OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

November 13, 2001

ADVANCE SHEET NO. 39

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2001-UP-481 State v. Kelly Walden Byrd
(York, Judge Henry F. Floyd)

2001-UP-482 State v. Timmy Douglas
(Cherokee, Judge Frank Eppes)

2001-UP-483 In the interest of: Latoya S.
(Richland, Judge Donna S. Strom)

2001-UP-484 State v. James Russell
(York, Judge Henry F. Floyd)

2001-UP-485 State v. Darryl Lamont Hunter
(Anderson, Judge Alexander S. Macauley)

PETITIONS FOR REHEARING

3263 - SC Farm Bureau v. S.E.C.U.R.E.	(2) Pending
3343 - Langehans v. Smith	Pending
3382 - Cox v. Woodmen	Pending
3393 - Vick v. SCDOT	Pending
2001-UP-212 - Singletary v. La-Z-Boy	Dismissed 11-6-01
2001-UP-409 - State v. David Hightower	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-421 - State v. Roderick Maurice Brown	Pending
2001-UP-424 - Boan v. Boan	Pending
2001-UP-425 - State v. Eric Pinckney	Pending
2001-UP-435 - State v. Ronald J. Huell	Pending
2001-UP-452 - Bowen v. Modern Classic Mtrs.	Pending

2001-UP-461 - Storage Trailers, Inc. v. Proctor Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson Pending

3271 - Gaskins v. Southern Farm Bureau Pending

3289 - Olson v. Faculty House (2) Pending

3299 - SC Properties & Casualty Guaranty Assn. v. Yensen (2) Pending

3307 - Curcio v. Caterpillar Pending

3310 - Dawkins & Chisholm v. Fields, et al. Pending

3314 - State v. Minyard Lee Woody Pending

3321 - Andrade v. Johnson Pending

3327 - State v. Peake Pending

3329 - S. C. Dept. of Consumer Affairs v. Rent-A-Center Pending

3330 - Richard Bowen v. Ann Bowen Pending

3332 - SC Farm Bureau Mutual Ins. Co. v. Kelly Pending

3333 - State v. Dennis Zulfer Pending

3335 - Joye v. Yon Pending

3338 - Simons v. Longbranch Farms Pending

3344 - Henkel v. Winn Pending

3345 - Cunningham v. Helping Hands Pending

3346 - State v. Thomas Ray Ballington Pending

3348 - Thomas v. Thomas Pending

3351 - Chewning v. Ford Motor Co.	Pending
3352 - Ex Parte Moore v. Fairfield	Pending
3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - State v. Leroy Wilkes	Pending
3356 - Keeney's Metal v. Palmieri	Pending
3358 - SC Coastal Conservation v. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3361 - State v. Tommy Lee James	Pending
3364 - SCDSS v. Mrs. H and Mr. H	Pending
3365 - State v. Laterrance Ramon Dunlap	Pending
3366 - Crafton v. Brown	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs	Pending
3372 - Dukes v. Rural Metro	Pending
3376 - State v. Roy Johnson, #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
3383 - State v. Jon Pierre PaCoste	Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-085 - Curcio v. Caterpillar	Pending

2001-UP-123 - SC Farm Bureau v. Rabon Pending

2001-UP-124 - State v. Darren S. Simmons (2) Pending

2001-UP-125 - Spade v. Berdish Pending

2001-UP-156 - Employer's Insurance of Wausau v. Whitaker's Inc., of Sumter Pending

2001-UP-159 - State v. Darnell Hunter Pending

2001-UP-160 - State v. Elijah Price, Jr. Pending

2001-UP-192 - State v. Mark Turner Snipes Pending

2001-UP-193 - Cabaniss v. Pizza Hut of America, Inc. Pending

2001-UP-232 - State v. Robert Darrell Watson, Jr. Pending

2001-UP-235 - State v. Robert McCrorey, III & Robert Dimitry McCrorey Pending

2001-UP-238 - State v. Michael Preston Pending

2001-UP-239 - State v. Billy Ray Jackson Pending

2001-UP-248 - Thomason v. Barrett Pending

2001-UP-249 - Hinkle v. National Casualty Pending

2001-UP-261 - San Souci Owners Association v. Miller Pending

2001-UP-292 - Franzello v. Bankhead Pending

2001-UP-298 - State v. Charles Henry Bennett Pending

2001-UP-300 - Robert L. Mathis, Jr. v. State Pending

2001-UP-304 - Jack McIntyre v. State Pending

2001-UP-321 - State v. Randall Scott Foster Pending

2001-UP-322 - Edisto Island v. Gregory Pending

2001-UP-323 - Goodwin v. Johnson Pending

2001-UP-325 - Hessenthaler .v Tri-County Pending

2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-365 - Gaither v. Blue Cross Blue Shield	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-383 - Rivera v. Columbia OB/GYN	Pending
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-389 - Clemson v. Clemson	Pending

PETITIONS - U. S. SUPREME COURT

2000-UP-738 State v. Mikell Anthony Pinckney	Pending

The Supreme Court of South Carolina

Stardancer Casino, Inc., Respondent,

v.

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, David P. Schwacke, in his official capacity as Solicitor for the Ninth Judicial Circuit, J. Al Cannon, Jr., in his official capacity as Sheriff for Charleston County, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department, Defendants,

of whom

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law

Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department are Appellants.

O R D E R

We grant the State's petition for rehearing to the extent it asks that we reconsider our original holding that 27 S.C. Regs. 117-190 (Supp. 2000) is applicable to S.C. Code Ann. §12-21-2710. We agree that the regulation is inapplicable, and accordingly revise our original opinion by removing the references to Reg. 117-190. In addition, we have added two sentences to the last full paragraph in the conclusion and three footnotes. The attached opinion shall be substituted for Op. No. 25335, originally filed July 30, 2001.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/Costa M. Pleicones J.

I would grant on all issues.

s/E.C. Burnett, III J.

Columbia, South Carolina

November 9, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stardancer Casino, Inc., Respondent,

v.

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, David P. Schwacke, in his official capacity as Solicitor for the Ninth Judicial Circuit, J. Al Cannon, Jr., in his official capacity as Sheriff for Charleston County, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department, Defendants,

of whom

Robert M. Stewart, Sr.,

in his official capacity as Chief of the State Law Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department are Appellants.

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

Opinion No. 25335
Heard January 23, 2001 - Refiled November 9, 2001

AFFIRMED

Attorney General Charles M. Condon, Assistant Deputy Attorney General Robert D. Cook, Senior Assistant Attorney General Nathan Kaminski, Jr., Assistant Attorney General Christie Newman Barrett,

of Columbia, for appellants Robert M. Stewart, Charles M. Condon, and Gregory Hembree; and Sheryl S. Schelin and Janet Carter, of Conway, for appellant Paul S. Goward.

Saunders M. Bridges, Jr., of Florence, for respondent.

JUSTICE PLEICONES: This is an appeal from a circuit court order declaring that respondent's operation of a gambling "day cruise to nowhere" (day cruise) is not in violation of any of nine existing state criminal statutes.[1] We affirm.

Facts

Respondent brought this declaratory judgment action to determine whether any of its activities are unlawful, and to obtain a permanent injunction against appellants (the State).[2] From a circuit court order declaring respondent's actions not unlawful but denying the injunction, the State appeals.

Respondent's day cruises begin and end at an Horry County port, and make no intervening stops. The United States flag vessel is equipped with gambling devices, including slot machines, blackjack tables, a roulette table, craps tables, and poker tables. Once the ship is beyond South Carolina's three mile territorial waters, gambling is permitted. Before the vessel reenters the territorial waters, the equipment is secured and unavailable for use. The equipment remains on the vessel at all times.

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[1]S.C. Code Ann. §§16-19-10; 16-19-20; 16-19-30; 16-19-40; 16-19-50; 16-19-120; 16-19-130; 12-21-2710; and 12-21-2712.

[2]The four appellants have been sued in their official capacities as state and county law enforcement officers and prosecutors. We will refer to them collectively as "The State."

At least one other cruise line operates "day cruises" out of Charleston County. No prosecution has been made or threatened against the cruise line(s) operating out of Charleston, while respondent has been threatened with criminal prosecution and seizure of its gambling devices.

The issue in this case is whether respondent's operations violate any **existing** state criminal statute.

Federal Law

In order to explain our decision, we find it necessary to briefly review federal law in this area. Prior to 1992, federal law prohibited gambling on any United States flag ship. See 18 U.S.C §1081 (2000)[3]; 15 U.S.C. §1175(a).[4] The effect of these federal statutes was to put U.S. flag vessels at a competitive disadvantage in the passenger cruise industry, since the statutes did not prevent foreign flag vessels from offering gambling once the ship was beyond state territorial waters. See Casino Ventures v. Stewart, 183 F.3d 307 (4th Cir. 1999), *cert. denied*, 2000 U.S. Lexis 153 (Jan. 10, 2000); United States v. One Big Six Wheel, 987 F.Supp. 169 (E.D.N.Y. 1997).

In 1992, Congress amended §1175 of the Johnson Act and created several exceptions to its general prohibition on the use or possession of any gambling device on a U.S. flag vessel. 15 U.S.C. §1175(b). Pursuant to the amendment, the possession or transport of a gambling device within state territorial waters is not a violation of §1175(a) if the device remains on board the vessel and is used only outside those territorial waters. §1175(b)(1). Although the effect of this subsection was to permit the operation of "day cruises," another section provided states with a method for having "day cruises" remain a **federal** offense. §1175(b)(2)(A). Thus, "day cruises" such as that operated by respondent may be subject to **federal** criminal prosecution under §1175(a) if they begin and end in a state that "has enacted

[3]Part of the Gambling Ship Act, 18 U.S.C. §§1081-1084.

[4]Part of the Johnson Act, 15 U.S.C. §§1171-1178.

a statute the terms of which prohibit that use . . . ." Id.

As noted above, the issue in this case is whether respondent's operations violate any existing state criminal statute. The amendments to the Johnson Act do not preempt state laws prohibiting gambling and gambling devices, Casino Ventures, supra, and thus the Act has no direct bearing on the issues before the Court. However, while federal litigation pertaining to the meaning of the 1992 amendments was pending, the General Assembly amended several of the relevant state statutes. As explained below, the legislature's expression of intent in amending these statutes is relevant to the issue we decide today.

State Statutes

This declaratory judgment action determined the applicability to respondent's activities of nine criminal statutes. The circuit court held four of the statutes were inapplicable to respondent's operations, and the State concedes that the three lottery statutes[5] and the bookmaking statute[6] are not implicated here. Two of the challenged statutes[7] provide for the seizure and destruction of *unlawful* gambling and gaming devices. Since we agree with the circuit court that respondent's possession and use of the devices on board its vessel are not unlawful under our substantive state statutes, we need not discuss these two seizure statutes.

We will explain below why respondent's operations do not violate the remaining statutes, S.C. Code Ann. §§16-19-40; 16-19-50; and §12-21-2710.

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[5]S.C. Code Ann. §§16-19-10; -20; and -30 (1985 and Supp. 2000).

[6]S.C. Code Ann. §16-19-130 (1985).

[7]S.C. Code Ann. §12-21-2712 (Supp. 2000) and §16-19-120 (1985).

§16-19-40

Section 16-19-40 provides:

[From and after July 1, 2000,[8] this section reads as follows:]

> **If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place** at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, **and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall**, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.
> (emphasis added).

