms. Fountain sought to recover her medical expenses and lost wages, and her husband filed a loss of consortium claim. The Fountains did not pursue a construction defect claim against Tippins-Polk.

In defending the Fountains' premises liability lawsuit, Wildevco and Fred's filed third-party claims against Tippins-Polk for equitable indemnification, negligence, breach of contract, and breach of warranty, arguing Tippins-Polk improperly constructed the sidewalk and that the defective construction was the sole proximate cause of Ms. Fountain's injuries. The case was set for a date certain trial in March 2016. On the eve of trial, Wildevco and Fred's settled with the Fountains for $290,000, with Wildevco paying $250,000 and Fred's paying $40,000. The third-party claim was continued, and in June 2016, a bench trial was held solely on Fred's and Wildevco's equitable indemnification claims against Tippins-Polk.

The general theory of the third-party claim was that Tippins-Polk deviated from the site plans and improperly constructed the entrance curbing, which was the sole proximate cause of Ms. Fountain's injuries. In other words, Fred's and Wildevco sought to re-classify the dangerous condition as "improper construction" rather than an unsafe elevation change in a premises liability context, which was the basis of Ms. Fountain's lawsuit. Essential to Respondents' position is the notion that they did not breach any duty to Ms. Fountain to inspect the premises and correct or warn of any potential trip hazards.

At the conclusion of the trial, the court noted there were "potential areas of confusion" between the various construction drawings but ultimately concluded Tippins-Polk deviated from the site plans in building an elevated sidewalk with a sloped curb ramp. As to the relevant elements of equitable indemnification, the trial court found a special relationship existed between Fred's and Tippins-Polk "based on Tippins-Polk's agreement to construct a facility for a Fred's retail store with knowledge that the Fred's facility would be open for business to the public, as well as its selection as general contractor based on its prior construction of at least one other Fred's store." Relying exclusively on construction defect cases rather than cases involving premises liability or equitable indemnification, the trial court

further concluded neither Wildevco nor Fred's breached any duty owed to Ms. Fountain regarding inspection and maintenance because "the defects were such that could not reasonably have been discovered" by Wildevco or Fred's.[1] Thus, the trial court concluded equitable indemnification was appropriate.

The court of appeals affirmed, finding "ample evidence of a special relationship" between Tippins-Polk and Fred's and concluding neither Fred's nor Wildevco were at fault in the underlying action. *Fountain v. Fred's, Inc.*, 429 S.C. 533, 839 S.E.2d 475 (2020). Following the court of appeals' denial of Tippins-Polk's petition for rehearing, this Court granted Tippins-Polk's petition for a writ of certiorari.

II.

In an action at equity, tried by a judge alone, this Court's standard of review is de novo. *Lewis v. Lewis*, 392 S.C. 381, 385–86, 709 S.E.2d 650, 651–52 (2011). In short, "[w]e have jurisdiction in appeals in equity to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of verdict by jury." *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951).

"South Carolina has long recognized the principle of equitable indemnification." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Id.* (citation omitted). "A right to indemnity may

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[1] The trial court's findings were not based on premises liability cases, but were based on the following construction defect cases, despite Respondents' construction defect claims having been abandoned prior to trial. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008) (involving claims of negligence, breach of warranty, and strict liability against builder for damages caused by installation of defective stucco); *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989) (involving breach of implied warranty of habitability); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976) (affirming a verdict against a septic tank vendor and finding an implied warranty of fitness for use "springs from the sale itself"); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970) (affirming a verdict in favor of plaintiffs on breach of implied warranty claim regarding the improper installation of a septic tank).

arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id.* (citation omitted).

"Traditionally, courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Id.* An additional element is the absence of fault by the party seeking equitable indemnification. A party is not entitled to equitable indemnification if any "negligence of his own has joined in causing the injury." *Id.* (citation omitted).

Thus, after demonstrating a sufficient relationship exists, a party seeking equitable indemnification (here, Fred's and Wildevco) must prove: "(1) the indemnity defendant ([Tippins-Polk]) is at fault in causing the damages of the third party ([the Fountains]); (2) the plaintiff has no fault for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party's claim." *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013).

Here, Tippins-Polk argues the court of appeals erred with respect to two of these elements. First, Tippins-Polk argues it was error to affirm the trial court's finding that a special relationship existed between it and Fred's. Secondly, Tippins-Polk argues that it was error to affirm the finding that Wildevco and Fred's were without fault. We address each claim in turn.

A. Special Relationship

Tippins-Polk argues the court of appeals erred in finding a special relationship existed between it and Fred's. In support of its argument, Tippins-Polk relies heavily upon *Rock Hill Telephone Co. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005), in which this Court held no special relationship existed between a utility and a subcontractor hired by an independent contractor.

As a matter of equity, a party is entitled to indemnity if "the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (citations omitted). "Traditionally, the courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Inglese*, 403 S.C. at 299, 742 S.E.2d at 691 (citation omitted).

Here, the trial court and court of appeals found the connection between Fred's and Tippins-Polk was established because Tippins-Polk knew the commercial space it constructed would be leased to Fred's and open to the public and because Tippins-Polk had been the general contractor in several other unrelated construction projects for Fred's stores.[2] The court of appeals also construed certain testimony in the record as establishing that Tippins-Polk owned another location that was also leased to Fred's. Although this may be some evidence of a course of dealing between Fred's and Tippins-Polk, it is a close question whether the evidence in this record is adequate to support a finding of a special relationship. However, we need not resolve that issue. Even assuming a special relationship existed between Fred's and Tippins-Polk, we find Respondents manifestly failed to demonstrate their own absence of fault and therefore were not entitled to equitable indemnification.

B. Without Fault

As previously noted, a party may be entitled to equitable indemnification only if "no personal negligence of his own has joined in causing the injury." *Vermeer Carolina's, Inc.*, 336 S.C. at 60, 518 S.E.2d at 305 (citation omitted). "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57–58, 398 S.E.2d 500, 503 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992).

Tippins-Polk argues the court of appeals erred in affirming the finding that Respondents were without fault. We agree. For Respondents to prove they were without fault and thus deserving of equitable indemnity, Respondents were required to demonstrate that they had not breached any duty they owed as landowner and shopkeeper to Ms. Fountain as a business invitee. While we understand Respondents' desire that we only look to Tippins-Polk's fault under construction defect law, we are constrained to analyze the "without fault" element through the lens of premises liability law.

"The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App.

[2] There is no indication in the record that Tippins-Polk and Fred's ever contracted with one another directly.

