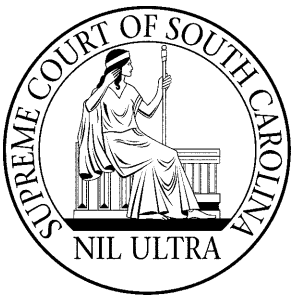

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 23, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27572 - Stokes-Craven Holding Corporation v. Scott L. Robinson	Pending
27596 - Clarence Kendall Cook v. The State	Pending
27607 - The State v. Donna L. Phillips	Pending
2015-MO-061 - Kennedy Funding v. Pawleys Island North	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5383-Protection and Advocacy v. SCDDSN	Pending
2015-UP-328-Billy Lisenby v. SCDC (7)	Denied 01/05/16
2015-UP-505-Charles Carter v. SCDC (3)	Denied 01/28/16
2015-UP-523-State v. Gary Lane Prewitt	Pending
2015-UP-568-State v. Damian Anderson	Pending
2015-UP-572-KNS Foundation v. City of Myrtle Beach	Pending
2016-UP-012-Whelthy McKune v. State	Pending
2016-UP-015-Onrae Williams v. State	Pending
2016-UP-022-State v. Michael Anderson Manigan	Pending
2016-UP-023-Frankie Lee Bryant v. State	Pending
2016-UP-028-Arthur Washington v. Resort Services	Pending
2016-UP-034-State v. Tyrel R. Collins	Pending
2016-UP-037-Joseph Gelotte v. Davis Roofing	Pending
2016-UP-039-State v. Fritz A. Timmons	Pending
2016-UP-040-State v. Jonathan Xavier Miller	Pending
2016-UP-047-State v. Zinah D. Jennings	Pending
2016-UP-052-Randall Green v. Wayne Bauerle	Pending
2016-UP-054-In the matter of the Jt. Application of Duke Energy	Pending
2016-UP-055-State v. Ryan P. Deleston	Pending
2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr.	Pending
2016-UP-059-Betty J. Keitt v. City of Columbia	Pending

2016-UP-061-Charleston Harbor v. Paul Davis	Pending
2016-UP-065-State v. Dennis M. Penny, II	Denied 03/17/16
2016-UP-067-National Security Fire and Casualty v. Rosemary Jenrette	Pending
2016-UP-068-State v. Marcus Bailey	Pending
2016-UP-069-John Frick v. Keith Fulmer	Pending
2016-UP-070-State v. Deangelo Mitchell (AA Ace Bail)	Pending
2016-UP-071-Bank of America v. Johnson Koola	Pending
2016-UP-073-State v. Mandy L. Smith	Pending
2016-UP-074-State v. Sammy Lee Scarborough	Pending
2016-UP-079-Russell Cumbee v. Brandi Fox-Cumbee	Pending
2016-UP-084-Esvin Perez v. Gino's The King of Pizza	Pending
2016-UP-082-Wildflower Nursery v. Joseph Beasley	Pending
2016-UP-088-State v. Dwayne Lee Rudd	Pending
2016-UP-089-William Brelnad v. SCDOT	Pending
2016-UP-091-Kyle Pertuis v. Front Roe Restaurants, Inc.	Pending
2016-UP-097-State v. Ricky Passmore	Pending
2016-UP-119-State v. Bilal Sincere Haynesworth	Pending
2016-UP-125-Jerome Myers v. Walter Kaufmann	Pending
2016-UP-127-James Jeff v. Lear's Welding	Pending
2016-UP-132-Willis Weary v. State	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Denied 03/04/16
5247-State v. Henry Haygood	Granted 08/12/15
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5253-Sierra Club v. Chem-Nuclear	Pending
5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Pending
5301-State v. Andrew T. Looper	Pending
5308-Henton Clemmons v. Lowe's Home Centers	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5313-State v. Raheem D. King	Pending
5314-State v. Walter M. Bash	Granted 03/04/16
5317-Michael Gonzales v. State	Pending
5322-State v. Daniel D. Griffin	Pending
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew McAlhaney v. Richard McElveen	Pending
5329-State v. Stephen Douglas Berry	Pending
5331-State v. Thomas Stewart	Pending
5332-State v. Kareem Harry	Pending

5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Phillip Flexon v. PHC-Jasper, Inc.	Pending
5337-Ruben Ramirez v. State	Pending
5338-Bobby Lee Tucker v. John Doe	Pending
5341-State v. Alphonso Thompson	Pending
5342-John Goodwin v. Landquest	Pending
5344-Stoneledge v. IMK Development (Southern Concrete)	Pending
5345-Jacklyn Donevant v. Town of Surfside Beach	Pending
5346-State v. Lamont A. Samuel	Pending
5347-George Glassmeyer v. City of Columbia	Pending
5348-Gretchen A. Rogers v. Kenneth E. Lee	Pending
5351-State v. Sarah D. Cardwell	Pending
5352-Ken Lucero v. State	Pending
5355-State v. Lamar Sequan Brown	Pending
5360-Claude McAlhany v. Kenneth A. Carter	Pending
5365-Thomas Lyons v. Fidelity National	Pending
5369-Boisha Wofford v. City of Spartanburg	Pending
5370-Ricky Rhame v. Charleston County School	Pending
5371-Betty Fisher v. Bessie Huckabee	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending

2015-UP-031-Blue Ridge Electric v. Kathleen Gresham	Pending	
2015-UP-069-Amie Gitter v. Morris Gitter	Pending	
2015-UP-091-U.S. Bank v. Kelley Burr	Pending	
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending	
2015-UP-174-Tommy S. Adams v. State	Pending	
2015-UP-176-Charles Ray Dean v. State	Pending	
2015-UP-201-James W. Trexler v. The Associated Press	Pending	
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending	
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending	
2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v. Harley)	Pending	
2015-UP-223-Shou Martin v. Wilmer (John) Rife	Denied	03/07/16
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending	
2015-UP-259-Danny Abrams v. City of Newberry	Pending	
2015-UP-262-State v. Erick Arroyo	Pending	
2015-UP-266-State v. Gary Eugene Lott	Pending	
2015-UP-269-Grand Bees Development v. SCDHEC	Pending	
2015-UP-273-State v. Bryan M. Holder	Pending	
2015-UP-280-State v. Calvin J. Pompey	Pending	
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending	
2015-UP-303-Charleston County Assessor v. LMP Properties	Pending	
2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill	Pending	

2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-320-American Community Bank v. Michael R Brown	Pending
2015-UP-327-State v. Shawn Justin Burris	Denied 03/04/16
2015-UP-328-Billy Lisenby v. SCDC (7)	Dismissed 03/11/16
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending
2015-UP-339-LeAndra Lewis v. L. B. Dynasty, Inc.	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending
2015-UP-353-Wilmington Savings Fund v. Furmanchik	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-359-In the matter of the estate of Alice Shaw Baker (Fisher v. Huckabee)	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-372-State v. Sheldon L. Kelly	Pending

2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-381-State v. Stepheno J. Alston	Pending
2015-UP-382-State v. Nathaniel B. Beeks	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Pending
2015-UP-388-Joann Wright v. William Enos	Pending
2015-UP-391-Cambridge Lakes v. Johnson Koola	Pending
2015-UP-395-Brandon Hodge v. Sumter County	Pending
2015-UP-402-Fritz Timmons v. Browns AS RV and Campers	Pending
2015-UP-403-Angela Parsons v. Jane Smith	Pending
2015-UP-414-Christopher A. Wellborn v. City of Rock Hill	Pending
2015-UP-417-State v. Raheem Jamar Bonham	Pending
2015-UP-423-North Pleasant, LLC v. SC Coastal Conservation	Pending
2015-UP-427-William McFarland v. Sofia Mazell	Pending
2015-UP-428-Harold Threlkeld v. Lyman Warehouse, LLC	Pending
2015-UP-429-State v. Leonard E. Jenkins	Pending
2015-UP-432-Barbara Gaines v. Joyce Ann Campbell	Pending
2015-UP-439-Branch Banking and Trust Co. v. Sarah L. Gray	Pending
2015-UP-446-State v. Tiphani Marie Parkhurst	Pending

2015-UP-455-State v. Michael L. Cardwell	Pending
2015-UP-465-Dushun Staten v. State	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-474-Edward Whitner v. State	Pending
2015-UP-476-State v. Jon Roseboro	Pending
2015-UP-477-State v. William D. Bolt	Pending
2015-UP-478-State v. Michael Camp	Pending
2015-UP-485-State v. Alfonzo Alexander	Pending
2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr.	Pending
2015-UP-501-State v. Don-Survi Chisolm	Pending
2015-UP-505-Charles Carter v. S.C. Dep't of Corr. (3)	Pending
2015-UP-513-State v. Wayne A. Scott, Jr.	Pending
2015-UP-518-SCDSS v. Bruce Walters	Pending
2015-UP-524-State v. Gary R. Thompson	Pending
2015-UP-536-Vondell Sanders v. State	Pending
2015-UP-540-State v. Michael McCraw	Pending
2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2015-UP-548-Thaddess Starks v. State	Pending
2015-UP-556-State v. Nathaniel Witherspoon	Pending
2015-UP-557-State v. Andrew A. Clemmons	Pending
2015-UP-564-State v. Tonya Mcalhaney	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Michael Wilson Pearson, Respondent.