Section 16-19-40 has two clauses; the first prohibits the playing of games in certain locations and the second provides for punishment of the

[8]The amendment added subsection (g).

person "keeping" that location. Since it is a criminal statute, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991) (strict construction of §§16-19-40 and -60). Ironically, the current statute does not cover respondent's video poker machines. The 1999 amendment added clause (g), which prohibits gambling on a machine **licensed** pursuant to §12-21-2720. Video poker machines can no longer be licensed, and consequently are not covered by this statute.[9] State v. Blackmon, supra. At most, then, §16-19-40 may apply to respondent's gaming tables. For the reasons given below, however, we conclude that it does not.

We first consider the portion of the statute that criminalizes the playing of certain games. The statute lists numerous specific locations at which the playing of games are prohibited. Since the list of prohibited locations does not include any term such as 'vessel,' ' ship,' or 'boat,' we hold that the "playing" clause does not apply to respondent's operations. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001) (where criminal statute very specifically lists locations covered, those not mentioned are excluded, applying maxim *expressio unius est exclusio alterius*).

Further, because a 'vessel or float' is not a prohibited location under the "playing" clause of §16-19-40, but is a named location under the bookmaking statute, §16-19-130, and because both statutes are part of the anti-gambling criminal statutes, we hold that the circuit court properly concluded this portion of the statute was inapplicable to respondent's operations. See, e.g., Great Games, Inc. v. South Carolina Dep't of Revenue, 339 S.C.79, 529 S.E.2d 6 (2000) (statutes which are part of the same

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[9]Of course, possession or use of these machines, whether licensed or not, is absolutely prohibited under §12-21-2710. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). As explained later in this opinion, this statute does not apply to the machines located on respondent's ship.

legislative scheme should be construed together).[10]

The portion of §16-19-40 criminalizing the "keeping" of a gaming location uses slightly different language and arguably could be read to cover respondent's gaming table activities. While the "playing clause" lists specific locations, the "keeping clause" punishes "every person so keeping **such** tavern, inn, retail store, **public place**, or house used as a place for gaming . . . . " (emphasis added) Respondent's vessel is a public place, and therefore seemingly covered under the literal language of this clause. Reading the statute as a whole, however, we conclude this 'public place' language is a reference back to the locations listed in the "playing" part of the statute**.** The "keeping" clause does not literally track the language of the "playing" clause, but does refer to "keeping **such**" a location. To read the "keeping" clause otherwise would result in "playing" being a criminal act in more and different locations than would "keeping." This, in turn, would lead to the absurd result that the person running the game could not be prosecuted if, for example, he

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[10]The dissent ignores these principles of statutory construction and conflates the term "highway" in S.C. Const. art. XIV, §4 with §16-19-40 to conclude that the playing clause of the statute prohibits playing on navigable waters. As this Court has held, art. XIV, §4 is "hardly anything more than a constitutional sanction of the common-law rights of the public in navigable waters." State ex rel. Lyon v. Columbia Water Power Co., 82 S.C. 181, 190, 63 S.E. 884, 889 (1909). Nothing in §16-19-40 obstructs the rights of the public to use navigable waters. Furthermore, when construing the term 'highway' in a statute, we view it in context. Here, the statute lists eight building structures, then 'street' and 'highway' and then three outdoor spaces. In our view, the term 'highway' in §16-19-40 refers only to dirt highways and not water highways. Compare Speights v. Colleton County, 100 S.C. 304, 84 S.E. 873 (1915) (term 'highway' means only dirt, and not water, highway). Finally, we note that §16-19-50 and §12-21-2710 prohibit gambling and possession of gambling devices anywhere in the State (including non- navigable waters), save on a vessel operating a "day cruise to nowhere."

was operating in a private street, field, or open wood while a person playing there would be prosecuted. The absurdity of this result is heightened by the fact the General Assembly has chosen to punish a "keeper" more harshly than a "player." See Broadhurst v. City of Myrtle Beach Elec. Comm'n, 342 S.C. 373, 537 S.E.2d 543 (2000) (no matter how plain statutory language is, it will be construed to avoid absurd result). Respondent's vessel is not a "public place" within the meaning of §16-19-40.

We affirm the circuit court's conclusion that respondent's operations do not violate §16-19-40.

§16-19-50 and §12-21-2710

These two code sections criminalize actions of a "person who shall set up, keep, or use [games used for gambling purposes]" (§16-19-50) and make it unlawful "to keep on your premises" any devices used for gambling (§12-21-2710). In determining the applicability of these two statutes, we look at the General Assembly's expression of its legislative intent, as reflected in 1999 Act No. 125.

As noted above, in 1999 the Fourth Circuit held the Johnson Act did not preempt existing state gambling statutes. Casino Ventures, supra. This appellate decision reversed a district court opinion which had held that under the 1992 amendments to the Johnson Act, a state could ban "day cruises" only by enacting a statute which "opted out" of the Act by prohibiting the repair or use of gambling equipment on voyages. Casino Ventures v. Stewart, 23 F. Supp. 2d 647 (D.S.C. 1998).

While the appeal from that district court decision was pending before the Fourth Circuit, the General Assembly enacted comprehensive video poker legislation which, among other things, amended §16-19-50 and §12-21-

2710.[11] 1999 Act No. 125. Act No. 125 contains an intent clause[12] which states in part:

> The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

The intent of the legislature is determined in light of "the overall climate in which the legislation was amended." State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). At the time the legislature enacted Act No. 125, a federal district court had ruled "day cruises," like those operated by respondent, were permissible unless and until the legislature "opted out" of the Johnson Act. While this ruling was later found to be erroneous by the Fourth Circuit, we agree with the circuit court that "in light of the overall climate" then existing, this intent clause in Act No. 125 must be read to evince a legislative intent **not** to make the cruises unlawful.

The State offers no alternative construction of this intent clause, but instead argues "[w]hatever may have prompted the insertion of [this intent language in Act No. 125], the Fourth Circuit's subsequent decision made its purpose clear." We do not agree that subsequent action by a separate entity can either alter or elucidate legislative intent.

In light of this language in the act amending §§12-21-2710 and 16-19-50, we conclude the legislature did not intend them to prohibit "day cruises." Our conclusion that the General Assembly does not intend that any current statute be construed to ban "day cruises" is reinforced by its subsequent

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[11]This act also amended §16-19-40 and §12-21-2712. Section 12-21-2712 is a "seize and destroy" statute which applies only if the devices are otherwise unlawful. As explained earlier, §16-19-40 by its own terms does not apply to gaming tables located on respondent's vessel.

[12]Section 22(B).

rejection of legislation which would have enacted new gaming statutes explicitly criminalizing them in 1999 and 2000. See House Bill 3002 (1999); Senate Bill 0002 (2000).[13]

Accordingly, we affirm the circuit court's conclusion that neither of these two "possession" statutes applies to respondent's conduct.

Conclusion

We affirm the circuit court's ruling that respondent is not in violation of any state criminal statute. As noted above, the applicability of the three lottery statutes (§§16-19-10; -20; -30) and the bookmaking statute (§16-19-130) is not at issue here. Further, §16-19-40 is inapplicable because respondent's vessel is not a prohibited location nor a public place as described therein. In light of the intent clause of 1999 Act No. 125, we agree with the circuit court that the legislature did not intend that either §12-21-2710 or § 16-19-50 apply to "day cruise" operations. Further, we conclude that the General Assembly's rejection of statutes which would explicitly criminalize day cruises is evidence of its understanding that none of our existing statutes applies to such operations. Since the devices are not unlawful, they are not subject to seizure under either §12-21-2712 or §16-19-120.

Respondent is not subject to criminal prosecution under any **existing** criminal statute, and therefore we need not address its "selective enforcement"

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[13]The dissent's reliance on Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997) is misplaced. Whitner holds that, "Generally, the legislature's subsequent acts 'cast no light on the intent of the legislature which enacted the statute being construed.'" (internal citation omitted). Here, we are concerned with bills rejected in 1999 and 2000, during the first and second sessions of the 113th Session of the South Carolina General Assembly. This is the **same** General Assembly which enacted Act No. 125.

argument. We have construed these statutes as they apply to "day cruises to nowhere," that is, cruises on United States flag vessels operating out of a South Carolina port, making no intervening stops, and permitting gambling only when the ship is beyond the State's territorial waters.[14] Our decision rests on the intent of the Legislature expressed in 1999 Act No. 125: nothing in that Act is indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities in this State. Further, we emphasize that the General Assembly is free to enact legislation which effectively bans or makes a state crime "day cruise" operations such as that operated by respondent.

For the reasons given above, the order of the circuit court is

AFFIRMED.

TOAL, C.J., MOORE and WALLER, JJ., concur. BURNETT, J., dissenting in a separate opinion.

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[14]The dissent would mislead the casual reader to believe that we have legalized gambling devices on any contrivance capable of floating or use as water transportation, if controlled by a United States resident, citizen, or corporation. The only issue we decide is whether current law criminalizes the possession of gambling devices aboard U.S. flag vessels operating "day cruises to nowhere" out of South Carolina ports. The narrowness of our decision is the result of the issue before the Court, not disingenuousness on the part of the majority.

JUSTICE BURNETT: I respectfully dissent from the majority's conclusion respondent is not subject to criminal prosecution under any existing state statute. Respondent admits it possesses slot machines, blackjack tables, roulette tables, craps tables, and poker tables for use on "day cruises" or "cruises to nowhere." Possession of these items within the territorial waters of the State of South Carolina subjects respondent to the criminal laws of this state.

South Carolina Code Ann. § 16-19-40 (Supp. 2000) provides:

> *[i]f any person shall play at any* tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, *highway*, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank, (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, *and every person so keeping such* tavern, inn, retail store, *public place*, or house *used as a place for gaming* or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

(emphasis added).

Navigable waters are public highways. S.C. Const. art. XIV, § 4. Accordingly, gambling on a navigable water, a highway, violates § 16-19-40

and "keeping" gaming tables on navigable water of this State, a public place, violates § 16-19-40.

South Carolina Code Ann. § 16-19-50 (Supp. 2000) makes it unlawful to

> set up, keep, or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming. . . .

Violators of this section are subject to fines and possible imprisonment. Id.; see also S.C. Code Ann. § 16-19-100 (1985).

South Carolina Code Ann. § 12-21-2710 (Supp. 2000) makes it unlawful for any person

> to *keep on his premises* or operate or permit to be kept on his premises or operated *within this State* any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens

> or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(emphasis added). Respondent's gambling devices which are prohibited by § 12-21-2710 are subject to seizure, and, if a magistrate determines they violate § 12-21-2710 after a hearing, destruction. S.C. Code Ann. § 12-21-2712; State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

Nowhere do these statutes provide exceptions for gambling devices or tables located on boats. In fact, § 16-19-40 specifically applies to gambling devices or tables located on boats. Yet despite the plain language of these statutes, the majority concludes the General Assembly did not intend them to apply to the gambling devices aboard vessels such as respondent's. The majority bases this conclusion on the "intent" clause contained in Act 125, which stated in part:

> The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

The majority acknowledges the Fourth Circuit Court of Appeals has explicitly held the Johnson Act does not preempt state gambling laws: "That federal enactment does not even apply to South Carolina's territorial waters – it leaves regulation of those waters to the state." Casino Ventures v. Stewart, 183 F.3d 307, 312 (4th Cir. 1999), rev'g 23 F. Supp. 2d 647 (D.S.C. 1998), cert. denied 528 U.S. 1077 (2000). In fact, as the majority correctly explains,

the Fourth Circuit held that any state enactment pursuant to the Johnson Act would determine whether gambling day cruises violate **federal** law, not state law. Thus, under Casino Ventures, the legislature's intent statement in Act 125 has *no impact on state law whatsoever*. Nevertheless, the majority concludes that, because the Fourth Circuit's opinion in Casino Ventures was not filed until four days after Act 125 was signed into law,[15] the General Assembly must have intended to exempt gambling day cruises from the general prohibition on possession of gambling tables or devices. In essence, the majority would have us infer this startling intent, in clear contravention of the plain language of these statutes, solely on the basis of an earlier erroneous construction of federal law by the District Court of South Carolina.