2008) (citing *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001)). "An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." *Sims*, 343 S.C. at 716, 541 S.E.2d at 861–62 (quoting *Goode v. St. Stephens United Methodist Church,* 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997)). "However, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009) (citing *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991) (adopting Restatement (Second) of Torts § 343A (1965))).

"The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims*, 343 S.C. at 718, 541 S.E.2d at 863 (citing *Larimore v. Carolina Power & Light*, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). "The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge." *Id.* (citing *Callander*, 305 S.C. 123, 406 S.E.2d 361). Like a landowner, a merchant also owes its customers "the duty to exercise ordinary care to keep his premises in a reasonably safe condition." *Young v. Meeting St. Piggly Wiggly*, 288 S.C. 508, 510, 343 S.E.2d 636, 637 (Ct. App. 1986) (citations omitted). Thus, as a matter of law, both Fred's and Wildevco owed a duty of care to Ms. Fountain, as an invitee, to keep the premises reasonably safe and warn of any unreasonable dangers that could not be remedied.

Indeed, it is in this context that Fred's and Wildevco were sued for their own independent negligence—not vicariously for the negligence of Tippins-Polk. Even assuming Tippins-Polk improperly constructed the ramp and the ramp was a proximate cause of Ms. Fountain's injuries, both the improper construction and Respondents' failure to inspect and warn could have proximately caused Ms. Fountain's injuries. *See Hughes v. Child. Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) ("When we speak of proximate cause, we are not referring to the 'sole cause.' In order to establish actionable negligence, the plaintiff is required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury.").

Thus, to be entitled to equitable indemnity on their cross-claim against Tippins-Polk, Fred's and Wildevco were required to show not just that Tippins-Polk's

construction of the ramp was a proximate cause of Ms. Fountain's injuries but also that Respondents' failure to warn of or remedy the unsafe condition was *not* a proximate cause. *See Wiedeman-Singleton, Inc.*, 303 S.C. at 57–58, 398 S.E.2d at 503 (observing that "[i]f the second party is also at fault, he comes to court without equity and has no right to indemnity"); *see also Hughes*, 269 S.C. at 399, 237 S.E.2d at 757 (finding defendant medical provider owed patients a duty to inspect the premises in order to discover dangerous conditions and take adequate safeguards to prevent injuries).

Although the trial court concluded Fred's conducted periodic inspections, the evidence to support this finding is not included in the record on appeal, and under our de novo standard of review, we are unable to reach the same conclusion. *See* Rule 210(h), SCACR (providing an appellate court will not consider any fact which does not appear in the record on appeal). As to Wildevco, the evidence at trial is clear that Wildevco *never* conducted an inspection of the perimeter of the Fred's store to look for tripping hazards, although Barber admitted that if an inspection had occurred, the uneven surface would have been visible "to the naked eye."

Although a change in elevation in a walking surface may constitute an open-and-obvious condition of which a landowner or merchant has no duty to warn,[3] "an owner is liable for injuries to an invitee, despite an open and obvious defect, if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted." *Callander*, 305 S.C. at 125–26, 406 S.E.2d at 362–63 (finding error in charging the jury on "latent defect" where a reasonably careful inspection would have revealed the danger and holding shopkeeper nevertheless may be required to warn the invitee of the open-and-obvious risk if "the invitee's attention may be distracted[] so that he will not discover what is obvious" (citation omitted)).

Here, as in *Callander*, a reasonable inspection of the concrete entrance would have revealed the curbing elevation change. Accordingly, it was error for the trial court to find the dangerous condition was latent, and particularly to rely on inapposite construction defect concepts in doing so. The question then arises whether Fred's and Wildevco had a duty to warn of or remedy the uneven surface.

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[3] *See Hancock*, 381 S.C. at 331, 673 S.E.2d at 803 (noting an uneven surface in a parking lot may constitute an open-and-obvious danger).

Fall safety expert Steve Hunt testified at trial that any elevation change under four inches in height, such as the sloped portion of the curb ramp, is difficult to see and can constitute a tripping hazard. Hunt further explained:

> [I]t's more important here [at the entrance] than it is there [further down the sidewalk]. Why? Because we're walking into the entranceway of a store, where you [have] got doors, where you [have] got people coming and going and your eyes are focused on what you're going to be doing when you come in that door, not looking down from your field of vision.

Hunt testified that painting a curb yellow is a means of warning customers of the elevation change and acknowledged that although warnings do not always prevent accidents from occurring, painting a curb "can make a difference." Further, Ms. Fountain testified that at the time of her fall, she was looking ahead and not down at her feet and that if the raised curbing at the ramp had been painted yellow, she would have perceived the elevation change.

There is no evidence in the record that either Fred's or Wildevco warned of or attempted to remedy the trip hazard identified by their own safety expert, despite the condition existing for almost five years before the accident occurred. *See Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971) ("The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care."). In light of this failure of proof, we find it was error to conclude Fred's and Wildevco were without fault. Accordingly, we reverse and find Fred's and Wildevco were not entitled to equitable indemnification.

III.

In sum, Fred's and Wildevco failed to establish they were without fault in the Fountains' premises liability action. As a result, we reverse the court of appeals' finding that Fred's and Wildevco were without fault.[4]

[4] Because of our disposition, the court of appeals' decision to remand the matter to the circuit court for further proceedings regarding attorney's fees and costs is vacated.

REVERSED

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of H. Bright Lindler, Respondent.

Appellate Case No. 2021-001511

Opinion No. 28087
Submitted February 11, 2022 – Filed March 2, 2022

DISBARRED

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Jamie E. Wilson, both of Columbia, for the Office of Disciplinary Counsel.

Barbara Marie Seymour, of Clawson & Staubes, LLC, of Columbia, for Respondent H. Bright Lindler.

PER CURIAM: By order of the Disciplinary Hearing Commission of the North Carolina State Bar dated December 3, 2021, Respondent was disbarred by consent after admitting to misappropriating client settlement funds, willfully failing to pay state and federal income taxes for six and seven years respectively, and failing to remit federal employment taxes for thirty-seven quarters from 2008 to 2020. Respondent timely reported this matter to the Office of Disciplinary Counsel (ODC). Thereafter, the North Carolina order was forwarded to this Court by ODC on December 22, 2021. Pursuant to Rule 29(b), RLDE, ODC and Respondent were notified by letter that they had thirty days to inform the Court of any claim that imposition of the identical discipline is not warranted. Respondent filed a response on January 20, 2022, essentially arguing his misconduct warrants "substantially different discipline in this state." Rule 29(d)(4), RLDE, Rule 413, SCACR.