Appellate Case No. 2014-002741

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Clarendon County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 27612
Heard November 4, 2015 – Filed March 23, 2016

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

JUSTICE BEATTY: Michael Wilson Pearson was convicted of first-degree burglary, armed robbery, kidnapping, grand larceny, and possession of a weapon during the commission of a violent crime. The trial judge sentenced Pearson to an aggregate sentence of sixty years' imprisonment. The Court of Appeals reversed, holding the circumstantial evidence presented by the State was insufficient to submit the case to the jury. *State v. Pearson*, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014). This Court granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals. For reasons that will be discussed, we reverse the decision of the Court of Appeals and affirm Pearson's convictions and sentences.

I. Factual / Procedural History

Around 6:15 a.m. on May 15, 2010, Edward "Slick" Gibbons ("Victim") was attacked by three black males wearing masks as he exited his garage. According to Victim, he was putting on his shoes to get ready to go to work when the men ran out of a storage room in his carport and threw him on the ground. The three men robbed Victim of approximately $840, beat him, and wrapped duct tape around his head. One of the men called Victim by his nickname, "Slick," and said, "Slick, you know that we know that you got money," and the man asked him where the rest of the money was located. Victim told them he had already given them everything he had and begged them not to beat him anymore. Victim noticed one of the men appeared to have something in his hand that might have been a pistol, and he heard the men discuss whether to shoot him.

The three men then left in Victim's 1987 Chevrolet El Camino. As the men were driving away, Victim pulled himself up and observed one man, who was riding in the open back of the El Camino, yell to the two men seated inside the vehicle, "he's up, he's up." This man got out of the vehicle, ran back to Victim and hit him again, rendering him unconscious. When Victim regained consciousness, he alerted his wife by ringing the doorbell on the home. Victim's wife contacted her daughter who called 911 to report the attack.

At approximately 6:40 a.m., a local farmer, Cecil Eaddy, Jr., found the El Camino abandoned in the road with the keys still in it, the motor running, and the passenger door open. The car was located about a mile and half from the auto parts store that Victim owned and within a few miles of Victim's home. Eaddy pulled the vehicle out of the road, turned off the engine, took the keys to Victim's

store, and drove Walter Bush, one of Victim's employees, back to the vehicle so that Bush could drive it to Victim's store. Bush testified he drove the vehicle "[s]traight back to the store."

Ricky Richards, an investigator with the Clarendon County Sheriff's Department, responded to the 911 call. After a few minutes at Victim's home, Richards was called to process the El Camino. Richards testified he lifted fingerprints from the driver's side "door jamb" and the "rear quarter on the driver's side." Richards acknowledged there was no way to tell when the fingerprints were left on the vehicle.

While Victim was being treated at the hospital, Thomas Ham, an investigator with the Clarendon County Sheriff's Department, assisted Investigator Kenneth Clark in his interview with Victim. Investigator Ham also took the duct tape that was removed from Victim's head and submitted it to SLED for processing.

Ultimately, a fingerprint recovered from the vehicle was identified as a thumbprint belonging to Pearson and DNA evidence on the duct tape was matched to Victor Weldon. Marie Hodge, the Automated Fingerprint Identification System ("AFIS") examiner, testified that she was able to determine that the fingerprint matched Pearson's right thumbprint. However, Hodge admitted she could not "age" the fingerprint as it could have been "there from two years on up to two days."

Following his arrest, Pearson was interviewed by Investigators Clark and Ham. Investigator Clark testified that Pearson denied he knew Victim or where he lived. According to Investigators Clark and Ham, Pearson stated that he had never been to Victim's house or come in contact with Victim's vehicle. Investigator Clark also interviewed Victor Weldon, who denied having any involvement in the crimes. In separate interviews, Pearson and Weldon denied that they knew each other.

To counter these statements, the State presented evidence that Pearson had been on Victim's property. Richard Gamble, a local landscaper, testified Pearson had previously assisted him in doing landscaping work for Victim and Victim's son, who lived on the same block. Although Gamble could not recall the exact date of the landscaping project, he believed it took place in the spring of 2009 or

2010 and lasted "at least 5 days." Gamble further testified that while working on the project, he observed Pearson enter Victim's garage in order to retrieve tools that were located in the storage area.

Additionally, the State presented the testimony of John Hornsby, who worked as an area supervisor at the South Carolina Vocational Rehabilitation Center in Sumter. According to Hornsby, time cards and attendance records revealed Pearson and Weldon were both assigned to the facility's woodshop from December 9 through December 12, 2008. Hornsby indicated that around twenty-five individuals generally worked at the woodshop on a daily basis.

After the State rested, Pearson and Weldon both moved for a directed verdict on all charges. Pearson's counsel argued that even though Pearson's fingerprint was found on the outside of Victim's car, the fingerprint was insufficient to place Pearson at the crime scene. Counsel explained there was no evidence as to when the fingerprint was placed on the El Camino and further noted that Pearson lived a block and half from Victim's auto parts store where the vehicle was parked. Counsel opined that "[i]t could have been [placed] well before this whole thing happened."

In response, the State argued that Pearson's fingerprint was found on the rear of the vehicle, where Victim testified one of the men who robbed him had been seated as they drove away. The State also referenced evidence that Pearson and Weldon attended the same job training program over a four-day period, as well as testimony that Pearson had done landscaping work at Victim's home.

Pearson's counsel replied that there were no fingerprints found on the back of the El Camino where Victim "identified the man getting out of the truck, on or off the truck." Counsel reiterated that "the fingerprint was the only hard evidence the State ha[d] against [Pearson] found on that truck."

The trial judge denied both directed verdict motions. In so ruling, the judge stated:

> As far as Mr. Pearson's fingerprint the evidence in this case that has come before this jury that I recall he told the police officer he did not know [Victim]. He had not been at his house or his place of business.

> His vehicle was taken that morning. Within 30 minutes the vehicle was found abandoned a mile and a half or two miles away. The vehicle was processed and was carried to the auto parts place and processed. That day his fingerprint was found on the vehicle.
>
> And I certainly think at least that's sufficient evidence for the jury to make a determination of guilt or innocence in this case. And I respectfully deny your motion.

The judge explained he was aware there was also evidence that Pearson had done landscaping work in Victim's yard, was familiar with Victim's house, and there was a question regarding the timeframe of this work. However, the judge found this presented a question of fact for a jury to evaluate because Pearson maintained that he had no contact with Victim or his property.

Neither Pearson nor Weldon presented any evidence. The jury convicted both of first-degree burglary, armed robbery, kidnapping, grand larceny, and possession of a weapon during the commission of a violent crime.

Pearson appealed to the Court of Appeals. The Court of Appeals reversed, finding the circumstantial evidence presented by the State did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury. *State v. Pearson*, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014).

In so ruling, the court found that although the recovered fingerprint directly tied Pearson to the stolen vehicle, "the fingerprint merely raised a suspicion of Pearson's guilt because there was no additional evidence showing when the fingerprint was placed on the vehicle." *Id.* at 402, 764 S.E.2d at 712. The court explained that "there was other evidence showing Pearson may have had an opportunity to come in contact with the vehicle before the crimes occurred." *Id*. at 401, 764 S.E.2d at 711. The court noted there was "testimony that [Victim] regularly parked his vehicle in a public lot adjacent to his store" and Pearson "assisted with a five-day landscaping project at [Victim's] residence." *Id.*

The court also noted that "the additional incriminating evidence presented by the State failed to fill the gaps in proof and left the jury to speculate as to Pearson's guilt." *Id.* at 402, 764 S.E.2d at 711. Specifically, the court found no evidence established a relationship between Pearson and Weldon and, at most, the "evidence

demonstrate[d] the two co-defendants worked in the same facility at the same time." *Id.* at 402, 764 S.E.2d at 712. Although Pearson and Weldon denied knowing each other, the court found "it is not incredible that neither man could remember a fellow participant in a program they attended more than a year before the crimes." *Id.* The court concluded that "[d]espite the fact Weldon was tied to the crimes because of his DNA on the duct tape, nothing tied Pearson to the crime scene." *Id.*

Following the denial of the State's petition for rehearing, this Court granted certiorari to review the decision of the Court of Appeals.