Moreover, the majority asserts its interpretation of the legislature's intent must be correct because subsequent legislation addressing "day cruises" has been rejected. Subsequent legislative acts, however, do not shed light on the intent of the legislature in enacting an earlier statute. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997).

South Carolina's authority over gambling activity extends to the State's territorial waters. See Casino Ventures, 183 F.3d at 308. The criminal statutes of this state unequivocally make it unlawful to keep gambling tables or devices on boats and within this state. See §§ 16-19-40, 16-19-50 and 12-21-2710. We have held mere possession of gambling devices in this state – operational or inoperational, in storage or in use – violates state law. State v. 192 Coin-Operated Video Game Machines, supra. If the General Assembly had intended to exempt vessels conducting day cruises from this prohibition, it would have done so in plain terms. See Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so). The majority's ruling exempts casino day cruises from the general criminal laws of this state, without any clear expression of legislative intent to do so.

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[15]Act 125 was signed into law on July 2, 1999. Casino Ventures was filed on July 6, 1999.

Finally, under the majority's decision, gambling devices may be kept solely on "United States flag ships" or "United States flag vessels" operating out of a South Carolina port. While the majority does not define "United States flag ship" or "United States flag vessel" it does refer to 18 U.S.C. § 1081 (2000) which defines "American vessel" as:

> any vessel documented or numbered under the laws of the United States; and includes *any vessel* which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if such vessel is *owned by, chartered to, or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State.*

(emphasis added).

Pursuant to 18 U.S.C. § 1081, "vessel"

> includes every kind of water . . . craft . . . or other contrivance used or capable of being used as a means of transportation on water . . . as well as any ship, boat, barge, or other water craft or any structure capable of floating on the water.[16]

Applying the definitions referenced by the majority to its analysis, it is legal for gambling devices to be kept on any type of "contrivance . . . capable of being used for transportation on water" or "structure capable of floating on the water" if controlled by a United States citizen or resident. The majority's opinion suggesting its decision is limited to a very narrow class of water craft (i.e., "United States flag ships" or "United States flag vessels) is disingenuous or, at best, misleading.

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[16]The Johnson Act does not refer to United States flag ships. While it refers to "vessels," it does not define the extent of water craft encompassed by that term.

I would reverse the order of the circuit court and hold boats located within South Carolina and its territorial waters are subject to the same laws concerning gambling as any other premises in this state.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Max Knoten, Appellant.

Appeal From Richland County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25373
Heard May 23, 2001 - Filed November 5, 2001

AFFIRMED IN PART; REVERSED IN PART.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Tracey Colton Green, and Solicitor Warren B. Giese, all of Columbia, for respondent.

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

JUSTICE PLEICONES: Appellant was convicted of two counts of murder, two counts of kidnapping, and one count of first degree criminal sexual conduct in connection with the deaths of thirty-year-old Kimberly Brown ("Kim") and three-year-old Layah Brazil ("Layah"). He received consecutive sentences of life without the possibility of parole for the murder offenses and a consecutive sentence of thirty years for criminal sexual conduct. On appeal, he alleges the trial court erred in refusing to instruct the jury on voluntary manslaughter in connection with Kim's homicide, in refusing to charge the jury on involuntary manslaughter in connection with Layah's death, and in admitting certain hearsay statements of his mother.

FACTS

Around noon on Tuesday, November 18, 1997, Cora Brown, Kim's mother, went to her daughter's apartment after receiving no answer to phone calls placed to the apartment and after learning from Kim's employer that Kim had not arrived for work. She found the door to the apartment unlocked, and entered to find blood on the floor, but no sign of Kim, or Layah.[1] Mrs. Brown immediately called the Richland County Sheriff's Department and reported her daughter missing.

The Sheriff's Department began investigating the case as a missing persons incident. After investigators found Appellant's name in Kim's address book, police contacted him on Tuesday night. Appellant told police that he had been at Kim's apartment between 9 and 10 p.m. on Monday evening.

The investigation revealed that Appellant was the last person known to have seen Kim on Monday night, and that Appellant and his family were old and dear friends of Kim and her family.

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[1]Layah was Kim's niece and was temporarily residing with Kim.

Wednesday morning, police contacted Appellant at work and asked if he would come to the sheriff's office to speak with investigators. Appellant agreed to do so, and arrived at the office around 11:00 a.m. He again told police he had seen Kim and Layah at Kim's apartment Monday evening, and that he had arrived around 9 p.m. and remained for an hour. He stated that when he left Kim's apartment, he went to a co-worker's home and spent the night. When police contacted this co-worker, he provided Appellant with an alibi. Later, the co-worker told investigators that Appellant had not been at his home on the night of the disappearance, but that Appellant had asked him to tell police otherwise.

The investigating officer asked for and received permission to search Appellant's car. Upon inspecting the trunk of vehicle, he discovered what appeared to be blood. Thereafter, police resumed questioning Appellant regarding Kim's and Layah's disappearance.

Over the course of the next two days, Appellant gave a number of inconsistent statements to police, each more inculpatory than the last. In the first signed statement, taken between 8:30 and 9:30 p.m. Wednesday evening, Appellant claimed he left Kim's house on Monday evening between 10 and 10:30, that he got in his car, drove away from the apartment complex, and then blacked out. He woke up the next morning at the Rosewood boat ramp and went to work. He said he did not know if he had killed Kim or Layah.

In his second signed statement, given around 1 a.m. Thursday morning, Appellant stated that he and Kim had consensual sex that Monday evening, and afterwards, Kim became agitated. She armed herself with a knife and threatened him. She cut him on the leg[2] and chased him out of the apartment. Appellant, nude in the parking lot, retrieved a foot-long steel bar from the trunk of his car. He reentered the apartment. Kim cut him again, and he hit

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[2]While questioning Appellant, police observed and photographed a cut on his right leg. According to trial testimony, however, the photograph could not be located, and was unavailable at trial.

her over the head with the metal bar. Kim collapsed from the blow. He wrapped her body in a blanket and put her in the trunk of his car. He returned to the apartment, cleaned up, and napped for two hours. He awoke at 5:00 a.m. (now Tuesday morning), got Layah out of bed, and told the child they were going to look for Kim. He drove to a boat landing on Sumter Highway where he disposed of Kim's body. He left Layah at the landing, and went to work.

Appellant gave his final written statement around 11 a.m. Thursday. In that statement he admitted raping Kim. He further admitted pushing Layah into the river. Otherwise, the third statement is largely consistent with the second statement.

Kim's body was discovered by fishermen on Wednesday, November 19, around 5:00 p.m. The State introduced evidence at trial that she had been anally raped, and that she died from either head trauma or, more likely, strangulation.

The following morning, police discovered Layah's body in the river, sixteen feet from shore. The cause of death was drowning. There were no signs of trauma, or any other injuries to Layah.

The State introduced all three statements at trial. Appellant testified at trial and admitted making all three statements. He said that much of the statements' contents had been suggested to him by the police.

Appellant further testified that a co-worker[3] confessed to him that he killed Kim. The co-worker then threatened to kill Appellant's mother and sister if Appellant informed the authorities. Because he feared for the safety of his mother and sister, Appellant, taking cues from the interrogating officers, fabricated the confessions.

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[3]Not the same co-worker Appellant previously identified as an alibi.

ISSUE I

Did the trial court err in refusing Appellant's request to instruct the jury on the crime of voluntary manslaughter in the death of Kimberly Brown?

ANALYSIS

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Cole, at 101, 525 S.E.2d at 513.

Manslaughter is defined as "the unlawful killing of another without malice." S.C.Code Ann. § 16-3-50 (Supp. 2000); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990).

> Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Cole, at 101-02, 525 S.E.2d at 513 (internal citations omitted).

Even when a person's passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000).

Viewing the evidence in the light most favorable to Appellant, a charge of voluntary manslaughter was warranted here. The State introduced all three of Appellant's written statements at trial. The second statement was as follows:[4]

> Q: Can you provide additional information about Kim and Layah?
> A: I went over to Kim's about 9:00 p.m. We were talking. Layah was awake. Kim was cooking chicken and corn. Kim fed the baby in the kitchen. Kim and I did not eat. She put the baby to bed. Kim and I went upstairs. We had sex in her bed. I did not use a condom.
> Q: Did you ejaculate?
> A: Yes.
> Q: What next?
> A: We got up and started washing up. We started talking. I don't know what I said wrong or what happened to her. She got a knife from the kitchen and came back up the stairs. She started threatening me. She chased me down the stairs. I ran out the

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[4]Recall that in his first statement, Appellant claims to have blacked out, and therefore, could not remember what happened after he left Kim's house. In the third statement, he admits to raping Kim, and claims she cut him with the kitchen knife after he raped her. As depicted in the third statement, Kim's homicide would be murder as a matter of law because it was perpetrated during the commission of a felony. Likewise, Layah's homicide would be murder as a matter of law.

front door. I did not have on any clothes. She did not have on any clothes. I thought she was kidding. She cut me on the right leg. I went to my car and got a bar. It is about a foot long and silver. It's made out of steel. I pulled the latch in the car and the trunk opened. I got the bar from the trunk. We were in the house near the front door. Kim cut me with the knife then. I hit her with the bar across the head. She feel [sic] and hit the floor. She was crawling the stairs and she collapsed. I rolled her up in a blanket while she was on the stairs. I put her in the trunk. I went back in and tried to clean up. I went to sleep on the floor in the living room. I woke up around 5:00 a.m. I think I feel [sic] asleep around 3:00 a.m. When I woke up, I got Layah out of bed. I washed my hands. Layah walked downstairs and got into the front passenger seat of the car. I told her that we were going to try and find her mom. I was talking about Kim. I drove out and turned onto Sumter Hwy [sic]. I drove until I saw a sign that said "landing." It was to the right of Sumter Highway. I went down to the end by the water. I backed the car up. I took her out. I dragged Kim a few feet. I covered her with a big blanket. I went around and got Layah out of the car. I left her beside the car. I told her I would be back.
Q: What was Layah wearing?
A: A light blue jumpsuit.
Q: What time was it now?
A: About 6:15 a.m. It was dawn.
Q: Where did you go?
A: On to work. I clocked in around 7:20 a.m.
Q: Where is the bar you hit Kim with?
A: I threw it in the woods. I was standing next to Kim when I threw it. It hit a tree.
Q: Was Layah alive when you left?
A: Yes sir.
Q: Is there anything else?
A: No.

The State argues two grounds for affirming the trial court's refusal to charge voluntary manslaughter: first, it contends that the above evidence indicates, as a matter of law, that sufficient "cooling off" time elapsed while Appellant was retrieving the pipe such that he could not have been acting in the heat of passion when he killed Kim; additionally, the State contends that because Appellant recanted the confession at trial, he was not entitled to a charge on voluntary manslaughter.