Given Respondent's consent to disbarment in North Carolina and his admitted misappropriation of client funds and criminal tax-related misconduct, we find disbarment is the appropriate sanction to impose as reciprocal discipline.[1] Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and he shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of this Court.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[1] Willful failure to pay state or federal income taxes constitutes a misdemeanor. 26 U.S.C. § 7203; N.C. Gen. Stat. § 105-236(a)(9) (2019). Willful failure to collect, account for, and pay federal employment taxes is a felony. 26 U.S.C. § 7202.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Adam Rowell, Appellant.

Appellate Case No. 2018-000022

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5832
Heard September 22, 2020 – Filed July 21, 2021
Previously Withdrawn, Substituted and Refiled August 25, 2021
Withdrawn, Substituted, and Refiled March 02, 2022

AFFIRMED

Billy J. Garrett, Jr., of The Garrett Law Firm, PC, Carson McCurry Henderson, of The Henderson Law Firm, PC, Jane Hawthorne Merrill, of Hawthorne Merrill Law, LLC, and Clarence Rauch Wise, all of Greenwood, all for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

LOCKEMY, A.J.: Adam Rowell appeals his convictions for felony driving under the influence (DUI) resulting in death and felony DUI resulting in great bodily injury. On appeal, Rowell argues the trial court abused its discretion in admitting blood samples into evidence without the proper chain of custody and because the samples were taken (1) after 50% of Rowell's blood volume was replaced, and (2) after 150% of Rowell's blood volume was replaced. Rowell also asserts the trial court erred in failing to conduct an evidentiary hearing with a juror who failed to disclose his pending criminal charges during voir dire. We affirm.

FACTS/PROCEDURAL HISTORY

On November 15, 2014, Rowell was in a head-on automobile accident, which seriously injured Matthew Sanders and killed Jeremy Cockrell. Cockrell was driving a red pickup truck with Sanders in the passenger seat, and Rowell was in a dark blue pickup truck. Following the collision, Rowell was indicted for felony DUI resulting in death and felony DUI resulting in great bodily injury.

During voir dire, the trial court asked, "[Has] any member of the jury panel or any member of your immediate family members or close personal friends ever been arrested and charged with any criminal offense through whatever state, local or federal law enforcement agency?" The trial court asked another nine questions before asking the jurors to approach the bench if any of the questions applied to them. Juror 164 did not respond and was seated on the jury.

At trial, Sanders testified he and Cockrell were driving to Greenwood when Rowell's truck crashed into them. Cockrell died from blunt force trauma at the scene. Officer Kelly Anderson, a member of the Multidisciplinary Accident Investigation Team (MAIT), explained the collision occurred because Rowell's truck drifted into Cockrell's lane. According the MAIT investigation, one second prior to the collision, Rowell was traveling at sixty-nine miles per hour and Cockrell's truck was traveling at twenty-four miles per hour.

Emergency responders testified they could smell alcohol when they arrived. Open and unopened beers were in Rowell's truck, spilled alcohol was on Rowell's floorboard, and multiple beer cans were on the ground near the collision. Rowell, who was also seriously injured in the collision, received 2000 milliliters of intravenous (IV) fluid and a 500 milliliter blood transfusion on site, and was airlifted to Greenville Memorial Hospital. The flight records show the helicopter arrived at the hospital at 8:59 p.m.

The trial court held an in camera chain of custody hearing to address whether blood drawn from Rowell when he arrived at the hospital (Sample A) was admissible. Angela Waites, the flight nurse, stated it took twenty-four minutes to get Rowell to Greenville Memorial Hospital. She testified she observed Amanda Baker, an emergency room (ER) nurse, draw Sample A and believed it was drawn from Rowell's right arm because Baker was standing on Rowell's right-hand side.

Nurse Baker testified she did not recall Rowell as a patient because she cares for and draws blood samples from hundreds of patients. She explained that Rowell's medical documentation indicated Dr. Bradley Snow took Sample A from a central line and handed it to her. Nurse Baker testified that after blood is drawn from a central line, a technician takes it to the lab. Bill Evans was the technician listed on the medical records. Rowell's medical records indicated his blood was drawn at 9:08 p.m.; however, the hospital's audit trail indicated it was drawn at 8:54 p.m.

Robert Smith, the lab technician at Greenville Memorial Hospital, testified that according to the audit trail for Sample A, he received it in the lab at 9:24 p.m. Smith did not remember receiving this sample specifically because of the large number of specimens he regularly tested. He testified it was hospital policy to hand-deliver ER specimens to the lab and test them right away.

Dr. John Reddic, an expert in clinical chemistry from Greenville Memorial Hospital, testified the hospital's audit trail showed Nurse Baker drew Sample A and Robert Smith received it for testing. According to Reddic, Sample A showed a blood alcohol concentration (BAC) between .175 and .189. Dr. Reddic noted Sample A was controlled and handled within the hospital's normal protocol.

Rowell argued the conflicting time reports in the medical records suggested there were two separate blood draws, one at 8:54 p.m. and one at 9:08 p.m. However, the State asserted there was only one audit trail for blood and the records did not reflect a second draw. The trial court ruled the State established the chain of custody, the audit trail reflected an 8:54 p.m. blood draw, and a discrepancy in the notation of the time of the blood draw did not render the evidence inadmissible. During trial, the relevant medical witnesses testified similarly to their in camera testimony.

Dr. Reddic testified that a "clock slop" time discrepancy of several minutes can occur where records have been created based on clocks that were not synced. He also explained there is a lag time between when a doctor orders a blood draw, the

drawing of the blood, and the subsequent transport of the blood draw to the lab, and "thirty minutes is appropriate."

Dr. Snow, Rowell's surgeon, testified that during surgery, Rowell received 3,150 milliliters of blood, 360 milliliters of plasma, 3,000 milliliters of saline, and 3,000 milliliters of Plasma-Lyte. He stated 53% of Rowell's blood was replaced and he would have died without the transfusion.

After Rowell's surgery, Officer Smith acquired a search warrant for Rowell's blood (Sample B). Rowell objected to the admission of Sample B, arguing that when it was taken, 52% of his blood had been replaced and a BAC test of that blood would be unreliable. The trial court held another in camera hearing.

Dr. Jimmie Valentine, a defense expert, testified that when Sample B was drawn from Rowell, he had received fluids that totaled 161.7% of his blood volume. He explained Sample B was not an accurate indication of what Rowell's blood was like during the collision. He stated that "any value that one would find or try to attach to [Sample B] has very little scientific meaning because of th[e] volume that [went] into him." Dr. Valentine explained Sample B included 4.9 milligrams per liter of Benadryl, which was a toxic dose, and Rowell's medical records indicated the hospital did not give him Benadryl. Further, he explained Sample B had acetones, which was indicative of someone who was diabetic and Rowell's medical records did not indicate he had diabetes. Dr. Valentine testified the methodology and science used in the BAC testing was reliable; however, he questioned the validity of the results.