II. Standard of Review

"[W]hen the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *see Hepburn*, 406 S.C. at 429, 753 S.E.2d at 408 ("In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict."). Further, when the State relies exclusively on circumstantial evidence and a motion for a directed verdict is made, the trial judge is concerned with the existence or non-existence of evidence, not with its weight. *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478. The trial judge "should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Id.* "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.* "However, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis*." *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996) (emphasis added).

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014).

III. Discussion

A. Arguments

The State argues the Court of Appeals erroneously reversed Pearson's convictions based upon a misapplication of the standard of review regarding the

denial of a motion for a directed verdict. Although the State acknowledges that the Court of Appeals correctly identified the standard of review regarding "substantial circumstantial evidence," the State maintains the Court of Appeals improperly focused on "the State's burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime[.]" According to the State, the Court of Appeals confused the burden of proof required to sustain a conviction with the level of evidence required to sustain a challenge at the directed verdict stage.

Citing *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) and *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004),[1] the State contends the trial judge was not required to find the inferences from the evidence demonstrated Pearson's guilt to the exclusion of *every* other reasonable hypothesis. Instead, the State claims the relevant question was, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, as a trial judge must not weigh the facts. In support of this claim, the State notes that these principles are consistent with decisions of the United States Supreme Court ("USSC") such as *Jackson v. Virginia*, 443 U.S. 307 (1979).[2]

---

[1] The State references the following language in *Hepburn*:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of *any other reasonable hypothesis*.

Hepburn, 406 S.C. at 429, 753 S.E.2d at 409 (quoting *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478 (citations & internal quotations marks omitted)) (emphasis added).

[2] In *Jackson*, the USSC stated:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

Further, the State asserts that in reversing the trial judge's decision, the Court of Appeals engaged in speculation and weighed the evidence of the fingerprint "rather than simply considering its existence[] to determine whether it reached the level of substantial circumstantial evidence." In essence, the State avers the Court of Appeals reached its decision based on the "mere possibility" that Pearson may have had an opportunity to come in contact with Victim's vehicle before the crimes occurred. Even assuming that this alternate hypothesis was reasonable, the State asserts that the evidence did not need to exclude the hypothesis in order to submit the case to the jury.

B. Case Trend

Recently, this Court has been presented with a series of criminal cases where the Court of Appeals has reversed the trial judge's denial of a defendant's motion for a directed verdict on the ground the circumstantial evidence was insufficient to submit the case to the jury. Two of these cases, *State v. Lane*, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013),[3] and *State v. Bennett*, 408 S.C. 302, 758 S.E.2d 743

> doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts.

Jackson, 443 U.S. at 319 (citation omitted).

[3] In *Lane*, the defendant was indicted for first-degree burglary in connection with the theft of several firearms at the victim's home. *Lane*, 406 S.C. at 119, 749 S.E.2d at 166. At trial, the State presented evidence that the victim's neighbor observed a red car with gray primer paint on the front passenger panel and a paper license plate parked in the victim's driveway on the afternoon of the burglary. *Id.* at 120, 749 S.E.2d at 166. The neighbor observed two people in the vehicle, one of whom walked back and forth from the vehicle to the victim's front door. *Id.* Later that evening, following the burglary, the victim found a piece of paper with a unique username and password printed upon it lying next to his driveway. *Id.* at 120, 749 S.E.2d at 167. Law enforcement went to interview Lane after determining that the piece of paper had been issued to Lane from the local unemployment office. *Id.* The officers found Lane at his girlfriend's parents' home where they observed the red car with the gray primer paint and a paper license plate in the driveway. *Id.* Although Lane was initially evasive, he acknowledged

(Ct. App. 2014),[4] were cited to support the decision of the Court of Appeals in the instant case. *Pearson*, 410 S.C. at 398-400, 764 S.E.2d at 710-11.

This Court has since reversed *Lane* and *Bennett*. Further, in *Bennett*, the Court took the opportunity to resolve the apparent confusion over the appropriate standard governing whether the State has presented sufficient evidence to overcome a motion for a directed verdict. *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016). Initially, the Court differentiated between the analysis of a court considering circumstantial evidence when ruling on a directed verdict motion

---

that he was driving the red car the day of the burglary and confirmed that he had been issued the paper from the unemployment agency. *Id.* The Court of Appeals reversed the trial court's refusal to direct a verdict of acquittal for Lane, finding the State did not present substantial circumstantial evidence to prove Lane committed first-degree burglary. *Id.* at 122, 749 S.E.2d at 168. This Court granted the State's petition for a writ of certiorari and reversed, finding the evidence was sufficient to withstand Lane's motion for a directed verdict. *State v. Lane*, 410 S.C. 505, 765 S.E.2d 557 (2014).

[4] In *Bennett*, the defendant was convicted of second-degree burglary, malicious injury to property, and petit larceny in connection with theft and destruction at a community center. *State v. Bennett*, 408 S.C. 302, 758 S.E.2d 743 (Ct. App. 2014). The State presented evidence that a window was broken at the community center and that the door next to it was ajar. *Id.* at 303, 758 S.E.2d at 744. Inside the community center, there was evidence that a television, which was mounted on the wall of the community room, had been tampered with, as if someone had been attempting to remove it. *Id.* at 304, 758 S.E.2d at 744. A fingerprint lifted from the television matched Bennett's fingerprints. *Id.* Officers also discovered that a computer and television were missing from the computer room. *Id.* When officers returned later in the day, they found two drops of blood located beneath the stand where the television had been. *Id.* at 305, 758 S.E.2d at 745. The DNA profile from the blood droplets matched that of Bennett, who had also been identified as a frequent visitor at the community center. *Id.* On appeal, the Court of Appeals reversed, finding the evidence only created a suspicion of guilt and, therefore, a directed verdict should have been granted in Bennett's favor. *Id.* at 307, 758 S.E.2d at 746. This Court granted the State's petition for a writ of certiorari and reversed, finding the evidence was sufficient to withstand Bennett's motion for a directed verdict. *State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016).

and that performed by the jury. *Id.* at ___, 781 S.E.2d at 354. The Court explained that "[w]ithin the jury's inquiry, 'it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.'" *Id.* (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). In contrast, the trial court, when ruling on a directed verdict motion, "views the evidence in the light most favorable to the State and must submit the case to the jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" *Id.* (quoting *Littlejohn*, 228 S.C. at 329, 89 S.E.2d at 926). Based on this distinction, the Court explained:

> [A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

Id.; *see State v. Larmand*, 415 S.C. 23, 32, 780 S.E.2d 892, 896 (2015) ("Although Respondent presented plausible explanations for each of these facts, our duty is not to weigh the plausibility of the parties' competing explanations. Rather, we must assess whether, in the light most favorable to the State, there was substantial circumstantial evidence from which the jury could infer Respondent's guilt.").

C. Application

Here, the State presented evidence that: (1) Pearson's fingerprint was found on the stolen vehicle, which was located approximately two miles from Victim's home within thirty minutes of the crime; (2) Pearson denied that he had contact with Victim's vehicle, knew Victim, or knew where he lived; (3) Victim testified that before the suspects drove away one of the men, who was riding in the open back of the vehicle, got out of the vehicle and returned to attack him; (4) Pearson and Weldon were in the same vocational rehabilitation training program during a four-day period; and (5) DNA evidence on the duct tape removed from Victim's head was matched to Weldon.

Viewing this evidence in the light most favorable to the State, we conclude the evidence could induce a reasonable juror to find Pearson guilty. As in *Bennett*, we find the Court of Appeals weighed the evidence and erroneously required the State, at the directed verdict stage, to present evidence sufficient to exclude *every* other hypothesis of Pearson's guilt. *See Pearson*, 410 S.C. at 401-02, 764 S.E.2d at 711 ("Because the State offered no timing evidence to contradict *reasonable explanations* for the presence of the fingerprint, the jury could only have guessed the fingerprint was made at the time of the crimes." (emphasis added)).[5]

IV. Conclusion

Accordingly, we reverse the decision of the Court of Appeals and affirm Pearson's convictions and sentences.

REVERSED.

KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur. PLEICONES, C.J., concurring in result only.