Appellant argues that because Kim cut him before he struck her with the pipe, the trial court should have instructed the jury on voluntary manslaughter. We agree. Twice in the above statement, Appellant claims Kim cut him. After the first cut, he was chased out of the apartment, went to his car, and got the metal pipe. He reentered the apartment, and killed Kim after she cut him again.[5]

In State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), this Court

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[5]The uncontroverted evidence was that the outside temperature was near freezing, and according to Appellant's testimony, he was naked when chased from the apartment. Despite this evidence, the dissent argues that Appellant "methodically" retrieved a steel pipe from the trunk of his car, and thus, as a matter of law, sufficient cooling time had elapsed. Likewise, there is no indication in Appellant's second statement that he in any way provoked the knife attack by the victim. Whether or not it is true that the only purpose for Appellant's return to the apartment with the steel pipe was to maliciously harm the victim is an issue to be decided not by this Court, but by a jury. Construing the evidence as we must, in the light most favorable to the Appellant, he armed himself in response to the victim's unprovoked knife attack. Of necessity, he reentered the apartment to gather his clothes and personal effects when he was again attacked by the knife-wielding victim. This constitutes evidence of sufficient legal provocation.

Accordingly, reviewing the evidence in the light most favorable to Appellant, he was entitled to the requested jury charge.

reversed the Court of Appeals' affirmance of a defendant's murder conviction because the trial court erroneously refused to charge voluntary manslaughter. The Court observed: "Here, there is testimony which, if believed, tends to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred." Id. at 399, 434 S.E.2d at 274.

Were a jury to believe the facts as represented in Appellant's second statement, he and Kim were likewise in a heated encounter and she had twice cut him with a knife when he struck her with the pipe. It follows that a charge on voluntary manslaughter was required.

The cases cited by the State can be distinguished from the case we decide today.

The State cites State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), wherein we held that the trial court did not err in refusing to instruct the jury on the specific examples of "sufficient legal provocation" requested by the defendant. Defendant, in essence, sought a jury charge on the facts as he presented them at trial. We observed that

> Hughey requested the following examples of legal provocation: pulling a knife on a defendant, pointing a gun at a defendant, spitting in a defendant's face, assault of a family member, sudden mutual combat where one of the participants is killed by the other without a previously informed intention to do so, finding one's spouse in the act of adultery, or the deceased having molested a defendant's minor child. The requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation. Because the requested charge is an instruction on the facts, and the requested charge is fully and fairly covered by the trial judge's general charge,

refusal of the requested instruction is not reversible error.

Id. at 339 S.C. 452, 529 S.E.2d at 728. As required by law, the trial court in that case instructed the jury on voluntary manslaughter. The holding of State v. Hughey has no application to the instant case.

In State v. Cole, supra, we affirmed the defendant's murder conviction despite the trial court's failure to give a requested charge on voluntary manslaughter. We held that the fact that the defendant and a friend of the victim had previously fought and the victim's friend had pushed over defendant's stereo did not constitute sufficient legal provocation to support a charge on voluntary manslaughter. We further held that there was no evidence that the killing was committed in the sudden heat of passion. We remarked that

> [e]ven if [the defendant] had been in the heat of passion during the confrontation in his apartment, **three to five minutes had passed** in which he had time to go to his mother's apartment and find his gun. Far from passion, these actions indicate "cool reflection." [The defendant] admitted that in the time between when [the victim's friend] and the victim went out the front door and he went out the back, **he had "time enough for me to get my head together."** Most significantly, the men had been gone for several minutes when [the defendant] shot and killed the victim.

Id. at 102, 525 S.E.2d at 513 (citation omitted; emphasis added).

The facts of Cole are distinguishable from those portrayed in Appellant's second statement. There can be little argument that an unprovoked knife attack constitutes sufficient legal provocation to warrant the requested charge. Furthermore, unlike the facts of Cole, here there is no evidence that a significant period of time elapsed between the alleged knife attack and Appellant's striking the fatal blows. Appellant claims he was chased from the apartment by the knife-wielding victim. It was a cold

November evening and he was naked. He opened the trunk of his car with the trunk latch and retrieved the pipe. He then reentered the apartment. Kim cut him again, and he responded to the attack by hitting her with the pipe. Viewing this evidence in the light most favorable to Appellant, as we must, there is simply no evidence that, **as a matter of law**, Appellant had sufficient time to cool.

In Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), the defendant had been convicted of murder. He sought post-conviction relief on the basis of ineffective assistance of trial counsel. This Court agreed and reversed his conviction. The evidence in that case established that Carter had gone to the victim's home, and while there the two had fought. The victim struck Carter and ejected Carter from his home. Carter went to his car, retrieved a knife and returned to fatally stab the victim. The Court found that based on these facts, a jury could have found Carter guilty of voluntary manslaughter. Therefore, the trial court's charge which created a mandatory presumption of malice and precluded manslaughter prejudiced Carter and mandated reversal of his conviction.

The facts presented in Appellant's second statement are nearly indistinguishable from those in Carter. A charge on voluntary manslaughter was clearly warranted.

In support of its second argument, that because Appellant recanted his statement he was properly denied the requested voluntary manslaughter charge, the State cites a single case, State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975). In that case, the Court held there was no error in denying the defendant's request to charge that if the jury found the arresting officer used unreasonable force in effecting the arrest, the defendant's resistance would not have been unlawful. At trial, the defendant denied that he resisted arrest. The officer testified that he did not use unreasonable force in effecting the arrest. The defendant had made no pre-trial statement which would have supported the requested charge. The record contained no evidence that the officer used unreasonable force, and therefore the requested charge was not warranted. See State v. Cole, supra. Weaver is distinguishable from the

instant case.

Moreover, the State's argument does not accurately reflect the law of this State. In State v. Moore, 245 S.C. 416, 140 S.E.2d 779 (1965), the defendant was charged with, and convicted of, assault and battery of a high and aggravated nature. The trial court refused his requested jury charge on simple assault and battery, despite testimony that the victim had received only slight injuries. The defendant testified that he had been elsewhere when the incident occurred, and under the defense's theory, he could have been not guilty of even simple assault and battery. The Court held that the refusal to charge on the lesser included offense was reversible error. The Court stated that,

> In determining the issues to be submitted to the jury . . . all of the testimony, both for the State and the defense, must be considered. . . . The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State.

Id. at 420-21, 140 S.E.2d at 781.

Because there was evidence – in this case introduced by the State – supporting a conviction for the lesser included offense of voluntary manslaughter, we reverse Appellant's conviction in the slaying of Kimberly Brown.

ISSUE II

> Did the trial court err in refusing Appellant's request to instruct the jury on the crime of involuntary manslaughter in the death of Layah Brazil?

ANALYSIS

Involuntary manslaughter is defined as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally, but while one is acting lawfully, with reckless disregard for the safety of others. To warrant the court's elimination of the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Burriss, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999).

With regard to the offense of involuntary manslaughter, the general assembly has defined "criminal negligence" as the "reckless disregard of the safety of others." Further, a person charged with involuntary manslaughter "may be convicted only upon a showing of criminal negligence" as defined in S.C.Code Ann. 16-3-60 (Supp. 2000).

Appellant contends that because in his second written statement, he claims to have left Layah alive and standing by the river after he disposed of Kim's body on the morning of November 18, the trial court was required to instruct on involuntary manslaughter. He asserts that Layah's kidnapping ended when he drove away from the boat ramp that morning, because the child's "freedom" had been restored at that point in time. We disagree.

While we recognize that kidnapping is a continuing offense, commencing when the victim is wrongfully deprived of freedom and continuing until freedom is restored,[6] we cannot agree that this three-year-old child's freedom was restored where she had been placed in a situation so fraught with peril.

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[6]See State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)

Appellant points to no evidence that Layah's freedom was actually restored. To the contrary, the only evidence that Layah was released indicates that she was released around 6 a.m. a few feet from the edge of a river, that the outside temperature at the time of her release was twenty-four degrees Fahrenheit, and that she was clad only in her pajamas. Viewing these facts in the light most favorable to Appellant, we cannot conclude that Layah's freedom had been restored.

Because there is no evidence in the record to support a charge on involuntary manslaughter in the death of Layah Brazil, we affirm Appellant's murder conviction on that charge.[7]

ISSUE III

Did the trial court commit reversible error by allowing evidence that Appellant's mother said she knew Appellant was not telling the truth when he denied involvement in the crimes?

ANALYSIS

Appellant contends the trial court committed reversible error when it allowed a police officer to testify that Appellant's mother said she did not believe Appellant was telling the truth when he denied knowledge of Kim's disappearance. At trial, the State presented testimony of Investigator Dave Lawrence. Lawrence was one of the officers who took Appellant's statements and he was the officer who discovered blood in the trunk of Appellant's automobile. Over Appellant's objection, the trial court allowed

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[7]Sadly, we are reminded of the words of Oliver Wendell Holmes, Jr., who in his lecture on the criminal law observed: " . . . a newly born child is laid naked out of doors, where it must perish as a matter of course. This is none the less murder, that the guilty party would have been very glad to have a stranger find the child and save it." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 53 (1881).

Lawrence to recount an exchange between Appellant and his mother which took place at the sheriff's office. Lawrence testified as follows:

> Q: What was it that Mrs. Knoten told her son in that interview room?
> A: She continuously asked him questions about Kim and about Layah. And she immediately just was asking him questions very rapidly. She told Max that he needed to tell the truth and he needed to tell the truth now. She told him that this was not T.V. She said that he needed to cooperate with the investigators, and she told him to help find the baby.
> * * * [Defense objects for the second time to this line of questioning and is overruled] * * *
> Q: Investigator Lawrence, I believe you were at the part when she indicated, told him that this was not T.V., he needed to cooperate with the investigators to help find the baby?
> A: That's correct.
> Q: And then start from there.
> A: She continued pleading with him. And she told him that he was her son and that she was going to support him and she loved him **but she did not believe him**. She'd asked about the blood that was in his car. He continued –
> Q: No, no. Just, she asked about the blood in his car, correct?
> A: That's correct. . . .

Appellant contends this exchange constituted inadmissible hearsay because it was offered as proof of the matter asserted, that is, that Appellant's mother did not believe his denial. He further contends the State compounded the argument when, in closing argument, the State referred to Mrs. Knoten's statement: "You heard the testimony that [his mother] looked him in the eyes. Knowing that the blood was found in the trunk of that car, she took that newspaper article with the picture of Kimberly and Layah. She looked her son in the eyes and said, 'Max, I know you're lying. Tell the truth.' His own mother. And he looked his mother in the eyes and confessed to killing Kimberly Brown. I ask you what more do you need in a court of law?"

The State argues, *inter alia*, that under Rule 801(d)(2)(B) SCRE, the statement was not hearsay. That rule provides "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth." The comments to that section indicate that this rule is consistent with South Carolina law, citing State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1961), rev'd on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The defendant in State v. Sharpe, supra, was on trial for assault with intent to ravish. The Court recounted that

> After the appellant had been arrested and placed in jail, his mother came to the jail and an officer explained to her why he was under arrest. The mother was then permitted to see the appellant in the presence of an officer and she said: 'Israel, as many colored women as it is in this town why in the world did you go and get messed up with a white woman and you will just have to pay your penalty.' The appellant made no reply to this statement.
>
> Upon the trial of the case, when this testimony was given by the officer, an objection was made to its admission only on the ground that the appellant was not present when the statement was made. The record shows otherwise. The objection was properly overruled. This Court has held that statements in the presence of the accused by a third person are admissible as evidence when such accused remains silent and does not deny such statements. . . . Under this rule, when appellant's mother made the foregoing statement to him and he remained silent and did not deny same, such statement was admissible.