Dr. Valentine stated the BAC from Sample B was consistent with Rowell's blood having been diluted by transfusions. He explained a person with a BAC of .18 would normally have a BAC of .12 after four hours and that the dilution of the blood due to a transfusion could explain why Sample B's BAC was .09. Dr. Valentine agreed that Sample B would have included a percentage of Rowell's blood that had remained in his system after the transfusion.

The trial court held that because Dr. Valentine did not attack the validity of the methodology of the test, Sample B was admissible. Specifically, the trial court clarified it did not find the results reliable, only that the methodologies and procedures used in the testing were reliable.

Rowell testified he did not have diabetes, nor did he use Benadryl. He stated he drank twenty-four ounces of beer approximately four hours before the accident. The jury convicted Rowell of felony DUI resulting in death and felony DUI resulting in great bodily injury. The trial court sentenced him to thirteen years' imprisonment. After trial, Rowell learned Juror 164 had been arrested and charged with a crime in Greenwood County shortly before his trial. Rowell moved for a new trial, arguing—among other things—that Juror 164 failed to disclose his arrest during voir dire. However, Rowell did not request that the trial court conduct an evidentiary hearing.

At the hearing on Rowell's motion for a new trial, he argued he would not have seated Juror 164 on the jury had he known of his arrest because the juror could have had an incentive to help the State. Rowell stated he did not contact Juror 164 because Juror 164 was represented by counsel, who told them Juror 164 would not be speaking with them. Rowell did not request a separate evidentiary hearing on the juror issue and did not subpoena Juror 164. Following the hearing and before the trial court issued an order, Rowell sent an email to the trial court requesting a hearing with the juror.

The trial court denied Rowell's motion for a new trial. The trial court stated that on its face, the question asked during voir dire was comprehensible to the average juror; however, the court noted that it was the first of ten questions the juror had to remember and the amount of time between question and answer "could be confusing to the average juror." The trial court further opined because an arrest is a public arrest record, the juror did not conceal his arrest. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by admitting Sample A into evidence because the chain of custody was insufficient?

2. Did the trial court err by admitting Sample A into evidence because 50% of Rowell's blood had been replaced when Sample A was taken?

3. Did the trial court err by admitting Sample B into evidence because 150% of Rowell's blood had been replaced when Sample B was taken and the sample contained Benadryl and acetones?

4. Did the trial court err by failing to conduct an evidentiary hearing regarding a juror who failed to disclose his pending criminal charges?

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only . . . ." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion." *Id*. "The denial of a motion for a new trial will not be reversed absent an abuse of discretion." *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993).

LAW/ANALYSIS

I. Chain of Custody for Sample A

Rowell argues the inconsistency between the time that he landed at Greenville Memorial Hospital and the time Sample A was taken established it was factually impossible for Sample A to be Rowell's blood. He asserts the chain of custody was not complete because Bill Evans walked Sample A from Nurse Baker to the lab but never testified. Rowell also asserts an unidentified person brought the blood from the ER to the lab and the sample was unaccounted for during a period of thirty minutes. We disagree.

Our supreme court has held, "a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as *practicable*." *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (emphasis added) (quoting *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)). "Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." *Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754.

Our supreme court has stated it has "never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case." *Id.* at 93, 708 S.E.2d at 754 (quoting *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005)). "[W]e have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." *Id.* at 95, 708 S.E.2d at 755.

"Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." *Id.* at 94, 708 S.E.2d at 754 (quoting *Cochran*, 364 S.C. at 629 n.1, 614 S.E.2d at 646 n.1). "The trial [court's] exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Id.* at 94-95, 708 S.E.2d at 754-55 (omission in original) (quoting *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir. 1971)).

"In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody." *Id*. at 94, 708 S.E.2d at 754.

We hold the trial court did not err in admitting Sample A. During the in camera hearing, the State presented evidence that (1) Sample A was drawn by Dr. Snow via a central line; (2) it was handed to Nurse Baker; (3) Bill Evans was on duty and walked Sample A to the lab, and (4) Robert Smith, the lab technician, received the blood and facilitated the testing. This evidence identified who was in possession of Sample A. Although Evans did not testify and most of the witnesses in the chain did not recall these specifics, the State established through testimony and documentation Sample A's chain of custody as far as practicable given the circumstances.

Further, the circumstances surrounding the preservation and custody of Sample A diminished the likelihood it was tampered with. *See Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 ("The trial [court's] exercise of discretion must be reviewed in the light of the following factors: . . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." (omission in original) (quoting *De Larosa*, 450 F.2d at 1068)). Here, Sample A was collected for medical purposes to save Rowell's life and not for any investigative purpose, which makes it unlikely it was tampered with. *Id.* at 95, 708 S.E.2d at 755 ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be."); *cf. Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) ("The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment.").

As to the timing of the draw for Sample A, the inconsistency within the medical records and flight records regarding the landing time and the time of the blood

draw did not establish either a break in the chain of custody or that the blood was from someone else. The factual circumstances of this case reflect that the exact syncing of times between medical and flight personnel records was unlikely. A brief time discrepancy between organizations does not alter the chain of custody analysis because each person who possessed the sample was identified. *See Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754 ("Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." (quoting *Cochran*, 364 S.C. at 629 n.1, 614 S.E.2d at 646 n.1)); *State v. Patterson*, 425 S.C. 500, 508, 823 S.E.2d 217, 222 (Ct. App. 2019) ("Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible."). This discrepancy, as well as the discrepancy of thirty minutes between drawing the blood and delivery to the lab, goes to the weight and credibility of the evidence, not its admissibility. *See State v. Johnson*, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995) (holding a two-day discrepancy in the chain of custody regarding the dates an investigator turned in drug evidence to the evidence custodian did not establish the drugs were inadmissible); *id.* ("A reconciliation of this [two-day] discrepancy was not necessary to establish the chain of custody, but merely reflected upon the credibility of the evidence rather than its admissibility."). Therefore, the trial court did not abuse its discretion in admitting Sample A into evidence.[1]

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[1] The State argues the trial court did not err in admitting Sample A into evidence based on our supreme court's opinion in *Jamison v. Morris*, 385 S.C. 215, 227, 684 S.E.2d 168, 174 (2009) (stating that when a blood sample is drawn at a hospital for medical purposes as part of its medical treatment of a patient, the results would have been a part of the patient's medical record and presumed reliable as a business record regardless of a chain of custody). Although we acknowledge the State submitted a supplemental citation to *Jamison* prior to oral argument and raised this argument in its petition for rehearing, the State did not raise this argument to trial court or in its appellate brief. Thus, we decline to address this argument on the merits. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief."); *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

II. Blood Transfusion and Testing of Sample A

Rowell argues the trial court erred in admitting Sample A into evidence because roughly half his blood was replaced with liquids prior to the hospital's blood draw. He asserts the State failed to establish the reliability of the BAC test after he received a transfusion. We find this issue unpreserved for our review.