[5] Pearson cites *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), and *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000) as examples of cases where this Court found that circumstantial evidence, particularly fingerprint evidence, was insufficient for submission to the jury when the State failed to place the defendant at the scene of the crime. While we have certainly considered these cases, we need not engage in the futile exercise of attempting to distinguish their holdings from the instant case as we have recognized that "in this area of ever-evolving jurisprudence our inquiry is necessarily fact-intensive" and holdings in these cases are "limited to their peculiar facts." *Bennett*, 415 S.C. at ___ n.1, 781 S.E.2d at 354 n.1.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Manuel Antonio Marin, Petitioner.

Appellate Case No. 2013-002001

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27613
Heard April 8, 2015 – Filed March 23, 2016

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek and Appellate Defender David Alexander, both of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Anthony Mabry, all of Columbia; and Solicitor Barry J. Barnette and Assistant Solicitor Russell D. Ghent, both of Spartanburg, for Respondent.

JUSTICE KITTREDGE: Petitioner Manuel Antonio Marin was convicted of murder and possession of a firearm during the commission of a violent crime. Marin appealed, and the court of appeals affirmed, rejecting his argument that the trial court committed reversible error by refusing to instruct the jury that a person acting in self-defense has the right to continue shooting until the threat has ended. *State v. Marin*, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). We issued a writ of certiorari to review the court of appeals' decision. We affirm as modified.

I.

On July 20, 2008, both Marin and Nelson Tabares (Victim) attended a Colombian Independence Day festival, followed by an after-party at a Greenville nightclub. According to Christopher McDonald, the nightclub's bouncer, Victim was extremely intoxicated and had difficulty standing and walking, but was not aggressive. Due to Victim's condition, nightclub staff members, including McDonald and owner Larry Rodriquez, determined that it would not be safe for Victim to drive. As a result, McDonald and Rodriquez attempted to find Victim a ride home.[1]

Marin told McDonald that he knew where Victim lived and volunteered to drive Victim home. However, after McDonald helped Victim into the back seat of Marin's vehicle, Marin said that he needed Victim's address so that he could put it in his navigation system. McDonald looked at Victim's identification and gave the address to Marin. Marin, accompanied in the front seat by his former brother-in-law, Alfredo Jimenez, then began driving Victim home.

Marin testified that Victim was unruly and combative during the drive. According to Marin, Victim told him, "I'm sorry, but you got to go," then reached over the backseat and placed him in a headlock. Marin said he then decided not to take

[1] Rodriquez testified that Victim was not drunk, but merely ill. However, tests taken after his death revealed that Victim's blood-alcohol concentration was 0.323%, more than four times the legal limit to drive a motor vehicle. *See* S.C. Code Ann. § 56-5-2933(A) (Supp. 2015) (making it unlawful to drive a motor vehicle with a blood-alcohol concentration of 0.08% or higher).

Victim home, but to drive to a public location and seek help. Marin further testified that Victim attempted to grab the steering wheel. However, Jimenez stated that Victim became upset and began fighting with Marin over control of the steering wheel after Marin drove past the road on which Victim's home was located and would not stop.[2]

It is undisputed that Marin drove into Spartanburg County, retrieved a gun from the glove compartment, and shot Victim twice in the back of the head. Rather than stopping immediately, Marin continued driving until he arrived in downtown Spartanburg. Several witnesses observed Marin and Jimenez arguing in the street and a passerby called the police.

Marin was subsequently indicted for murder and possession of a firearm during the commission of a violent crime. Marin pleaded not guilty to both charges.

While Marin claimed he shot Victim in self-defense, he did not request any specific language for the self-defense charge at the charge conference, only requesting that the charge include an instruction that he had a right to act on appearances. Further, Marin did not object when, during closing arguments, the State asserted that Marin's firing of two shots was evidence of malice and supported a murder conviction, nor did he ask for any additional instructions before the trial court charged the jury, in relevant part, as follows:

> In this case the defendant has . . . raised what is known in the law as the defense of self-defense. The law recognizes the right of every person to defend himself or herself or a friend, relative[,] or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.
>
> The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity. And it is a complete defense to a charge of an unlawful homicide should you find that it exists based upon your evaluation of the evidence produced during the trial

[2] While Jimenez did not testify at trial, his statements were admitted into evidence as excited utterances. *See* Rule 803(2), SCRE (excepting from the prohibition against hearsay "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

of this case. The existence of self-defense entitles a person charged with the commission of an unlawful homicide to a verdict of not guilty.

And although the defendant has raised the defense of self-defense, the burden of proof is not on the defendant to prove the existence of self-defense. As I have already told you, the burden is always upon the state to prove the defendant's commission of the crime alleged against him beyond a reasonable doubt. And this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense.

But in order for you to consider the defense of self-defense you obviously must know what the elements are. And there are four basic elements that are required before self-defense may be established.

First, it must be shown that the defendant was without fault in bringing on the immediate difficulty which gave rise to the necessity of using deadly force which resulted in the taking of human life.

One cannot provoke, initiate[,] or otherwise through his own fault bring about a difficulty and then claim the right of self-defense in the use of deadly force against an attack which was caused by that provocation.

Secondly, it must be shown that at the time the fatal act was committed the defendant actually believed that he was in imminent danger of losing his life or sustaining serious bodily injury, or some other person was, or that the defendant actually was in such imminent danger. And the term imminent danger means an immediate or present danger and not a past or future danger.

And, thirdly, if the defense is based upon a belief of imminent danger, then it must be shown that the belief was reasonable, that is a reasonably prudent person of ordinary firmness and courage would have entertained the same belief.

If the defendant or the other person being defended actually was in imminent danger, then it must be shown that the circumstances were such as would warrant a person of ordinary prudence and courage to inflict the fatal injury in order to save himself or some other person from death or serious bodily injury.

In other words, it must be shown that a reasonably prudent person of ordinary firmness and courage if acting under the same or

similar circumstances would have reached the same conclusion and entertained the same belief.

Deadly force is only appropriate when necessary and may only be exercised where the defendant entertains a reasonable belief that he or some other is about to sustain loss of life or suffer serious bodily harm.

The law of self-defense encompasses preventative action taken to protect one's own life without another [sic] if such action is taken in anticipation of imminent danger of losing one's life or sustaining serious bodily injury.

A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness[,] and courage would have acted or should have acted in meeting the appearance of the danger.

In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.

Again, there is however a requirement of objectivity. Any such belief must be reasonable, that is a reasonable and prudent person if acting under the same or similar circumstances would have so believed or would have also been warranted in acting as the defendant did.

And, fourthly, it must be shown that the defendant had no other means of avoiding the danger of losing his life or sustaining the infliction of serious bodily injury other than to act as he did under the particular circumstances as existed, because, as I have stated, self-defense is founded upon necessity.

Now, if you have a reasonable doubt as to the defendant's guilt as it relates to a proof of an unlawful homicide after considering all of the evidence received during this case, including any evidence relating to the issue of self-defense, then it would be your duty to resolve that reasonable doubt in favor of the defendant and find him not guilty.

After the jury was charged, but prior to deliberations, the trial court provided an opportunity for the parties to note any exceptions to the charges. It was at this juncture that Marin first requested that the trial court instruct the jury that "if the

defendant is justified in defending himself or others in firing the first shot, then the defendant—also [may] continue—to continue [sic] shooting until it is apparent that the danger of death or serious bodily injury has . . . completely ended."

Marin represented to the trial court that *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), mandated such a charge. However, the trial court reviewed *Rye* and noted that only the dissenting opinion mentioned that language, and the reference was in the context of a different legal issue. Marin then acknowledged that *Rye* was not on point. When the trial court asked Marin if there were any other cases that approved of such a charge, Marin's counsel responded, "I'm not a walking encyclopedia." Thus, in the absence of any supporting authority, the trial court declined to give the requested charge.

A short time later, the jury requested further instruction on malice and voluntary manslaughter, but did not ask for clarification or reinstruction on self-defense. After the trial court reinstructed the jury on both malice and voluntary manslaughter, Marin renewed his request to have the "continuing to shoot" language charged to the jury. The trial court denied the request, finding that its thorough charge properly communicated the law of self-defense to the jury.

II.

Marin argues the trial court committed reversible error by failing to charge the jury that one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended. We disagree, for this common law rule was sufficiently encompassed in the jury charge provided by the trial court.

"'[T]he trial court is required to charge only the current and correct law of South Carolina.'" *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (alteration in original) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "'The law to be charged must be determined from the evidence presented at trial.'" *Id.* at 549, 713 S.E.2d at 603 (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007)). "'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the

evidence and issues presented at trial.'" *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (citing *State v. Rabon*, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980)). Moreover, "'[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583).