Id. at 271, 122 S.E.2d at 628-29 (citations omitted).

We agree that Appellant adopted the statement when he later confessed

to the crimes. "A party who has agreed with or concurred in an oral statement of another has adopted it." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 801.31[3][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2000).

Because Appellant did not refute his mother's statement, and later admitted he was lying when he denied involvement in or knowledge of the offenses charged, his mother's statement was not hearsay. Therefore, there is no merit to Appellant's third issue.[8]

CONCLUSION

Because a jury instruction on voluntary manslaughter was required based on the evidence presented at trial, we REVERSE Appellant's conviction for the murder of Kim Brown. Because, as discussed above, we find no merit in Appellant's other contentions, we AFFIRM Appellant's remaining convictions and sentences.

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

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[8]It is less clear that the admission of this obviously prejudicial evidence did not violate Rule 402, SCRE (relevance), or Rule 403, SCRE (unduly prejudicial). However, Appellant did not argue these grounds at trial, therefore, we do not consider them on appeal. See State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997) (argument not made to trial court not preserved for review).

JUSTICE BURNETT: I respectfully dissent from that portion of the majority opinion which holds appellant was entitled to an instruction on voluntary manslaughter regarding Kimberly Brown's (the victim's) death. In my opinion, there was no evidence of sufficient legal provocation and, therefore, appellant was not entitled to the charge.

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant. Id. To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. Id.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute legal provocation. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). A victim's attempts to resist or defend herself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter. State v. Shuler, ___ S.C. ___, 545 S.E.2d 805 (2001). Similarly, "the exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." State v. Norris, 253 S.C. 31, 39, 168 S.E.2d 564, 567 (1969).

"The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (internal quotations omitted). Both heat of passion and sufficient legal provocation must be

present at the time of the killing to constitute voluntary manslaughter. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000).

Considered in the light most favorable to the defendant, appellant's second statement does not support a charge on voluntary manslaughter. According to the statement, appellant and the victim engaged in consensual intercourse at her home. Thereafter, the victim became upset and struck appellant once on the leg with a kitchen knife. Appellant left the victim's home, went outside to his car where he opened the driver's door, released the trunk latch, raised the trunk, looked inside, located and removed a foot long steel bar. Appellant returned into the victim's home armed with the steel bar and struck her on the head. After the victim fell to the floor and attempted to crawl away, appellant rolled her in a blanket and placed her in the trunk of his car. Thereafter, appellant cleaned the victim's home to remove evidence of his crime, then took a two hour nap before dumping the victim's body in a river.[9]

I agree with the majority that the victim's initial assault with the kitchen knife cutting appellant's leg constitutes adequate legal provocation. However appellant's second statement explaining how he methodically obtained the steel pipe from his car trunk reveals that a sufficiently reasonable time between the provocation and killing elapsed during which appellant's passion should have cooled. See id. 339 S.C. at 452, 529 S.E.2d at 728 ("Even when a person's passions were sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonably time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter."). Accordingly, the only purpose for appellant's return to the apartment with the steel bar was to maliciously harm the victim. In striking appellant a second time with the kitchen knife, the

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[9]The pathologist testified the victim incurred two forceful blows to her head which caused her scalp to split. In addition, she was strangled. The pathologist stated while all the injuries occurred close to the time of the victim's death, strangulation was most probably the cause of death.

victim was simply attempting to defend herself against appellant's imminent attack. Her attempt to defend herself from a crime could not give rise to legal provocation.[10] See State v. Shuler, supra; State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984); State v. Norris, supra. Since there was no evidence of legal provocation, the trial judge did not err in refusing to charge voluntary manslaughter. State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (where no actions by deceased constitute legal provocation, charge on voluntary manslaughter is not required).

Furthermore, I note the majority relies upon Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), to support its conclusion appellant was entitled to a voluntary manslaughter charge. While Carter is factually similar to the present case, the legal issue in Carter was whether the post-conviction applicant was entitled to a King[11] charge, not whether voluntary manslaughter should have been submitted to the jury in the first instance. Carter is not dispositive of the issue in this case.

I would affirm.

TOAL, C.J., concurs.

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[10]The record indicates, at the time he spoke with police, appellant had one small superficial cut on his leg. Apart from his second statement, there is no evidence the victim stabbed appellant twice.

[11]State v. King, 158 S.C. 251, 155 S.E. 409 (1930), overruled Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

H. Clinton Sloan, Sam Wathen, Jeff Sarajian, Hilbert H. Hawes, Claude T. Hawkins, Andy DeBoer, Carol DeBoer, Lynn Hearl, Precision Southeast, Inc., and Samuel S. Blight, individually, and as class representatives, Appellants,

v.

The City of Conway, a body politic, and Grand Strand Water and Sewer Authority, Respondents.

Appeal From Horry County
Howard P. King, Circuit Court Judge

Opinion No. 25374
Heard September 25, 2001 - Filed November 13, 2001

AFFIRMED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, P.C., of Surfside Beach, for appellants.

Danny C. Crowe, of Turner, Padget, Graham & Laney, P.A., and Roy D. Bates, both of Columbia; and Michael W. Battle, of Battle & Vaught, P.A., of Conway, for respondent City of Conway.

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, of Columbia; Marian W. Scalise and C. Paige Fowler, of Richardson, Plowden, Carpenter & Robinson, of Myrtle Beach; Arrigo P. Carotti, of McCutcheon, McCutcheon & Baxter, of Conway; and Leo H. Hill, of Hill & Hill, of Greenville, for respondent Grand Strand Water and Sewer Authority.

JUSTICE MOORE: Appellants are water customers located within the service area of respondent Grand Strand Water and Sewer Authority (Grand Strand). They receive their water service as nonresident customers of respondent City of Conway (City). Appellants' action challenges City's 1996 ordinance raising water rates for all nonresident customers. The trial judge granted summary judgment to City and Grand Strand. We affirm.

FACTS

Grand Strand was created as a special purpose district in 1971[1] to distribute water and provide sewer systems in Horry County between the Inland Waterway and the Atlantic Ocean except in designated areas including

[1]1971 S.C. Act No. 337.

incorporated municipalities.[2] Grand Strand's authority includes the ability to construct and maintain facilities and to sell water to municipalities.[3]

By resolution in 1975, Horry County expanded Grand Strand's service area west to the Waccamaw River. The expanded area included territory located within three miles of City's limits. *See* S.C. Code Ann. § 6-11-420 (1976) (allowing for county's expansion of special purpose district). City commenced litigation in federal court claiming it had the right to serve this territory.[4] The federal court found City had no claim to the disputed territory since it had failed to challenge Horry County's resolution within the time provided by statute. *See* S.C. Code Ann. § 6-11-480 (1976). Accordingly, City had the right to provide service in Grand Strand's service area only to the extent Grand Strand had already consented. City of Conway v. Grand Strand Water and Sewer Auth., 535 F. Supp. 928 (D.S.C. 1982).

By agreements signed in 1982, 1985, and 1989, Grand Strand and City divided the provision of services in certain areas within Grand Strand's territory. Where appellants are located, Grand Strand provides sewer service and City provides water service. All of City's water is purchased wholesale from Grand Strand's Bull Creek plant.

In 1996, Grand Strand raised the rates it charges City for sewer treatment, a charge unrelated to City's cost of providing water service in the disputed area. After studying other municipalities' water rates for out-of-city customers, City decided it could raise revenue to offset this increased cost by increasing its water rates to out-of-city customers. City raised the rate 33%. This rate hike resulted in an increase from the previous rate of 1½ times the in-city rate to double the in-city rate. Grand Strand charges its own customers at cost, a lower rate than appellants must pay.

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[2]1971 S.C. Act No. 337, § 2.

[3]1971 S.C. Act No. 337, § 7.

[4]The Farmer's Home Administration provided loans to Grand Strand and the United States was a named party.

ISSUES

1. What is the effect of S.C. Code Ann. § 5-31-1910 (1976)?

2. Does City have a duty to charge reasonable rates to nonresident customers?

3. Did Grand Strand breach a fiduciary duty to its customers?

4. Are appellants entitled to service from Grand Strand as third-party beneficiaries of the federal court's order?

5. Is City's annexation requirement unlawful?

DISCUSSION

1. Ownership of Bull Creek plant and § 5-31-1910

The Bull Creek plant, which produces all of City's water, was built as a joint project by four charter participants, including Grand Strand and City. Grand Strand holds the deed to the Bull Creek plant. In exchange for Grand Strand's construction and maintenance of the plant, each of the other participants agreed to purchase "project capacity" and each bears the cost of water service according to its allocated capacity. The Bull Creek Project Agreement provides that each participant's rights in the project "constitute extensions of their respective water systems." Each participant may sell or lease its allocated capacity.[5]

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[5]Under S.C. Const. art. VIII, § 13(A), any incorporated municipality may agree with any other political subdivision for the joint administration of any function and the sharing of the costs therefor. The provision of water is a constitutionally permitted function of an incorporated municipality. S.C. Const. art. VIII, § 16.

South Carolina Code Ann. § 5-7-60 (1976), which was enacted as part of the Home Rule Amendment, provides generally that a municipality may contract to furnish and charge for any of its services outside its corporate limits.[6] Appellants claim, however, under the more specific provisions of S.C. Code Ann. § 5-31-1910 (1976), the agreement allowing City to provide water service to the disputed area is invalid because City does not own the Bull Creek plant. Section 5-31-1910 provides in pertinent part:

> Any city or town in this State owning a water or light plant may . . . enter into a contract with any person without the corporate limits of such city or town but contiguous thereto to furnish such person electric current or water from such water or light plant of such city or town and may furnish such water or light upon such terms, rates and charges as may be fixed by the contract or agreement between the parties . . . .

(emphasis added). The trial judge found City's contract for its allocated capacity in the plant was sufficient ownership to pass muster under this statute. We agree.

In construing a statute, our primary function is to ascertain the intent of the legislature. Florence County v. Moore, 344 S.C. 596, 545 S.E.2d 507 (2001). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Folk v. Thomas, 344 S.C. 77, 543 S.E.2d 556 (2001). Reasonably construed, the ownership requirement of § 5-31-1910 simply ensures a municipality's ability to provide water to the persons with whom it contracts. Here, City "owns" an allocated capacity of water produced by the Bull Creek plant. City has a proprietary interest in this allocated capacity as evidenced by

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[6]"Any municipality may perform any of its functions, furnish any of its services . . . and make charges therefor . . . in areas outside the corporate limits of such municipality by contract. . . ."

City's unilateral ability to sell or lease it.[7] We hold this ownership interest is sufficient to pass muster under the statute.

2. Duty to charge reasonable rates

Appellants contend City has a duty to charge them reasonable rates and the double rate for out-of-city customers is unreasonable because it is unrelated to the cost of providing the service. They claim there is at least a factual issue regarding reasonableness and summary judgment should not have been granted.

Our decision in Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911), is dispositive here. In Childs, we held a municipality has "no public duty to furnish water to [a nonresident] at reasonable rates or to furnish it at all." 70 S.E. at 298. Any right a nonresident has arises only by contract. Further, a city actually has "an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable." *Id.* (emphasis added). We concluded the nonresident plaintiff had no basis to challenge the out-of-city rate which, in that case, was four times the in-city rate. *See also* Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. App. 1993) (following Childs and holding higher rates for out-of-city water customers cannot be challenged under the S.C. Unfair Trade Practices Act).