Rowell never raised to the trial court the issue that a blood transfusion caused Sample A's BAC testing results to be unreliable. At trial, Rowell extensively challenged the chain of custody for Sample A; however, he never objected to Sample A's admission on the basis that the test was unreliable because he had previously received 500 milliliters of blood and 2000 milliliters of IV fluids. Thus, this issue was not preserved for appellate review because this argument was not raised to and ruled on by the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

III. Blood Transfusion and Testing of Sample B

Rowell argues the trial court erred in admitting Sample B into evidence because more than 150% of his blood had been replaced by blood and other fluids before Sample B was drawn. Even if the admission of Sample B was so unreliable that its admission was error, this error was harmless. The jury received clear evidence of Rowell's intoxication from Sample A, the evidence of open containers in his truck, the alcohol spilled on the floor of his truck, and testimony that his breath smelled of alcohol at the accident scene. *See State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result."); *State v. Howard*, 296 S.C. 481, 485, 374 S.E.2d 284, 286 (1988) ("Where guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than that the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result.").

IV. Juror Concealment

Rowell argues the trial court erred in denying his request for an evidentiary hearing as to Juror 164's failure to disclose his pending criminal charges during voir dire.

Rowell asserts the trial court abused its discretion in failing to hold a hearing because without such hearing, the trial court could not determine the basis for Juror 164's failure to answer truthfully. We disagree.

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "Whether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004). "The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." *State v. Kelly*, 331 S.C. 132, 147, 502 S.E.2d 99, 106 (1998) (quoting *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)). "If the court finds no intentional concealment occurred, the inquiry ends there." *Lynch v. Carolina Self Storage Ctrs., Inc.*, 409 S.C. 146, 155, 760 S.E.2d 111, 116 (Ct. App. 2014).

In *Woods*, our supreme court held,

> intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

345 S.C. at 588, 550 S.E.2d at 284.

We find the trial court did not abuse its discretion in failing to conduct an evidentiary hearing with Juror 164. *See South*, 310 S.C. at 507, 427 S.E.2d at 668

("The denial of a motion for a new trial will not be reversed absent an abuse of discretion."). Nothing required the trial court or a party to hail a juror into court to testify on the issue of juror misconduct under the circumstances presented here. *See State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (holding the trial court may, in its discretion, consider juror affidavits on the issue of premature jury deliberations and if the trial court finds the affidavits credible and indicative of misconduct it should hold an evidentiary hearing to assess whether such deliberations occurred); *Lynch*, 409 S.C. at 159 n.2, 760 S.E.2d at 119 n.2 (noting "a trial court is not obligated to take juror testimony when the court determines it can rule" on the misconduct issue without it); *id.* at 155, 760 S.E.2d at 166 (stating "[i]f the court finds no intentional concealment occurred, the inquiry ends there"). In *Woods*, our supreme court rejected a juror's testimony as to why her failure to respond to two questions asked during voir dire was unintentional. 345 S.C. at 589-90, 550 S.E.2d at 285. There, the juror failed to disclose that she worked as a volunteer victims' advocate for the prosecuting solicitor's office and testified during an evidentiary hearing that she either did not hear the questions asked during voir dire or did not realize they applied to her. *Id.* at 585-87, 550 S.E.2d at 283-84. Despite this testimony, our supreme court found the juror's failure to respond was intentional because the questions at issue "were reasonably comprehensible and should have elicited a positive response from [the j]uror." *Id.* at 589-90, 550 S.E.2d at 285.

Here, after reviewing the voir dire proceedings with the court reporter to ensure it correctly recalled the sequence of events, the trial court concluded that the question, although straightforward when viewed in isolation, was presented in a way that could be confusing to the average juror. The trial court therefore concluded Juror 164's failure to disclose his pending criminal charges was unintentional. Because the trial court's conclusion was based upon its own observations of voir dire, the record supports the trial court's conclusion, and Juror 164's testimony was not necessary for the trial court to rule on the issue. Thus, we find the trial court did not err in failing to conduct an evidentiary hearing and did not abuse its discretion in denying Rowell's motion for a new trial based on Juror 164's concealment.

CONCLUSION

Based on the foregoing, we find the trial court did not err in admitting Sample A into evidence and any potential error as to Sample B was harmless. Further, we

find the trial court did not abuse its discretion in denying Rowell's motion for a new trial based on Juror 164's concealment. Accordingly, Rowell's convictions are

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Christopher Hart, Appellant.

Appellate Case No. 2017-001291

Appeal From Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5896
Heard December 12, 2019 – Filed March 2, 2022

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Caroline M. Scrantom, all of Columbia, for Respondent.

MCDONALD, J.: John Christopher Hart appeals his murder conviction, arguing the circuit court erred in (1) allowing the State to make comments in closing argument that could only arouse the passions and prejudices of the jury; (2) admitting into evidence incriminating statements Hart made in response to

questioning when he was in custody but had not yet been given *Miranda* warnings; and (3) denying Hart's motion for a continuance despite the State's discovery tactics. We affirm Hart's conviction.

Facts and Procedural History

Shortly before midnight on April 10, 2013, Robert Greenberg was driving his tow truck down Greenwood Drive in Lexington County, when he heard what he believed to be a gunshot. Greenberg found Paula Justice (Victim) bleeding and unresponsive on the side of the road. Victim was later pronounced dead at Lexington Medical Center. An autopsy revealed she died from a gunshot wound to the head.[1]

The Lexington County Sheriff's Department determined Victim, a confidential informant for Richland County,[2] lived at the America's Value Inn and had recently called and texted one of her cell phone contacts listed as "KG." The Sheriff's Department considered KG a potential suspect because patrons at the Inn identified him as the last person seen with Victim on the day she was killed. Investigating officers ultimately identified "KG" as Hart and issued a warrant for Hart's arrest.

On April 19, 2013, Hart was found and taken into custody in Utica, New York, on the murder warrant.[3] When Lexington County investigators learned Hart was in custody, Sergeant Roy Mefford contacted the agent in New York to "get an idea of Mr. Hart's demeanor and whether or not he was going to speak with me." The next

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[1] Two shell casings from a .45 caliber semiautomatic handgun were recovered at the crime scene.