III.

The court of appeals expressed concern that "the charge Marin requested is not a correct statement of law." *Marin*, 404 S.C. at 620, 745 S.E.2d at 151. On this point the court of appeals erred, for we have previously held that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (citation and internal quotation marks omitted). *But see* 40 C.J.S. *Homicide* § 189 (2014) ("[A] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body."). While we acknowledge that the language Marin requested accurately states the law, our inquiry on appellate review is concerned only with the question of whether the jury charge, when viewed as a whole, accurately conveys the applicable law of self-defense. *See, e.g.*, *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.'" (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464)). Indeed, "'[t]he *substance* of the law is what must be charged to the jury, not any *particular verbiage*.'" *Id.* at 549, 713 S.E.2d at 603 (emphasis added) (quoting *Adkins*, 353 S.C. at 318–19, 577 S.E.2d at 464).

Here, the experienced and excellent trial judge gave a thorough and comprehensive self-defense charge, well beyond the general *State v. Davis*[3] elements. While the

[3] 282 S.C. 45, 317 S.E.2d 452 (1984) (per curiam). The four-part self-defense instruction recommended by this Court in *Davis* was (1) the defendant was without fault in bringing about the danger; (2) the defendant believed he was, or the defendant actually was, in imminent danger of death or serious bodily harm; (3) the defendant's belief or action was reasonable; and (4) the defendant had no other

"continuing to shoot" charge may have been appropriate, its absence does not mandate reversal. The essence of the charge was encompassed in the jury instructions, particularly the instruction that "a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable." The circumstances here are therefore unlike those in cases where the charge given completely omitted applicable principles of self-defense law. *See, e.g.*, *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (holding "the trial judge erred in charging the jury only the *Davis* charge without considering the facts and circumstances of the case").

IV.

The dissent relies in part on *Fuller* to support its conclusion that the trial court inadequately instructed the jury on the law of self-defense as the law applied to the facts of this case. The dissent's approach would extend the *Fuller* holding to the point it both conflicts with our well-settled standard of review and risks offending our constitutional prohibition against judges "charg[ing] juries in respect to matters of fact." S.C. Const. art. V, § 21.

The facts in *Fuller* were as follows:

> On the night of September 20, 1986, Fuller, a black man, solicited a white prostitute, Susan Phillips, on Two Notch Road, in the parking lot of the Columbia Motor Lodge. Fuller agreed to meet Ms. Phillips back at her trailer. Ms. Phillips lived in a trailer on Blume Court, next to the Ole Place Club and behind the Columbia Motor Lodge. Fuller drove to Blume Court while Ms. Philips ran down Two Notch Road to Blume Court. Fuller parked his car and waited on Blume Court while Ms. Phillips went in the trailer. Upon arriving at her trailer, Ms. Phillips found that another prostitute already had a "bag" (a man) in the bedroom. Since the trailer was occupied by another prostitute, Fuller left to find a friend's party.
>
> Unsuccessful in finding the party, Fuller returned to Blume Court. Upon returning, Fuller encountered a car driven by a white woman blocking the entrance to Blume Court. Fuller asked her to

---

probable means of avoiding the danger, except that a defendant on his own premises has no duty to retreat. *Id.* at 46, 317 S.E.2d at 453.

> move. Mr. Dixon, the owner of the private Ole Place Club, and Mr. Phillips, the Ole Place Club's bouncer, approached Fuller's car and asked him what he was "trying to do to that white lady." Fuller denied that he was "doing anything." While grabbing Fuller's door, Mr. Dixon responded, "Nigger, don't lie to me." Mr. Dixon then grabbed Fuller by the throat[] and stated, "[T]hat is why we have got to take care of niggers like you."
>
> Fuller, threatened by Mr. Dixon, reached down to the floorboard of his car and retrieved his gun. He then fired a warning shot between Dixon and Phillips. Not knowing Blume Court was a dead end street, Fuller drove to the end of Blume Court. As he began to turn around in an attempt to leave, he saw Dixon and Phillips open the trunk of their car. Both Dixon and Phillips then got in their car and tried to block Fuller's car from exiting Blume Court.
>
> Maneuvering past Dixon's car, Fuller turned right on Two Notch Road. After entering Two Notch Road, Fuller's car crashed into a steel rail at the road's curb. Fuller could not move his car off of the steel rail. The testimony was unclear as to whether the Dixon car forced Fuller off the road or whether he lost control of his car. After Fuller crashed his car, Dixon and Phillips drove their car into Fuller's car. Fuller testified that one of the two men yelled, "[W]e're going to take care of you."
>
> Fuller testified that after his car had been rammed, the two men began to exit their car. He cautioned them to stay in their car. Fuller testified that when the door of the car opened, he saw something shiny in Dixon's hand and thought it was a gun. Fuller fired four shots at the men's car and killed both men. A gun was never found in Dixon's car.

Fuller, 297 S.C. at 441–42, 377 S.E.2d at 329–30.

This Court held "it was error for the trial judge to charge *Davis* as an exclusive self-defense charge." *Id.* at 443, 377 S.E.2d at 330. In charging only the general self-defense law from *Davis*, we held the trial court failed to charge the jury on applicable principles of law that were directly implicated by the facts of the case, such as the right to act on appearances,[4] that words accompanied by hostile acts

[4] "[Fuller] testified that he saw Dixon and Phillips open the trunk of their car and

may establish self-defense,[5] and that an individual has no duty to retreat if doing so would place him at an increased risk of death or serious bodily harm.[6] *Id.* at 443–44, 377 S.E.2d at 331 (citations omitted).

Here, unlike in *Fuller*, the trial court gave a thorough self-defense instruction that far exceeded the requirements of *Davis*. *Fuller* does nothing to alter the recognized principles that an appellate court must consider the jury charge as a whole and a trial court need not use the precise verbiage requested by a party as long as the legal principle is included in the charge. Adopting the dissent's expansive interpretation of *Fuller* would therefore place the law on jury instructions at odds with settled law by encouraging appellate courts to ignore the standard of review and encouraging trial courts to make unconstitutional comments on the facts. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Indeed, while maintaining it was reversible error to not charge the "continuing to shoot" language, the dissent concedes the charge is "alarmingly close to an impermissible charge on the facts."

V.

Because the thorough jury charge included consideration of the applicable principles of self-defense, the failure to incorporate the precise "continuing to shoot" verbiage does not rise to the level of reversible error. As the court of appeals correctly observed, "[c]onsidered as a whole, the trial court's charge explained this principle of law." *Marin*, 404 S.C. at 622, 745 S.E.2d at 152. We therefore affirm the court of appeals' decision as modified.

---

also thought he saw a shiny object in Dixon's hand." *Id.* at 444, 377 S.E.2d at 331.

[5] "Testimony presented at trial revealed that Dixon stated 'he was going to take care' of Fuller; that Dixon grabbed Fuller by the throat; and[] that Dixon and Phillips called Fuller a 'nigger.' Testimony also revealed that Dixon and Phillips rammed Fuller's car . . . ." *Id.* at 444, 377 S.E.2d at 331.

[6] "Testimony elicited at trial revealed that Dixon and Phillips rammed Fuller's car door when he tried to leave his car. Fuller also testified that he did not believe it was safe to leave his car and run from the scene." *Id.* at 444, 377 S.E.2d at 331.

AFFIRMED AS MODIFIED.

BEATTY, HEARN, JJ., and Acting Justice Jean H. Toal, concur.
PLEICONES, C.J., dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES: I dissent from the majority's decision because in my view, the trial judge's refusal to charge the legal principle contained in the requested charge was reversible error. Accordingly, I would reverse Marin's conviction and sentence and remand for a new trial.