Appellants attempt to avoid the holding of Childs by relying on S.C. Code Ann. § 5-31-670 (1976) which post-dates that decision. This section provides:

> Any city or town or special service district may, after acquiring a waterworks or sewer system, furnish water to persons for reasonable compensation and charge a minimum and reasonable sewerage charge for maintenance or construction of such sewerage system within such city or town or special service

[7]The Bull Creek Project Agreement provides that a participant must offer its allocated capacity first to another participant before disposing of it to another entity.

district.

(emphasis added). Appellants contend this statute modified Childs by imposing a reasonableness standard on water rates for nonresident customers.

We find this statute does not affect our holding in Childs. We reached our decision in Childs even while considering a constitutional provision[8] that required "reasonable compensation" for municipal water service. Such a provision, whether constitutional or statutory, does not apply for the benefit of nonresidents unless expressly provided. Childs, 70 S.E. at 298. Here, § 5-31-670 does not expressly apply to nonresident municipal water customers. Absent a specific legislative directive, there is no reasonable rate requirement for water service to nonresidents.

Further, under Childs, City's duty to appellants arises only from contract. In this case, the 1982 agreement between City and Grand Strand provides that City's water rates to the area must be reasonable in that they may be no more than the rates charged all other out-of-city customers. Under the 1989 agreement, City may also determine reasonable rates by "taking into account the capital, administrative, and other applicable costs of the City." Read together,[9] these agreements provide City's rates to the area are reasonable if they are the same as the rates charged all other out-of-city customers or, if rates to the area are higher than those for other out-of-city customers, they are reasonable if based upon increased costs in serving the area in question. Here, appellants are charged the same rates as all other out-of-city customers and City has therefore met its contractual obligation to charge reasonable rates.[10]

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[8]1895 S.C. Const. art. VIII, § 5. The "reasonable compensation" provision is no longer extant.

[9]The 1989 agreement incorporates the "applicable policies of the City" which includes the earlier 1982 provision regarding reasonable rates.

[10]To the extent appellants argue the disparity in treatment between in-city customers and out-of-city customers is unconstitutional, we find their

Because City has no duty to charge reasonable rates other than by agreement, and its rates comply with this agreement, summary judgment was properly granted.

3. Grand Strand's breach of fiduciary duty

Appellants claim since they are located in Grand Strand's service area, Grand Strand has a fiduciary duty to them which it breached by allowing City to provide water service. The trial judge found there is no legal authority to find Grand Strand has a fiduciary duty to the residents in its service area.

Assuming Grand Strand has such a duty, appellants have shown no breach. Grand Strand's agreement with City does provide for reasonable rates for customers in its service area, *i.e.* rates must either be the same as those charged all other out-of-city customers or, if higher, must be related to increased costs in providing the service. The trial judge properly found Grand Strand breached no fiduciary duty.

4. Effect of the federal court's order

Appellants contend they are entitled to service from Grand Strand as third-party beneficiaries of the federal court's 1982 order which held City could not serve the residents in Grand Strand's service area absent Grand Strand's consent. There has been no violation of this order since Grand

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argument without merit. A legislative classification does not violate equal protection if there is any reasonable hypothesis to support it. Lee v. S.C. Dep't of Natural Resources, 339 S.C. 463, 530 S.E.2d 112 (2000). Here, out-of-city customers pay no taxes to City and this is a reasonable basis for disparate treatment. To violate due process, the ordinance must have no reasonable relationship to any legitimate governmental interest. R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 527 S.E.2d 763 (2000). Raising revenue to meet increasing municipal needs is a legitimate governmental goal and selling water at higher rates to customers who do not pay taxes is rationally related to this goal.

Strand consented to City's service in this case.[11] Even if appellants qualified as third-party beneficiaries of the federal court's order, they have been deprived of no benefit bestowed by that order. We find the trial judge properly ruled on this issue.

5. Annexation requirement

City's individual contracts with appellants require, as a condition to water service, that appellants agree to annex their property.[12] Appellants claim the trial judge erred in finding this contractual provision valid. We disagree.

Appellants rely on Touchberry v. City of Florence, 295 S.C. 47, 367 S.E.2d 149 (1988). In Touchberry, we held the municipality could not require annexation as a condition for providing water service. In that case, however, the customers were already entitled to municipal water service as third-party beneficiaries of a franchise agreement between the municipality and the service authority in the disputed area. The franchise agreement specifically required the municipality to provide service in the area whenever requested, conditioned only upon physical and economic feasibility. The municipality therefore could not withhold water service based on annexation.

There is nothing in Touchberry holding generally that a city cannot require annexation as a contractual condition for water service. Unlike Touchberry, the agreements here between City and Grand Strand do not mandate that City provide water service to individual customers on demand. Further, given a municipality's duty to its own residents under Childs, the

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[11]The federal court's order does not prohibit Grand Strand from contracting with City. Under its enabling act, Grand Strand has the authority "to make contracts of all sorts and execute all instruments necessary or convenient for the carrying on of the authority." 1971 S.C. Act No. 337, § 7 (18).

[12]City's administrator testified the annexation provision has not been enforced. Customers who do annex are charged the lower in-city rates.

contractual provision requiring annexation is valid as a means of broadening City's tax base.

Appellants' remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See generally* Fraternal Order of Police v. S.C. Dep't of Revenue, 332 S.C. 496, 506 S.E.2d 495 (1998) (issues raised but not ruled on are not preserved on appeal); *see also* Lawson v. S.C. Dep't of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000) (civil conspiracy); E & S Investment Corp. v. Richland Bowl, Inc., 264 S.C. 582, 216 S.E.2d 522 (1975) (interest on security deposit).

AFFIRMED.

TOAL, C.J., WALLER, BURNETT AND PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Paul Buckmon, Appellant.

Appeal From Barnwell County
Gary E. Clary, Circuit Court Judge

Opinion No. 25375
Heard September 27, 2001 - Filed November 13, 2001

AFFIRMED IN PART; REVERSED IN PART.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia, and Solicitor Barbara R. Morgan, of Aiken, for respondent.

Deputy Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Eleanor Duffy Cleary, of the South Carolina Office of Appellate Defense, of

Columbia, for appellant.

JUSTICE MOORE: Appellant appeals his convictions for murder, attempted armed robbery, and criminal conspiracy. We affirm in part and reverse in part.

FACTS

One December night, around 10:00 p.m., the unresponsive body of Minh Chapman (the victim) was found. The victim's body was found in the driver's seat of her car, which was parked outside the China Express Restaurant where she was manager. The victim's purse, containing approximately $1,400 of the restaurant's receipts, was beside her on the front car seat. After the police and rescue squad arrived, the victim was transported to the hospital. Initially, because there was no evidence of violence at the scene, she was thought to have suffered a heart attack. Later it was determined she had died from a single gunshot wound to the chest.

At trial, the fingerprint expert testified he was unable to positively identify anyone in this case.[1] No fingerprints were discovered on a spent shell casing found near the car. Further, no fingerprints were found on a .25 caliber semi-automatic pistol the police recovered from the home of the mother of Maurice Benning, one of appellant's co-defendants. The firearms examiner testified the fired shell casing found at the scene came from the pistol that was recovered. However, the examiner could not conclusively determine whether the .25 caliber bullet recovered from the victim's body had been fired by the recovered pistol.

A witness, Shirley Collins, testified she saw three people, sometime between 9:55 p.m. and 10:05 p.m., crossing the road in front of her while

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[1]Appellant was tried along with two co-defendants, Tunzy Sanders and Maurice Benning.

driving on the night of the murder. She testified the three people, whose race and sex she could not identify, were wearing dark clothes and were traveling in the direction of the China Express.

Temetrius Williams testified she drove appellant, Tunzy Sanders, and Benning around on the night of the murder. She drove them to a parking lot near the China Express to drop them off, but since it was raining they decided not to stay. She then drove the three to Jermaine Walker's house. She could not remember what they were wearing.[2]

Previously, Temetrius had made a statement to police which consisted of the following: When she arrived at appellant's house, appellant said he would bring her some money. She agreed to drive appellant, Sanders, and Benning, who were wearing black clothes and carrying walkie-talkies, to town. She parked her car at the House of Pizza, where they exited the car and then returned shortly thereafter. Upon returning, Benning stated, "Y'all can use it but please return it because it ain't mine." Thereafter, she dropped them off at Walker's house around 7:50 p.m. During this time, they said, "we're going to get some cheese tonight." In her statement, Temetrius told the police that cheese meant money.

Maurice Odom, who was imprisoned at the time, testified solely for the purpose of impeaching Temetrius. He testified he informed the police Temetrius had told him appellant had placed a gun to her head the night of the victim's murder and that all three men were wearing black clothes.

Jermaine Walker testified Temetrius dropped appellant, Sanders, and Benning off at his house. He stated the three had on "regular like blue jeans and shirts, dark clothes." Walker testified they stayed until about 9:30 or 10:00 p.m. While there, they stated they were going to "get a lick," which he

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[2]Temetrius admitted her testimony did not match her previous statement to police, but insisted the police had harassed her into making that statement.

took to mean there was going to be a burglary or a robbery. He could not remember who made that comment. When they left, Walker testified, they stated they were going to a friend's house and they walked in the direction of the China Express, which is the same direction in which the friend lived. Walker further stated that appellant also lived in that same direction.

A cellmate of Benning testified he and Benning discussed the China Express crime.[3] He testified Benning told him the following: (1) there were two pistols, (2) he was "out to get paid that night," (3) he was the look-out, (4) he said take her out if necessary, (5) he ran after the victim was shot, (6) he kept his mother's gun but threw the other gun away, (7) a few other places had been "cased" that night but without luck.[4]

Two other jailhouse informants testified about conversations they had with Sanders concerning the China Express crime. Both informants testified Sanders told them he planned to rob the victim and had shot and killed the victim. The testimony was only considered as it related to Sanders.

At the close of the State's case, appellant's directed verdict motion on all of the charges was denied. Appellant was convicted of murder, attempted armed robbery, and criminal conspiracy, and was sentenced to consecutive terms of life imprisonment for murder, twenty years for attempted armed robbery, and five years for criminal conspiracy.[5] Following the jury's

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[3]The jury was instructed the cellmate's testimony was only to be considered as it related to Benning.

[4]Officer Vince Padgett testified that, in a written statement, Benning said he went to the China Express, but that he had second thoughts and decided to leave. As he was running away, he heard a shot. He went back and retrieved the gun, which he placed back in his mother's room where she normally kept it.

[5]Appellant's co-defendant Benning was acquitted of all charges except criminal conspiracy. His other co-defendant, Sanders, was found guilty as

verdict, appellant's motion for a new trial was denied.

ISSUE

Did the trial court err by failing to direct a verdict of acquittal on the charges against appellant?

DISCUSSION

On appeal from the denial of a directed verdict, we must review the evidence in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. 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. Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). See also State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996) (trial court should grant directed verdict motion where jury would be speculating as to guilt of accused or where evidence is sufficient only to raise mere suspicion of guilt). "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, supra.

Murder and attempted armed robbery convictions

No direct evidence was adduced at trial linking appellant to the crimes

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charged; however, his conviction was reversed by this Court on the grounds that his Sixth Amendment right to counsel was denied when his counsel was removed before trial. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000). Sanders has since been retried and convicted for the murder of the victim.

of murder and attempted robbery. The State's case depended entirely on circumstantial evidence. When a directed verdict motion is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial judge must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, supra; State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). In reviewing a directed verdict motion, the trial judge is concerned with the existence of evidence, not with its weight. State v. McHoney, supra; State v. Lollis, supra.

The circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt. The key pieces of circumstantial evidence relied upon by the State are: (1) Temetrius's written statement that a comment was made about getting some "cheese;" (2) Walker's testimony that a comment was made about getting a "lick;" (3) the fact appellant, Sanders, and Benning were together at least until they left Walker's house, around 9:30 or 10:00 p.m., and walked in the direction of the China Express; and (4) Shirley Collins's testimony that she saw three people running towards the China Express around 10:00 p.m.

Even viewing the circumstantial evidence in the light most favorable to the State, the evidence does not reasonably tend to prove appellant's guilt. While appellant was seen leaving Walker's residence and walking with Sanders and Benning towards the direction where the China Express was located, appellant's home was also located in that same direction. Additionally, while Collins testified she saw three individuals running towards the China Express, she stated she could not identify their race or their sex. None of the evidence presented by the State places appellant at the scene of the crime.

The trial court erred by not granting appellant's motion for a directed verdict on the charges of murder and attempted armed robbery because the State's evidence against appellant merely raised a suspicion appellant is guilty. See, e.g., State v. Lollis, supra (directed verdict should have been

granted where circumstantial evidence presented by State was insufficient to submit case to jury); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) (directed verdict should have been granted where fact defendant's fingerprint was on screen propped up against house did not prove entry where defendant had been in and around victim's house at least three times prior to burglary).

Criminal conspiracy conviction

A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). The essence of a conspiracy is the agreement. Id. It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement. Id. To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

Viewing all of the evidence in the light most favorable to the State, there was sufficient evidence to submit the issue of appellant's guilt on the charge of conspiracy to the jury. The evidence indicated appellant was involved in a discussion about "getting some cheese," (meaning money) in front of Temetrius.[6] Appellant was also involved in a discussion about "getting a lick," (meaning committing a burglary or a robbery) in front of Walker. While both Temetrius and Walker used the word "they" when stating who made those comments, a reasonable inference is that "they" meant all three defendants, including appellant, discussed committing an unlawful act. These conversations show evidence of criminal conspiracy in

[6]At trial, Temetrius denied making this comment; however, whether she was credible at trial or when she gave her statement to the police goes to the weight of the evidence, which is not considered by the trial judge when ruling on a directed verdict motion. See State v. McHoney, supra; State v. Lollis, supra (when reviewing directed verdict motion, trial judge is concerned with existence of evidence, not with its weight).

that appellant was part of a discussion about committing an unlawful act prior to the time in which the victim was killed. See State v. Kelsey, supra (proof of express agreement not necessary to establish existence of conspiracy); State v. Wilson, supra (essence of conspiracy is agreement). Other evidence that existed to show his possible involvement in a conspiracy was the fact appellant was with the other two defendants prior to the time the victim was killed. Therefore, evidence of appellant's involvement in a conspiracy existed such that the trial court properly denied his directed verdict motion on the charge of conspiracy.

Accordingly, appellant's murder and attempted armed robbery convictions are reversed and his conspiracy conviction is affirmed.

AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

The South Carolina Court of Appeals

The State, Appellant,

v.

James E. Henderson, III, Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied and the attached opinion substituted for our previous opinion.

Kaye G. Hearn , C.J.

Jasper M. Cureton,J.

Carol Connor ,J.

Columbia, South Carolina
November 5, 2001.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

James E. Henderson, III,

Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3367
Heard May 8, 2001 - Filed July 9, 2001
Substituted and Refiled November 5, 2001

AFFIRMED

Leon E. Stavrinakis, of Charleston, for appellant.

Stephen P. Groves, Sr., of Charleston; and Reese I. Joye, of N. Charleston, for respondent.

HEARN, C.J.: The State appeals the circuit court's reversal of James E. Henderson, III's municipal court conviction for first offense driving under the influence (DUI) and illegal possession of legal liquor. We affirm.

FACTS AND PROCEDURAL HISTORY

In January 1996, a police officer arrested Henderson, a college student, and charged him with first offense DUI and illegal possession of legal liquor.

At Henderson's trial, the State sought to elicit testimony from the Datamaster test operator that he read Henderson the "right to refuse" warning and advised him of his right to an additional test.[1] Henderson moved to suppress any evidence indicating he had the right to have an independent test to determine his blood-alcohol level.

Citing City of Columbia v. Wilson, 324 S.C. 459, 478 S.E.2d 88 (Ct. App. 1996), Henderson offered to stipulate that "the test was performed pursuant to SLED procedures and that he was advised of his statutory rights." As part of the objection, Henderson requested the trial judge have the "additional tests" language redacted from the SLED report. The State refused the requested stipulation but offered to redact the portions in question from the SLED report before it was admitted into evidence. The trial judge ruled the objectionable portion of the SLED report could be read into the record, but that it would be redacted before admission.

The jury found Henderson guilty on both counts. He was sentenced to 30 days in jail suspended to campus confinement for 15

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[1] In accordance with S.C. Code Ann. § 56-5-2950 (Supp. 2000), the South Carolina Law Enforcement Division Breathalyzer Operator's Test Report (the SLED report) contains an implied consent warning which a BA Operator is required to give to all persons for whom he or she is administering a BA Test.

weekends. Henderson appealed to the circuit court and was granted a new trial based on Wilson.

SCOPE OF REVIEW

In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception. S.C. Code Ann. § 14-25-105 (Supp. 2000); S.C. Code Ann. § 18-3-70 (Supp. 2000); City of Columbia v. Felder, 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979). In reviewing criminal cases, this court may review errors of law only. State v. Culter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973); State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997).

DISCUSSION

The State contends the circuit court judge erred in finding that the municipal court improperly permitted the State to circumvent Henderson's offer to stipulate. We disagree.

In Wilson, this court considered a question strikingly similar to that presented here, to wit: whether the circuit court judge erred in reversing the municipal court conviction because the municipal court judge denied Wilson's motion to redact identical language on the Datamaster form. Because Wilson, unlike Henderson, did not offer to stipulate that the test was performed pursuant to SLED procedures or that he was advised of his statutory rights, the city was required to lay a foundation for admission of the results. Thus, reversal was not warranted in Wilson.

Here, however, Henderson offered to stipulate that the proper procedures were followed and that he was advised of his statutory rights. The State refused to stipulate to these facts, although it consented to redacting the language from the report that was admitted into evidence. The municipal court judge inexplicably ruled that the language would be redacted from the

report but that the Datamaster operator could read the entire report to the jury. The officer recited the implied consent warning as follows to the jury:

> I must now tell you that the arresting officer has directed me to give you a breath test. I am trained and certified by the South Carolina Law Enforcement Division, SLED, to give this test. You have the right to refuse to take this test. If you refuse to take this test your privilege to drive in South Carolina must be suspended or denied for 90 days. You have the right to additional independent tests. Whether you take this breath test or not you will be given reasonable assistance in contacting a qualified person of your own choosing to conduct any additional tests. You will have to pay for additional tests.

Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury. Unlike the situation in Wilson, the State was not required to lay a foundation for the Datamaster test results. While we recognize that a stipulation usually involves the consent of all parties, the State's consent was not necessary here, where, by statute, "a person's . . . failure to request additional blood or urine tests is not admissible against the person in the criminal trial." § 56-5-2950(a). It was thus error for the municipal court judge to allow it to come before the jury.

Contrary to the State's argument, we are not persuaded that a different result is required by either State v. Anderson, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995) or State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). In Anderson, the defendant was found guilty of driving under suspension (DUS), DUI, and violating the Habitual Traffic Offender Act. At trial, the defendant offered to stipulate to the jurisdiction of the court, but the solicitor refused. On appeal, Anderson argued the trial court erred in denying his motion to sever the habitual traffic offender charge from the DUS and DUI charges. While the dissent would have required the trial court to grant the motion, the majority held it could not reach the issue since it had not been

preserved. Accordingly, Anderson cannot be read to hold that the State should not accept an offer to stipulate under the circumstances presented in this case.

Hamilton is equally unavailing to the State's position. There, this court held that the State was not required to stipulate, as requested by the defense, to Hamilton's prior burglary convictions because the previous burglaries were an element of the crime for which Hamilton was charged. We did not hold that a stipulation could never be required, however.

The facts presented in this case are distinguishable from those in either Anderson or Hamilton. Here, a specific legislative enactment proscribes the admission of a person's failure to request additional blood or urine tests. Wilson held there was no error in refusing to redact language concerning independent testing on the Datamaster form where the defendant did not offer to stipulate that proper procedures were followed and that he was advised of his statutory rights. The logical extension of Wilson's holding is that where the defendant does offer to so stipulate, it is error to permit the State to introduce evidence which is barred by § 56-5-2950(a).

Moreover, we believe this error resulted in prejudice to Henderson given the fact that the State presented less than overwhelming evidence of Henderson's guilt. Therefore, the error was not harmless. See State v. Sweet, 342 S.C. 342, 349, 536 S.E.2d 91, 94 (Ct. App. 2000) (finding error not harmless in light of less than overwhelming evidence).

For the foregoing reasons, the circuit court judge's decision to reverse Henderson's conviction is hereby

AFFIRMED.

CURETON and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jerry Martin,

Appellant.

Appeal From Cherokee County
Lee S. Alford, Circuit Court Judge

Opinion No. 3405
Submitted October 1, 2001 - Filed November 13, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Trent N. Pruett, of Pruett Law Firm, of Gaffney, 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 Harold W. Gowdy, III, of Spartanburg, for respondent.

HUFF, J.: Jerry Martin appeals his conviction for possession of marijuana. Martin claims the trial court erred in admitting evidence seized in the execution of a search warrant that he contends lacked sufficient probable cause to support issuance. He further contends the trial court erred in allowing the admission of his prior drug offenses and in allowing the solicitor to cross-examine him as to his marijuana use. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

Based on information from a confidential informant, the Gaffney City Police Department executed a search warrant on Martin's home on February 4, 1999. One of the police officers found marijuana in Martin's pants pocket. Martin went to trial on January 18, 2000. At trial, he sought to suppress the marijuana seized, asserting a deficiency in the search warrant affidavit as to the informant's credibility and reliability. He further sought to exclude evidence of his prior convictions pursuant to Rule 609, SCRE, as well as evidence of his prior drug use. The trial judge ruled against Martin on all three issues, and Martin was convicted of possession of marijuana and sentenced to one year imprisonment.

LAW/ANALYSIS

I. Validity of Search Warrant

Martin argues the trial judge erred in denying his motion to suppress evidence obtained as a result of the February 4, 1999 search. Specifically, Martin asserts the search warrant affidavit was insufficient on its face to establish probable cause inasmuch as it failed to establish the credibility or

reliability of the confidential informant. He further contends the affidavit was not properly supplemented by sworn oral testimony. We disagree.

At the hearing on the motion to suppress, Detective Sergeant Billy Gene Odom of the Gaffney City Police Department testified he appeared before Magistrate Robert B. Howell on February 1, 1999, and presented an affidavit to obtain a search warrant for Martin's residence. The affidavit provided, in pertinent part, as follows:

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

> Affiant's belief is based upon information received from a Confidential Reliable Informant who has provided information in the past that has proven true and correct. This C.R.I. states that he/she has seen a quantity of marijuana at the above described location within the past 72 hours. Affiant knows this C.R.I. to know marijuana when seen by past information received from this C.R.I.

A search warrant may be issued only upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Great deference must be given to a magistrate's conclusions as to whether probable cause exists to issue a search warrant. State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). Nonetheless, the magistrate may issue the warrant "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (1985).