[2] Approximately one year before her death, Victim and Jeremy "Munchkin" Washington were arrested and charged with trafficking cocaine, twenty-eight to one hundred grams. Victim agreed to cooperate against Washington and pled guilty to a lesser trafficking charge (ten to twenty-eight grams). Her sentencing was deferred and she was released on bond; however, she was killed before she was able to testify against Washington on the drug trafficking charge.

[3] Hart fled to New York, where he has family, because "[he] was nervous and [he] went to the farthest spot [he] could get to."

day, officers Sean Spivey and Christopher Stout went to New York to interview Hart and transport him back to Lexington County.

A Lexington County Grand Jury indicted Hart for Victim's murder. At Hart's jury trial, the State presented evidence from three cell phones, including a 10:27 p.m. text from Victim to Hart indicating she was waiting for him to arrive on the night she was murdered.

Tevin Deloach testified for the State, identifying himself as Hart's driver on the night of Victim's murder. According to Deloach, he drove Hart to meet Victim in a Waffle House parking lot, and Hart told Deloach "he was gonna set her up to kill her." After they picked up Victim, Hart received a phone call from someone instructing him to "hurry up." Deloach drove the pair to a dirt road and parked the car, and Hart exited with Victim. The two "got out of the car and walked up the road and [Deloach] heard the gunshot and [Hart] ran back to the car with the gun in his hand." Hart then yelled for Deloach to "go, go, go" and called someone on his phone to report "it was done." Hart told Deloach he killed the woman because she was a confidential informant "and Munchkin [Washington] hired him to kill her so he wouldn't have to go to jail."

A jailhouse informant, Deandre Staley, also testified for the State, claiming Hart told him in the recreation yard that he "bodied the bitch" because "she was a CI" who was getting others in the community in trouble. Hart told the informant that Victim had set up Munchkin, a West Columbia drug supplier whose real name was Jeremy Washington. Hart wrote Staley a jailhouse letter communicating Hart's belief that Staley would not "snitch on him."

In June 2016, fifteen-year-old Alex "A.J." Wallace gave a written statement to Deputy Spivey, in which he confessed to shooting Victim because she owed him money. Although Wallace said Hart was with him at the time of Victim's murder, he claimed Hart "had no idea at all" that the shooting was to occur. Wallace's confession contained numerous inconsistencies, including a misidentification of the murder weapon and Victim's clothing, and no mention of Tevin Deloach.[4]

[4] During the State's case, Spivey testified he was unable to corroborate Wallace's confession and that he excluded him as a possible "KG" suspect due to the many inconsistencies in his story.

At Hart's trial, Wallace testified he grew up within "walking distance" from where Victim was found and killed her because she owed him $1250 and refused to answer his phone calls. Wallace claimed he shot Victim in the back of the head and then ran back to his house.[5] In addition to confessing that he murdered Victim, Wallace testified Hart was unaware he intended to kill her. Finally, Wallace denied he was confessing because Hart asked him to "take" the charge for Victim's murder. On cross-examination, Wallace denied telling a friend, Terrance Flagler, that he was going to take Hart's charge and that he had been studying the discovery in Hart's case in preparing to testify.

Hart testified in his own defense. Although Hart admitted he was present at the time and place of the murder—and that he picked up and disposed of the handgun—he claimed he did not know Wallace intended to shoot and kill Victim. Hart did not deny his involvement in selling drugs and testified he knew he was the last person seen with Victim before her death. However, he denied ever confessing to shooting her or threatening anyone to keep silent. He further denied receiving instructions from Washington, his drug supplier, about the need for someone to "take out" Victim, or reporting to Washington that the task "was done." Hart claimed he fled to New York because he did not want to be asked to snitch about Wallace's involvement in the killing.

Flagler, who was Wallace's co-defendant in a home invasion murder case, testified for the State in reply. According to Flagler, while they were in jail, Wallace told Flagler that Hart "brainwashed" him, and convinced him to take his charge.

Following the five-day trial, the jury found Hart guilty of murder, and the circuit court sentenced him to fifty years' imprisonment.

Standard of Review

"A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be

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[5] At the time of Hart's trial, Wallace was charged in a separate murder, in which he was accused of shooting a homeowner in the head during a home invasion burglary.

disturbed." *State* v. *Northcutt,* 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial." *Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." *Id.* at 324, 468 S.E.2d 620, 624–25.

"The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of the totality of the circumstances surrounding the waiver" of the right to remain silent. *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (quoting *State v. Doby*, 273 S.C. 704, 258 S.E.2d 896 (1979)). "On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *Id.* "Part of the State's burden during [a suppression hearing] is to prove that the statement was voluntary and taken in compliance with *Miranda*." *State v. Creech*, 3l4 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct App. 1993).

Law and Analysis

I. Closing Arguments

Hart argues the circuit court erred in allowing the State to argue in closing that Hart was "pure evil," and "evil walks the streets, evil lives in Lexington County; evil is in this courtroom." While this is strong language, "[t]he relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881. "The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial." *Id.*

In its closing argument, the State defined "murder" for the jury:

> Murder is the unlawful killing of another with malice aforethought, express or implied. Unlawful killing just means it's not justified, it's not self-defense. Malice aforethought, express or implied. Express means you say

> it, implied means by your actions. Aforethought means it can be premediated like in this case or it can be just at the moment you pull the trigger. But right before and at the time the trigger is pulled[,] you meant to do it and you meant for her to die. Malice. That's a dark word. That's an evil word. It's a word that talks about, in this case, an execution. Not just ill will between two people, not an argument between somebody that went bad. Not even a robbery that goes bad, but pure evil. Evil walks the streets. Evil lives in Lexington County.

Hart objected, stating, "The evil characterization is improper." However, the circuit court ruled it would allow the malice argument and definition because "[m]alice is an element the State's got to prove. [The prosecutor] can argue what he thinks he's proved."[6] The State continued its closing argument by again characterizing Hart as evil: "Evil is in this courtroom. John Christopher Hart, premediated, filled with malice with an evil heart, put a gun to the back of [Victim]'s head, pulled the trigger[,] and left her for dead."