I agree with the majority that the language requested by Marin was a correct statement of law. However, in my opinion, the charge given did not encompass the charge requested, and, therefore, based on the evidence at trial, it was reversible error for the trial judge to refuse to give the requested charge. *See State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial" (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003))); *State v. Day*, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (finding a trial judge's refusal to specifically tailor the self-defense charge to adequately reflect the facts and theories presented by the defendant is reversible error (citation omitted)); *State v. Fuller*, 297 S.C. 440, 443, 337 S.E.2d 328, 330 (1989) (holding a trial judge's refusal to include an additional requested jury charge on self-defense is reversible error where the facts and circumstances presented at trial warrant such a charge). First, it is my opinion that Marin was entitled to a charge explaining that where a defendant is justified in using deadly force, the defendant may continue to use such force until the danger dissipates.[7] *See State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (holding a person justified in firing the first shot in self-defense may continue to shoot until the apparent danger to his life or body has ceased). Marin, who was employed as a newspaper marketing director and manager of a car rental company, testified he was being attacked from the backseat when he twice shot the victim out of fear for

[7] I find the specific language "continuing to shoot" alarmingly close to an impermissible charge on the facts. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 183–84 (Ct. App. 1992). Regardless, Marin's requested charge was based on a correct principle of law, and the trial judge was required to charge that principle to the jury. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (holding when a party requests the trial judge charge a correct and applicable principle of law, the court must charge it (citation omitted)).

his safety, and evidence presented at trial corroborated Marin's version of events. Specifically, law enforcement testified skid marks and debris in the roadway were consistent with damage observed to the front of Marin's vehicle corroborating Marin and Jimenezs' statements after the incident that there was a struggle over control of the steering wheel; the crime scene investigator found the victim's body slumped over the center console of Marin's vehicle between the driver's and front passenger's seat, with his left arm positioned palm-up in the driver's seat, and with one foot on the backseat floorboard and one foot on the backseat;[8] and the pathologist who performed the autopsy on the victim testified there were two gunshot wounds to the head—one fatal, and one potentially fatal—and it was not possible to determine which gunshot wound came first, only that the gunshots "came close together," and both were fired at extremely close range. As to why Marin shot the victim twice, Marin testified at trial, "It happened real fast -- boom, boom."

In closing argument, the solicitor argued, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head." The solicitor further argued, "Would a reasonable person shoot someone twice in the back of the head?" While the solicitor's statements do not singularly require the trial judge give the requested charge, in my view, the statements effectively highlight the importance of the charge requested in light of the facts of this case. Additionally, in my opinion, it is worth noting that after the trial judge gave the original jury charge, the jury requested additional guidance as to malice and voluntary manslaughter, and the trial judge again refused to include Marin's requested verbiage regarding the principle of "continuing to shoot."[9] *See State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (finding that when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked, and that the information relayed by the trial judge to the jury is given "special consideration.").

---

[8] The crime scene investigator further found no indication the victim's injuries were sustained in the backseat or any other location other than where his body was positioned between the front seats of the vehicle.

[9] The jury returned its verdict approximately one hour after the trial judge provided the additional instruction.

Second, in my view, the language cited by the majority as encompassing Marin's requested charge—"a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable"—merely explains that a defendant may take a human life in self-defense, and utterly fails to further define for the jury reasonable self-defense conduct under the facts of this case. In my opinion, the charge requested by Marin goes a step further, and elucidates reasonableness in this case, i.e., a person entitled to exercise self-defense may continue using deadly force until the perceived danger has dissipated. Accordingly, in light of the solicitor's closing argument, I find the language cited by the majority is not remotely sufficient to explain or clarify for the jury that the two shots fired by Marin were not necessarily indicative of malice. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603; *Day*, 341 S.C. at 418, 535 S.E.2d at 435; *Fuller*, 297 S.C. at 443, 337 S.E.2d at 330 (1989). Thus, I do not find the jury charge included the requested, applicable principle of self-defense.

For the reasons given above, I would find the trial judge committed reversible error by failing to charge the principle embodied in the requested "continuing to shoot" language, reverse Marin's conviction, and remand to the lower court for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Johnie Allen Devore, Jr., Appellant.

Appellate Case No. 2013-000883

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5392
Heard November 3, 2015 – Filed March 23, 2016

DISMISSED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

HUFF, A.C.J.: Johnie Allen Devore, Jr. seeks to appeal his conviction for driving under the influence (DUI). We dismiss the appeal for lack of jurisdiction.

On March 14, 2013, Devore—who was represented by counsel—was convicted of DUI in a jury trial. On March 21, 2013, seven days after his conviction, Devore sent a pro se letter to the trial judge, raising various concerns and asking the trial judge to reconsider the verdict or to declare a mistrial. On April 1, 2013, eighteen days after his conviction, Devore sent a second pro se letter, this time to the circuit solicitor, "Re: Request for Appeal or Re-examination of [his case]." This letter purportedly attached his March 21 letter to the trial judge, and stated he intended the attached letter "to be a request for appeal, review, or consideration of changing [Devore's] trial results to a mistrial." Devore noted his letter to the trial judge had "been ignored and [had] remained unanswered."

At some point, Devore obtained new counsel—Attorney Wilkes—to represent him. On April 19, 2013, thirty-six days after his conviction, Attorney Wilkes filed an "Amended Notice of Appeal" with this court from Devore's conviction entered March 14, 2013, noting a pro se filing requesting reconsideration had been mailed to the trial judge on March 21, 2013, that no order appeared to have been issued from that filing, and that a second pro se filing was served on the solicitor on April 1, 2013.

On June 21, 2013, this court remanded the matter for the limited purpose of entertaining Devore's motion. On March 17, 2014, the trial judge held a hearing on Devore's motion for a new trial. Attorney Wilkes began the hearing by giving the background on the matter, informing the trial judge that Devore had, subsequent to his DUI conviction, sent the two documents—one of which was addressed to the trial judge and was "technically a motion for a new trial which was appropriate under the time frame." The trial judge responded, "Now, he was represented by counsel, wasn't he, at that point?" Attorney Wilkes agreed Devore was represented by counsel at the time, but further explicated that "[trial counsel] left on vacation and left the country without filing the motion or notice," that "[t]here may have been some miscommunication," and Devore, "being . . . aware of the timing, filed both."

Attorney Wilkes then proceeded to argue the merits of the motion to the trial judge. In ruling on the matter, the trial judge began by indicating he did receive Devore's post-trial motions, but stated he was confused because, "for all [he knew], [Devore] was still represented by [trial counsel]." The trial judge further stated it was "difficult for [him] to respond when [Devore was] represented by counsel." He noted that Devore's pro se documents were timely filed, but stated it put him in an

awkward position of not knowing how to respond since Devore was represented by counsel who had not communicated with the court that there were motions to be resolved by the court. The trial judge then addressed the merits of the argument, but found no error and no basis for a new trial.

On March 27, 2014, Attorney Wilkes filed a notice of appeal from Devore's March 14, 2013, conviction and sentence, as well as the trial judge's oral ruling of March 17, 2014, which denied Devore's post-trial motion. On October 10, 2014, the State filed a motion to dismiss for lack of appellate jurisdiction. On November 13, 2014, this court denied the State's motion to dismiss. The parties thereafter filed the record on appeal and their briefs for consideration by this court.

The State persists in asserting this court lacks appellate jurisdiction over the matter, declaring it did not waive the argument and continuing to maintain the appeal should be dismissed. Specifically, it contends that Devore was admittedly represented by counsel at the time he submitted the March 21, 2013, letter to the trial judge and, pursuant to *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010), such substantive pro se documents are not proper when a party is represented by counsel. Thus, the March 21, 2013 letter could not operate as a notice of appeal or as a motion for reconsideration which would stay the time for filing of the appeal. Accordingly, the State maintains no proper motion for reconsideration or notice of appeal was served within the required ten days of Devore's conviction. Devore argues this court does have appellate jurisdiction. He contends the State's argument overlooks the fact that, although he had an attorney of record from the trial, he did not have an attorney "actively representing" him after the conclusion of the trial. Thus, he maintains his pro se filings did not create or constitute prohibited "hybrid representation." We agree with the State that this court lacks appellate jurisdiction to consider the matter.

Our appellate court rules require a party intending to appeal to serve and file a notice of appeal. Rule 203(a), SCACR. In criminal appeals, after a trial resulting in conviction, a notice of appeal must be "served on all respondents within ten (10) days after the sentence is imposed." Rule 203(b)(2), SCACR. However, "[w]hen a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion." *Id.* Our rules of criminal procedure provide as follows:

> Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. . . . The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

Rule 29(a), SCRCrimP.

"The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)); *see also Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by [the appellate court]."). "[T]he failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction . . . ." *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004). Accordingly, in the absence of a timely served notice of appeal, this court has no jurisdiction.

Turning to the procedural facts of this case, absent service of a proper notice of appeal within ten days of Devore's March 14, 2013 sentence, and if no valid post-trial motion was made within ten days to stay the time for appeal, this court has no appellate jurisdiction. It is undisputed Devore served his pro se letter on March 21, 2013, within ten days of his conviction. However, if the pro se letter is a substantive document filed while Devore was represented by counsel, such that his representation is partially pro se and partially by counsel, it would be improper and could not be accepted. Rather, it would be considered a nullity.