"[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000). In determining the validity of the warrant, a reviewing court may consider only information

brought to the magistrate's attention. State v. Owen, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981).

A "totality of the circumstances" test is applicable in determining whether sufficient probable cause exists to issue a search warrant:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Bellamy, 336 S.C. at 143, 519 S.E.2d at 348 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). "Under the 'totality of the circumstances' test, a reviewing court considers all circumstances, including the status, the basis of knowledge, and the veracity of the informant, when determining whether or not probable cause existed to issue a search warrant." State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 679 (2000). "[A] deficiency in one of the elements [of veracity and reliability] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Bellamy, 336 S.C. at 144, 519 S.E.2d at 349.

Here, the magistrate had a substantial basis for concluding marijuana would be discovered in a search of appellant's home. The affidavit advised the magistrate that the confidential informant previously provided Odom with true and correct information, thus establishing the informant's veracity and reliability. The affidavit also specifically set forth the informant's firsthand knowledge of the marijuana in Martin's home, as well as indicated the affiant knew the informant to know marijuana, based on information previously received from the informant. Although Martin correctly notes the affidavit does not specify what reliable information the informant had provided in the past, and the affidavit does not indicate the informant's prior information had led to

arrests or convictions, the affidavit does specifically indicate the informant's past information proved to be true.[1] We therefore conclude, under the totality of the circumstances test, the affidavit provided the magistrate with information sufficient to make a probable cause determination.

Assuming, however, the search warrant affidavit was insufficient on its face to establish probable cause, we nonetheless find the affidavit was properly supplemented by sworn oral testimony. See State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-679 (2000) ("Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause."). The record indicates Detective Odom provided the magistrate with oral testimony as to the reliability and veracity of the confidential informant. Detective Odom testified that whenever he appears before Magistrate Howell to obtain a search warrant based on information from an informant, the magistrate has the practice of asking a certain group of questions, including whether the police have used the informant before and, if so, whether use of the informant was successful. He also asks when drugs were last seen in, or purchased from, the particular residence. He further testified this informant had gone to the residence on two occasions to make a controlled buy while wearing a wire, the first time being a week prior to issuance of the search warrant and the second time within seventy-two hours before signing of the search warrant. Detective Odom knew the informant was able to identify marijuana, in part, because when he sent the informant in on a controlled buy, the informant brought back marijuana. His response to Magistrate Howell's questions would have been to state that, within the past seventy-two hours, marijuana had been seen and purchased from the residence.

Magistrate Howell confirmed he asks four standard questions whenever a police officer presents a search warrant for his signature: (1)

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[1] Detective Odom testified at the suppression hearing that the affidavit would not have included an indication that information from this informant had led to previous arrests and convictions, as there had not yet "been any convictions made off this informant."

whether the police have used the informant before; (2) whether use of the informant has been productive in the past; (3) when narcotics were last seen in the residence; and (4) when a purchase of narcotics was last made at the residence. Although neither Detective Odom nor Magistrate Howell was able to recall the specifics of Odom's appearance before the magistrate in this specific case, Magistrate Howell stated he would not have signed the search warrant had he not been satisfied with Detective Odom's answers to his four standard questions. He further stated he asks those "same four questions on every search warrant" he executes, and he could state with "absolute certainty" that he did so on this particular occasion.

Based on our review of the record, we are convinced the sworn oral testimony before the magistrate sufficiently supplemented the search warrant affidavit to establish any deficiency that might exist in the affidavit as to the veracity and reliability of the informant. Accordingly, we find no error in the admission of the evidence seized pursuant to the search warrant.

II. Evidence of Prior Convictions

Martin next asserts the trial court erred in ruling evidence of his prior convictions could be used to impeach his testimony because the court failed to properly weigh the probative value of his prior convictions against the prejudicial effect of the evidence. We agree.

Under Rule 609(a)(1), SCRE, evidence that an accused has been convicted of a crime, which was punishable by death or imprisonment in excess of one year, is admissible for impeachment if the court determines the probative value of admitting this evidence outweighs its prejudicial effect to the accused. The party attempting to introduce the prior conviction for impeachment purposes has the initial burden of establishing the basis for its admission. State v. Scriven, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000). Rule 609(a)(1) requires the trial judge to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused. Id.

In State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), our Supreme Court expressly approved the five-factor analysis generally employed by federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused, but recognized there may be other factors which a trial judge should, in the exercise of discretion, consider under the facts and circumstances of each particular case. These factors include, but are not limited to:

> 1. The impeachment value of the prior crime.
> 2. The point in time of the conviction and the witness's subsequent history.
> 3. The similarity between the past crime and the charged crime.
> 4. The importance of the defendant's testimony.
> 5. The centrality of the credibility issue.

Id. While Colf involved the admission of prior convictions more than ten years old under Rule 609(b), SCRE, this court has implicitly recognized the value of these factors in making such a determination under Rule 609(a)(1), and urged the trial bench to not only articulate its ruling, but also provide "the basis for it, thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1)." Scriven, 339 S.C. at 342, 529 S.E.2d at 75-76. Further, our Supreme Court has expressly recognized the importance of the factors in a Rule 609(a)(1) analysis. In Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000), the court stated that the above five factors, "along with any other relevant factors, should be considered" when the trial courts "weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence."

In the instant case, the State sought to introduce Martin's prior convictions which were less than ten years old. The record shows Martin was

convicted of PWID Valium on January 29, 1990, PWID Xanax and felony DUI in September of 1991, and possession of crack cocaine in 1995. He also had two convictions for possession of marijuana, one of which occurred in 1995. The trial court ruled the possession of marijuana charges were inadmissible, finding they carried a sentence of one year or less, and that their prejudicial effect would outweigh any probative value. The court determined the State could, however, introduce evidence of Martin's convictions for PWID Valium, possession of crack cocaine, and felony DUI if Martin took the stand. The court stated as follows:

> The concern I have is if he's going to take the stand and tell his story, give his side of the thing, the jury's entitled to know. Otherwise, if they're not able to present any prior offenses in the past, then they have a right to assume that he has no prior record whatsoever and that he has a clean record and that concerns the court, because that would not be - - you know, I think they're entitled to know if he has these other charges, you know, which might effect his propensity for truth telling.

Martin took the stand and defense counsel, based on the trial court's ruling, brought out Martin's convictions for PWID Valium, PWID Xanax, felony DUI, and possession of crack.

Martin asserts the trial court reached its ruling on this issue without articulating the required balancing test to determine whether the probative value of the convictions would outweigh their prejudicial effect. We agree.

Although the trial judge specifically stated he would not allow admission of Martin's prior marijuana convictions because the prejudicial value would outweigh any probative value, he made no meaningful analysis of the other convictions he allowed before the jury. The only basis the trial judge provided for his ruling was that Martin's convictions "might effect his propensity for truth telling." However, this is not necessarily so. See State v.

Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000) ("Narcotics offenses are generally not considered probative of truthfulness."). Further, at least three of the convictions were for crimes similar to that for which Martin stood trial, and three were fairly remote in time, two of the convictions being more than eight and a half years old, and one conviction being just weeks shy of falling under the ten-year time limit imposed by Rule 609(b), SCRE. Indeed, in reviewing the court's ruling on the matter, it appears the fact that Martin had prior convictions which fell within a ten-year time period simply satisfied the trial judge that the convictions should be admitted.

Finally, as in Scriven, 339 S.C. at 342-43, 529 S.E.2d at 76, we note the State made no presentation as to the probative value of the convictions in support of their admission, and it does not appear the court properly applied the burden of establishing a basis for their admission. Based on the record before us, we cannot conclude any meaningful balancing of the probative value and prejudicial effect of these convictions has taken place as required by Rule 609(a)(1).[2] Further, given the remoteness of the convictions and the similarity between the prior convictions and the crime charged, we cannot conclude the admission of these convictions was harmless error. We therefore remand this issue to the trial court for a hearing on the admissibility of each of Martin's prior convictions, with instructions for the trial judge to apply the proper burden of establishing admissibility, and carefully weigh the probative value of the prior convictions for impeachment purposes against their prejudicial effect. See Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000); Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 77 (2000) (appellate court should not undertake a rule 609 balancing test, but should remand the issue to the trial court).

[2] It should be noted that the trial judge did not have the benefit of Scriven and Green at the time of trial, and Colf, involving a Rule 609(b) analysis, had been issued only two weeks prior to the trial.

III. Evidence of Marijuana Use

Martin also contends the trial court erred in allowing the State to cross-examine him on his use of marijuana because he did not place his character into issue. We find no error.

Prior to Martin's testimony in his own defense, his attorney moved in limine to preclude the State from introducing evidence of his marijuana use. The court ruled the State could cross-examine Martin about his marijuana use if he denied being in possession of marijuana on the night of his arrest. The court found Martin's denial of possession of marijuana would open the door to testimony about his marijuana use and that such evidence would be relevant, with the probative value outweighing any prejudicial effect.

During his direct examination, Martin testified, when officers came to his residence on February 4, he was present along with three other people. At the time, he was sitting on a couch with another person whom he really did not know. He denied that the marijuana found by the police was his, or that it was found on his person, claiming the marijuana was actually found "under the couch." On cross examination, Martin admitted to smoking marijuana on a regular basis.

Generally, evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Even if evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). Although evidence of other bad acts is inadmissible to demonstrate a person's character in order to show action in conformity with that character, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, absence of accident or mistake, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). A trial judge has considerable latitude in ruling on the admissibility of evidence and his decision will not be

disturbed absent prejudicial abuse of discretion. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

In the instant case, we find evidence of Martin's marijuana use was logically relevant and admissible, not to impugn his character, but rather to establish his motive, as well as his intent for possessing marijuana. See State v. Gilchrist, 329 S.C. 621, 626, 496 S.E.2d 424, 427 (Ct. App. 1998) ("Evidence of prior drug use is competent to establish motive for a crime where the record supports a logical relevance between the drug use and crime for which the defendant is accused."); State v. Gore, 299 S.C. 368, 370, 384 S.E.2d 750, 751 (1989) (evidence that appellant sold cocaine from the same trailer on two prior occasions only one month earlier was admissible to establish his intent regarding his possession of cocaine at the time in question).

Martin admitted the marijuana was found in his residence, but maintained that it was not found on his person and did not belong to him. Accordingly, the State responded with evidence as to Martin's motive and intent in regard to the marijuana found in his residence. Conviction of possession requires proof of possession, either actual or constructive, coupled with knowledge of the drug's presence. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). "Possession requires more than mere presence. The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it." State v. Muhammed, 338 S.C. 22, 27, 524 S.E.2d 637, 639 (Ct. App. 1999). Here, the State was required to establish Martin either had, or at least had the right to exercise, dominion and control over the marijuana discovered in his home, and that he had knowledge of the presence of the marijuana. The jury could have believed that Martin did not have knowledge and/or possession of the drug, but that it was actually possessed by someone else present at the scene. Under these circumstances, the evidence of Martin's prior use of marijuana was relevant and admissible to show his knowledge of the presence of the drug, and his intent to possess it. See State v. Moseley, 119 Ariz. 393, 581 P.2d 238 (1978) (wherein Supreme Court of Arizona held, in face of prior bad act challenge, evidence of "track marks" on defendants' arms, and resulting inference of prior narcotic use by injection, was admissible where defense advanced theory that drugs found

in defendant's presence were under the dominion and control of another, as the evidence was relevant and admissible to show defendant's knowledge, as well as his intent to possess the drugs). Accordingly, we find no error in the admission of this evidence.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and STILWELL, JJ., concur.