The use of such descriptive language in characterizing a defendant can, when considered in the context of the entire record, result in a denial of due process requiring a new trial. For example, in *State v. Day*, 341 S.C. 410, 422, 535 S.E.2d 431, 437 (2000), the State repeatedly referenced the defendant's "Outlaw" tattoo, not to establish identity, but to emphasize the defendant's criminal nature. Considering the repeated characterization, our supreme court explained, "[e]vidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant." *Id.* However, "the State did not use Day's tattoo or nickname for any purpose other than to attack his character." *Id.* at 422, 535 S.E.2d at 437–38. "The solicitor repeatedly referred to Day as an 'outlaw' in her closing argument in order

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[6] In *State v. Gallman*, 79 S.C. 229, 60 S.E. 682, 686 (1908), our supreme court approved the following definition of malice in the context of a murder charge: "It is a wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and in this case it would be an indication to do a wrongful act which resulted in the death of this man, without sufficient legal provocation, or just excuse, or legal excuse."

to paint a picture of Day as someone who was proud of his status as an outlaw, who felt he was above the law, and who was able to deceive law enforcement by hiding evidence and concocting a story about self-defense." *Id.* at 422–23, 535 S.E.2d at 437–38. In concluding "the use of the term 'outlaw' permeate[d] the solicitor's closing argument, infect[ed] the trial with unfairness, and deprive[d] Day of due process of law," the court noted the solicitor used the word "outlaw" twenty three times during her closing. *Id.* at 423–24, 535 S.E.2d at 438.

Similarly, in *State v. Hawkins*, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the supreme court held the State's forty plus references to the defendant's nickname, "Mad Dog," during the trial's guilt and sentencing phases was "excessive and repetitious use of the term denied appellant the right to a fair trial and infected the sentencing proceedings with an arbitrary factor, in violation of the Eighth Amendment to the United States Constitution and the laws of South Carolina." *But see State v. Tubbs*, 333 S.C. 316, 322, 509 S.E.2d 815, 818 (1999) (holding the State's seven references to defendant's nickname, "Cobra," during closing arguments "did not infect the entire trial with unfairness because it was only used seven times, and one of those times was used to establish identity").

Here, the State used the word "evil" six times in its closing argument. Despite the State's claim that it used evil to define malice, the record reflects that five out of the six times the State referenced "evil" in closing, it was to paint Hart as a person with a propensity to kill—someone the jury should be afraid to have living in their community. *See e.g.*, *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) ("The solicitor introduced impermissible evidence of 'devil worship' and Mafia membership to suggest that Mitchell was a bad person with a propensity to commit the crime. We find a reasonable probability that, had defendant's character not been improperly placed into issue, the outcome would have been different.").

Nevertheless, our review of the record convinces us that the State's characterizing Hart as "evil" did not prejudice him, nor did the solicitor's comments "so [infect] the trial with unfairness as to make the resulting conviction a denial of due process." *Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881; *see also Copeland*, 321 S.C. at 324, 468 S.E.2d at 624 (holding a solicitors argument "may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it"). The record here supports the State's theory that Hart executed Victim because Washington directed him to kill

her in retaliation for her agreement to cooperate against Washington in her work as a confidential informant for Richland County. Because malice is a statutory element the State must prove to sustain a murder conviction, the circuit court did not abuse its discretion in addressing the propriety of the State's closing argument under the circumstances of this case. *See Copeland,* 321 S.C. at 324, 468 S.E.2d at 624 ("The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant.").

II. Voluntary Incriminating Statements

Hart next argues the circuit court erred in admitting into evidence incriminating statements he gave in response to questioning by Sergeant Mefford because although Hart was in custody, he had not yet been given *Miranda* warnings.

At a pretrial *Jackson v. Denno*[7] hearing, Sergeant Mefford testified that he called the case agent in New York to "get an idea of Mr. Hart's demeanor and whether or not he was going to speak with me." Instead, the agent offered to put Hart on the phone. Mefford admitted he did now know whether anyone had *Mirandized* Hart before this telephone conversation. On the call, Mefford introduced himself to Hart, asked Hart if he understood what he was being charged with, and asked if Hart would be willing to speak to investigators from the Sheriff's Department if they were to come to New York. When Hart tried to ask about details of the case, Mefford explained he would not discuss any evidence over the phone. Hart then interjected, "How do you charge me with murder? You found a gun with my fingerprints on it?"[8]

After hearing Mefford's testimony in camera along with the arguments of counsel, the circuit court ruled it would allow Hart's statement to Mefford into evidence, finding it was a "voluntary comment" and "not responsive" to Mefford's inquiry.

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[7] 378 U.S. 368, 444 (1964) (holding "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

[8] Although Hart admitted to picking up the gun from the crime scene and disposing of it, law enforcement was unable to recover any fingerprints from the weapon after they recovered it from a pond in Richland County.

The United States Supreme Court addressed what constitutes an "interrogation" for *Miranda* purposes in *Rhode Island v. Innis,* 446 U.S. 291 (1980). In formulating a definition of interrogation, the Court noted "the concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Id.* at 299. The Court concluded "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300–01. The Court went on to explain the following regarding interrogation:

> That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Id. at 300–02. Turning to the facts of *Innis*, the Court concluded the respondent was not "interrogated" within the meaning of *Miranda*:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.
>
> Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

Id. at 302–03.

In *State v. Howard*, 296 S.C. 481, 486, 374 S.E.2d 294, 286–87 (1988), our supreme court applied *Innis* to determine whether a jailed defendant had been interrogated when he volunteered incriminating information to his federal probation officer, Heyward Polk, prior to being advised of his *Miranda* rights. In concluding Polk did not interrogate Howard, the court explained:

> There is no indication in the record that Polk expressly questioned Howard. Neither Howard nor Polk testified that questioning occurred during this visit. Likewise, we find that Polk's actions were not reasonably likely to elicit an incriminating response from the suspect. Howard, feeling remorseful about his criminal activities, volunteered the information without any solicitation from

> Polk. Howard revealed the other crimes to Polk because he trusted him, and believed Polk could help him consolidate the charges to reduce the punishment.

Id. at 489, 374 S.E.2d at 288; *see also State v. Primus*, 312 S.C. 256, 258, 440 S.E.2d 128, 128 (1994) ("The first statement appellant made was 'I didn't do anything.' Appellant 'blurted' out this statement when he first saw the police officer. Because appellant was not being subjected to any interrogation at this point, *Miranda* is inapplicable and the trial judge committed no error in not suppressing this statement."); *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989) (holding that "[r]eading or attempting to read the *Miranda* rights form would be communication normally incident to arrest" and does not constitute interrogation); *State v. Thompson*, 276 S.C. 616, 623, 281 S.E.2d 216, 220 (1981) ("Here, the appellant rather than the officer initiated the conversation. Finger-printing is an action normally attendant to arrest and custody. The answers the officer gave to the appellant's questions were not such that he should have known they were reasonably likely to elicit a response from the appellant. Therefore, appellant's *Miranda* rights were not violated.").