In *Foster v. State*, Foster, who was represented by counsel in a post-conviction relief (PCR) matter pending before our supreme court, attempted to file a substantive document with the appellate court, which the court instructed the Clerk of Court to return. 298 S.C. 306, 306, 379 S.E.2d 907, 907 (1989). Foster's counsel asserted the court was required by the state constitution to accept Foster's pro se document. *Id.* at 306-07, 379 S.E.2d at 907. The court disagreed, holding

our constitution "does not establish a right to 'hybrid representation,' that is, representation which is partially pro se and partially by counsel." *Id.* at 307, 379 S.E.2d at 907. The court ordered the Clerk to return Foster's document and stated, "Nothing in this order shall be construed to limit any litigant's right to file a *pro se* motion seeking to relieve his counsel, nor . . . limit a pro se litigant's right to file a brief in cases submitted pursuant to the procedures established" for *Anders v. California*[1] and *Johnson v. State*[2] appeals.

Thereafter, in *State v. Stuckey*, Stuckey submitted a pro se initial appellate brief and designation of matter and sought to have it incorporated with the initial brief his appellate defender "will file on his behalf." 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). Stuckey asserted he had a right to "hybrid representation" under our federal constitution. *Id.* Our supreme court disagreed and stated, "[s]ince there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted unless submitted by counsel." *Id.* at 58, 508 S.E.2d at 564. Because Stuckey attempted to file a substantive document related to the case while she was represented by counsel and the document was not submitted through counsel, it was "not appropriate for consideration" by the appellate court. *Id.* at 58, 508 S.E.2d at 564-65. The court also continued to note exceptions to the rule for pro se motions seeking to relieve counsel and for a party's right to file a pro se brief pursuant to *Anders* and *Johnson*. *Id.* at 58, 508 S.E.2d at 565.

Finally, in *Miller*, following denial of his PCR application, Miller filed a pro se "59(e)/60(B) Motion," which was not heard at that time because of the filing of notices of appeal. 388 S.C. at 347, 697 S.E.2d at 527. This court denied the petition for writ of certiorari and, thereafter, the circuit court entertained Miller's pending pro se motion, ultimately denying and dismissing it. *Id.* Miller then filed a pro se notice of appeal from that order. *Id.* Our supreme court held as follows:

> Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.

---

[1] 386 U.S. 738 (1967).
[2] 294 S.C. 310, 364 S.E.2d 201 (1988).

> Because [Miller] was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity.
>
> We therefore vacate the order ruling on the motion and dismiss [Miller's] notice of appeal as moot. *We also take this opportunity to remind judges and clerks of court of our directive in* Foster *not to accept substantive documents, with the exception of motions to relieve counsel, filed pro se by a party who is represented by counsel.*

Id. (emphasis added) (internal citations omitted).

Following a criminal trial, a defendant's trial counsel "must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [*Anders*]." *Id.* (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). "After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal, and if the client is indigent, assist the client in filing an appeal." *Wilson v. State*, 348 S.C. 215, 218 n.3, 559 S.E.2d 581, 583 n.3 (2002). Even though an attorney is retained for purposes of trial only, "[t]he requirement [that he] take reasonable steps to protect the client requires counsel . . . to serve and file the Notice of Appeal and to continue to represent the client until relieved by [the appellate court] under Rule 235, SCACR." *In re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991). Rule 264 of our appellate court rules, formerly Rule 235, provides for continued representation by a party's trial counsel at the appellate level until proper withdrawal, stating as follows: "The attorneys . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in the appellate court *until withdrawal is approved and notice is given* as provided in this Rule." Rule 264(a), SCACR (emphasis added). As well, Rule 602(e)(1), SCACR stipulates, except as otherwise provided, "[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal." *See also* Comment 4 to Rule 1.3, RPC, Rule 407, SCACR ("Unless the relationship is

terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . [I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter."); Rule 1.16(c), RPC, Rule 407, SCACR ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.").

We find Devore was represented by counsel at the time he sent his March 21, 2013 pro se letter and, therefore, that document could not qualify as a proper motion or notice of appeal and is, essentially, a nullity.[3] First, we note that Devore conceded to the trial judge that he was represented by counsel at the time he sent his pro se letter to the trial court. Beyond that concession, however, we find Devore was represented by counsel at that time. We disagree with Devore's contention that counsel for a litigant must be actively filing documents around the same time as the litigant is filing pro se documents for it to be considered "hybrid representation." Our courts have determined "hybrid representation" is representation that is partially pro se and partially by counsel. Here, Devore was clearly represented by trial counsel at trial and, once Devore was convicted, trial counsel was obligated to ensure Devore was made fully aware of his right to appeal. In the event Devore desired to appeal, trial counsel, even if only retained to represent Devore at trial, was obligated to serve and file a notice of appeal and continue to represent Devore until his withdrawal from representation was approved.[4] Thus, trial counsel was Devore's counsel of record at the time Devore

---

[3] The April 1, 2013 letter was beyond ten days from Devore's March 14, 2013 conviction and sentence and, therefore, was clearly untimely.

[4] In the event Devore was improperly denied his right to appeal, the proper avenue of relief is through a PCR proceeding. *See McCray v. State*, 271 S.C. 185, 187, 246 S.E.2d 230, 231 (1978) ("[W]here an accused establishes in a [PCR] proceeding that he was unconstitutionally deprived of his statutory right to a direct appeal, this [c]ourt, upon obtaining jurisdiction of the case on the [PCR] appeal, will review the trial record and pass upon all issues properly raised and argued just as if a direct appeal had been taken to this [c]ourt."). We disagree with Devore's assertion that, pursuant to *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013), a PCR hearing would be unwarranted in this case because it would not be necessary

sent the March 21, 2013 letter to the trial court and any attempt to serve a motion for new trial or notice of appeal by this pro se letter constituted "hybrid representation." Since Devore was represented by counsel, his pro se motion was not proper and could not be accepted. Inasmuch as the letter was not submitted through counsel and it was not a motion to relieve counsel, the trial judge appropriately followed our supreme court's specific directive not to accept substantive documents filed pro se by a party who is represented by counsel.[5] Because Devore's pro se filings were a nullity, there was no proper notice of appeal served or post-trial motion made within ten days of imposition of his sentence, and this court does not have appellate jurisdiction. Accordingly, we dismiss this appeal.

DISMISSED.

WILLIAMS and THOMAS, JJ., concur.

---

to resolve a factual dispute and would not aid the court in its application of law. Unlike *Rivera*, we are dealing here with the issue of appellate jurisdiction. If Devore's appeal is dismissed for lack of appellate jurisdiction because trial counsel was ineffective in protecting his right to appeal, then the matter clearly would be proper for consideration in a PCR action. However, this court simply cannot consider the matter if it is divested of appellate jurisdiction.

[5] It is clear from the hearing held on Devore's pro se motion that the trial judge recognized the problem arising from the pro se filing while Devore was represented by counsel and, for that reason, did not initially respond to or rule on the matter. It was only after this court remanded for consideration of Devore's motion that he held a hearing and considered Devore's motion. Further, the fact that the trial judge eventually ruled on Devore's pro se motion does not prevent dismissal of this appeal. As noted, timely service of the notice of appeal is jurisdictional, it may not be extended by this court, and failure to comply with procedural requirements for an appeal divests this court of appellate jurisdiction. Accordingly, Devore's pro se motion was improper and was a nullity. *See Miller*, 388 S.C. at 347, 697 S.E.2d at 527 (vacating an order which ruled on an improper pro se motion, finding the motion to be a nullity, and dismissing the appeal from the order on the motion).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Insurance Reserve Fund, Respondent,

v.

East Richland County Public Service District and Coley Brown, Defendants,

Of whom East Richland County Public Service District is the Appellant,

and Coley Brown is a Respondent.

Appellate Case No. 2014-000728

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5393
Heard January 4, 2016 – Filed March 23, 2016

AFFIRMED

Scott A. Elliott, of Elliott & Elliott, PA, of Columbia, for Appellant.

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Respondent South Carolina Insurance Reserve Fund; and Kenneth Emanuel Berger, of the Law Office of Kenneth E. Berger, LLC, of Columbia, for Respondent Coley Brown.

MCDONALD, J.: East Richland County Public Service District (the District) appeals the circuit court's order finding the South Carolina Insurance Reserve Fund (the Fund) owed no duty to defend or indemnify the District, arguing the circuit court erred in concluding (1) the policy exclusion relied upon by the Fund did not conflict with the provisions of the South Carolina Tort Claims Act, and (2) the Fund had no duty to defend or indemnify the District. We affirm.