The State agrees that Hart was not given his *Miranda* rights prior to or during his telephone conversation with Sergeant Mefford. It is also uncontested that Hart was "in custody" at the time of his statement to Mefford. Despite Hart's custodial status, we find the circumstances of the phone call did not rise to the level of custodial interrogation; Mefford was merely trying to work out the logistics of coming to New York to question Hart and transport him back to Lexington County. Furthermore, Mefford's inquiry was unlikely to evoke an incriminating response—he told Hart he would not discuss evidence over the phone. As Hart was not subjected to the "functional equivalent" of questioning, we find no error in the circuit court's admission of Hart's voluntary, non-responsive statements.

III. Motion for Continuance

Hart next argues the circuit court erred in denying his motion for a continuance because the State continuously produced untimely discovery in the month leading up to trial, and the State admitted it "had been careful what it turned over." Court's Exhibit 3 is a disk containing copies of the discovery defense counsel was provided from April 2017 up until the trial began on May 22, 2017. It includes potentially exculpatory information, such as an FBI report documenting an interview with

"Munchkin" Washington on November 9, 2016, in which Washington stated he "did not hire or ask anyone to kill [Victim]," but "advised that he has stated openly on numerous occasions that he wanted [Victim] dead." The FBI report further notes, "Washington added, 'I have said that I wish someone would murder that bitch.' Washington also advised that others have stated that they were going to 'kill that bitch,' referring to [Victim]."

Before the circuit court, Hart argued,

> But, again, when you look at Court's Exhibit Number 3, the CD that's provided—I mean we can take the time and we can go through it, but if you start to look at the discovery that's been presented starting on April 12th all the way up until the trial date and you start actually going through these discovery packets, there are statements of witnesses that had been in the State's possession for months to four years that had not been turned over until April. Unless the State's gonna say they had turned it over to a previous attorney. I mean, this—and that's why I marked it as—the CD is all—the amount of discovery. There's two different cases. There's the case before April and the case after April and the amount of discovery has changed the nature of the case, specifically all the discussions with Jeremy Washington. In April we find that—we get the FBI statement saying that he doesn't know anything about the murder, he doesn't set it up, then we get another statement later, I think it's maybe May, I can pull it out, saying, well, maybe I do know something about it, I might have said something about paying money and drugs, but he never told me . . . .
>
> . . . .
>
> Okay, so on this Wednesday, a pre-polygraph interview. Let me be specific. In a pre-polygraph interview with this person with the FBI Wednesday of this week he says that he did hire John Hart and that he did—John Hart did confirm that he killed Paula Justice and that now as of

> yesterday I found out this morning Jeremy Washington has been charged with murder. That's a pretty big chain of events starting from last Wednesday.

Hart contends this was a highly unusual situation in that Washington was brought back to South Carolina from California, where he was being held in federal custody, and charged as a co-defendant in Victim's murder the week before Hart's trial was set to begin. The circuit court agreed, noting,

> The Court: Washington. He's the one that's just recently been charged with murder because his story changed very, very recently. How does the State stand on that one issue? Because I'm guessing that was a total shock to the State that he finally decided to change his story.
>
> The State: We didn't know what he was gonna say until we got him here, Judge.
>
> The Court: So he wasn't talked to by the State until y'all carted him in here from California?
>
> The State: No. He denied involvement on the phone in California and then we had reason to believe that wasn't true and asked the U.S. Attorney to polygraph him, they sent a polygraph examiner out there to him, I guess, in April. I'm not sure if it was—April, I believe, sometime at the beginning of April, and that's when he started disclosing the story and that's when we worked on getting the writ and he just came here last Monday, so we had an opportunity to talk with him on Tuesday. He got his attorney appointed Friday.
>
> The Court: All right. Mr. Phillips, your request to continue the case is denied since we were ready in March. I understand there was some additional discovery provided. If when we get to whatever it is there's something that was lately provided in very recent order and you want to argue suppression—or on any of it

> because of late discovery, certainly I'm gonna give you some latitude on that, but it doesn't seem to me like there was much provided by the State recently other than the changed story of the—Washington. Is it Washington?
>
> Mr. Phillips: Washington.
>
> The Court: Is the co-defendant now?
>
> The State: He's not—well, now he is as of yesterday.
>
> The Court: But anyway there may be some evidence the State would attempt to introduce that you have a real good basis for suppression because of late discovery and I'm certainly gonna consider those very thoroughly, but I think the case is ready to be tried and should go forward, so respectfully, I'm [going to] deny that motion for a continuance.

Hart contends fundamental fairness dictated he be given additional time to prepare for trial after the State supplemented its discovery, arguing he did not have enough time to investigate the 2016 statement from Washington denying he hired anyone to kill Victim, admitting he wanted Victim dead, and confirming others made threats to kill Victim. However, months later—on the eve of trial—Washington inculpated Hart by admitting he hired Hart to murder Victim.

"The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice." *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996).

While the manner in which the State chose to provide discovery here was arguably improper, in light of the lack of resulting prejudice to Hart, we disagree that the circuit court abused its discretion in denying the continuance request. Hart was not

prejudiced by the State's late disclosure of Washington's November 2016 FBI statement because Hart had approximately a month prior to trial to investigate Washington's statement that others wanted to kill Victim. Any prejudice to Hart was occasioned by Washington in changing his story, implicating himself, and directly naming Hart as Victim's killer. The State was not responsible for Washington's deception or for the fact that Washington's attorney would not permit him to speak again on the matter once he was charged with Victim's murder. And in light of Washington's admission that he hired Hart to murder Victim, Washington's unavailability to testify likely inured to Hart's benefit.

Moreover, any late disclosure related to Washington did not hamper Hart's ability to present a third-party guilt defense to the jury—Wallace confessed to Victim's murder from the witness stand. The jury simply did not believe the teenager's "confession" or his claim that nobody forced him to take the charge for Hart. As Hart cannot demonstrate he was prejudiced by the late discovery, we find the circuit court did not abuse its discretion in denying his motion for a continuance.[9]

Conclusion

For the foregoing reasons, Hart's conviction is

AFFRIMED.

WILLIAMS, C.J. and HUFF, A.J. concur.

[9] Despite our finding on this issue, we note our concern with the State's argument that the "new, supplemental pages . . . were disclosed in April because Washington changed his story in April." The fact that Washington eventually changed his story and was only charged as a co-defendant in the murder shortly before Hart's trial did not alter the State's ongoing duty to timely supplement its discovery responses in compliance with Rule 5, SCRCrimP, and *Brady v. Maryland*, 373 U.S. 83 (1963).