FACTS

In 2010, Coley Brown filed a complaint against the District for inverse condemnation, trespass, and negligence. The complaint alleged the District had installed a sewage force main and an air relief valve on Brown's street, and the valve released offensive odors on his property multiple times a day. Brown made repeated requests to the District to remedy the problem but, despite the District's attempts, the odor never subsided. The stench ultimately caused Brown to buy a new piece of property and move, but he was unable to sell the old property. The District tendered the complaint to the Fund pursuant to its insurance policy (the Policy), but the Fund denied coverage.

Pursuant to the Policy, the Fund is legally obligated to pay damages resulting from "[p]roperty [d]amage to which this applies caused by an occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which result[s] in personal injury or property damage neither expected nor intended from the standpoint of the insured."

The Policy defines property damage as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

Pursuant to Exclusion (f) (the pollution exclusion), no coverage exists for:

> . . . **personal injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritant, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental[.]

In March 2011, the Fund filed a complaint against the District seeking a declaratory judgment that the Fund had no duty to defend or indemnify the District in the Coley Brown matter. The Fund denied coverage based on the pollution exclusion as well as the Fund's position that the damages alleged by Brown did not qualify as "property damage" caused by an "occurrence." The District counterclaimed, seeking its own declaratory judgment that the Fund had a duty to defend and indemnify the District. In June 2011, the District and the Fund filed cross motions for summary judgment.

The circuit court held a non-jury trial in June 2012. The District's executive director and former maintenance superintendent, Larry Brazell, testified the force main at issue was installed in 1999 or 2000 and was approved by the Department of Health and Environmental Control (DHEC). The main was installed as part of a larger project that also included two nearby pump stations. The pump stations were designed to turn on and pump sewage through the force main when the sewage inside their collection wells reached a certain level. Brazell explained it was impossible to know when the pumps would turn on during a given day but posited that they could turn on once per hour or ten times per hour depending on the area's water usage or weather. Brazell testified that when the pumps activated, the air in the force main lines was forced out through an "air vacuum valve." Brazell stated that if this air was not released, the sewer lines would explode.

Brazell further explained the sewage odor itself was usually the result of naturally-occurring hydrogen sulfide—which smells like rotten eggs—and methane. The District was not required by DHEC to control or contain either of these gases. In response to the complaints, however, the District made various attempts to remedy the odors, including using a chlorine-based chemical, installing charcoal filters, and eventually using a granulated chemical media. In May 2010, the District took steps to modify the air relief valve in front of Brown's house so that any air

released from the valve would be dispersed in smaller amounts. However, Brazell explained the air relief valve was designed to force air containing hydrogen sulfide into the environment when the pumps came on and that such emissions generally happened multiple times per day. Nevertheless, Brazell offered some testimony that the situation at Brown's residence was unique because of the magnitude of the odor, the lack of prior odor complaints in the area, and the District's use of novel corrective measures to mask or eliminate the odors.

The circuit court subsequently ruled the Policy's terms controlled whether the Fund was required to defend the underlying action. Specifically, the court found the Policy's exclusion barring the inverse condemnation claim was valid and enforceable. As to the negligence and trespass claims, the court found the pollution exclusion's reference to gases and fumes encompassed the offensive odors delineated in Brown's complaint. The court also determined the discharges of offensive odors were included within the District's ordinary operations; thus, the pollution exclusion's exception was inapplicable. Finally, the court found there was no ambiguity between the policy's definition of "occurrence" and the pollution exclusion. Therefore, the court determined the Fund owed no duty to defend or indemnify the District in the underlying case.[1] The District subsequently filed a Rule 59(e), SCRCP, motion to alter or amend the court's judgment, which the circuit court denied.

STANDARD OF REVIEW

"The standard of review in a declaratory judgment action is determined by the underlying issue or issues." *Horry Cty. v. Ins. Reserve Fund*, 344 S.C. 493, 497, 544 S.E.2d 637, 639 (Ct. App. 2001). "The determination of legislative intent is a matter of law." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005). "An action to ascertain whether coverage exists under an insurance policy is an action at law." *Horry*, 344 S.C. at 497, 544 S.E.2d at 640. "In an action at law, this court will not disturb the [circuit] court's findings unless they are without any reasonable evidentiary support." *Id.*

[1] The circuit court's order also granted the Fund's motion for summary judgment, denied the District's motion for summary judgment, and dismissed the District's counterclaim with prejudice.

ANALYSIS

I. CONFLICT WITH THE TORT CLAIMS ACT

The District first argues the pollution exclusion is void because it conflicts with provisions of the South Carolina Tort Claims Act[2] (The Act) requiring coverage for the underlying causes of action. Specifically, the District argues the Act requires the Fund to provide coverage for *all* risks for which immunity has been waived under the Act. Additionally, the District asserts that because its decision to purchase insurance from the Fund precluded it from purchasing additional insurance from other sources, it was improperly exposed to liability for any excluded risks. We disagree.

The Act provides, "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15–78–40 (2005). The Act also lists several exceptions to the waiver of immunity. S.C. Code Ann. §15–78–60 (2005 & Supp. 2015).

The provisions of the Act detailing the District's responsibility to procure tort liability insurance are found in section 15–78–140(A) of the South Carolina Code (Supp. 2015), providing,

> (A) The political subdivisions of this State, in regard to tort and automobile liability, property, and casualty insurance shall procure insurance to cover these risks for which immunity has been waived by: (1) the purchase of liability insurance pursuant to Section 1–11–140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance. A pooled self-insurance liability pool is authorized to purchase specific and aggregate excess insurance. A pooled self-insurance liability fund

[2] S.C. Code Ann. §§ 15–78–10 to –220 (2005 & Supp. 2015).

must provide liability coverage for all employees of a political subdivision applying for participation in the fund. If the insurance is obtained other than pursuant to Section 1–11–140, it must be obtained subject to the following conditions:

(1) if the political subdivision does not procure tort liability insurance pursuant to Section 1–11–140, it also must procure its automobile liability and property and casualty insurance from other sources and shall not procure these coverages through the Insurance Reserve Fund;

(2) if a political subdivision procures its tort liability insurance, automobile liability insurance, or property and casualty insurance through the Insurance Reserve Fund, all liability exposures of the political subdivision as well as its property and casualty insurance must be insured with the Insurance Reserve Fund;

(3) if the political subdivision, at any time, procures its tort liability, automobile liability, property, or casualty insurance other than through the Insurance Reserve Fund and then subsequently desires to obtain this coverage with the Insurance Reserve Fund, notice of its intention to so obtain this subsequent coverage must be provided to the Insurance Reserve Fund at least ninety days prior to the beginning of the coverage with the Insurance Reserve Fund. The other lines of insurance that the political subdivision is required to procure from the fund are not required to commence until the coverage for that line of insurance expires. Any political subdivision may cancel all lines of insurance with the Insurance Reserve Fund if it gives ninety days' notice to the fund. The Insurance Reserve Fund may negotiate the insurance coverage for any political subdivision separate from the insurance coverage for other insureds;

> (4) if any political subdivision cancels its insurance with the Insurance Reserve Fund, it is entitled to an appropriate refund of the premium, less reasonable administrative cost.

Prior to 1997, an additional subsection provided, "It is the duty of the Budget and Control Board to cover risks for which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in § 15–78–150."[3] S.C. Code Ann. § 15–78–140(a) (Supp. 1986). However, the legislature deleted this subsection in June 1997. *See* 1997 S.C. Act No. 155, Part II, § 55. The amending act stated the General Assembly "has never intended that the government or taxpayers would be subject to unlimited liability for tort actions against the government . . . ." *Id.* The General Assembly also stated its "intent that there remain reasonable limits upon recovery against the government for tort actions, and that the government is only liable for torts as expressly prescribed and authorized in the 'South Carolina Tort Claims Act'." *Id.*

Here, the circuit court found this amendment could be construed as clarifying the duties of the Board and the Fund in light of *Town of Duncan v. State Budget & Control Board*,[4] which was decided in March 1997. Although we acknowledge that the legislature's decision to amend the statute demonstrated the legislature's intent to change the law, we do not believe *Town of Duncan*'s holding and the legislature's subsequent deletion of section 15–78–140(a) to be dispositive in this case. *See Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this [c]ourt recognizes a presumption that the Legislature intended to change the existing law.").

In *Town of Duncan*, town employees sued the town primarily for violation of the state Whistleblower Act. 326 S.C. at 9, 11, 482 S.E.2d at 770–11. The town was insured under a tort liability policy issued by the Budget and Control Board, and brought a declaratory judgment action when the Board refused to defend or

---

[3] The State Budget and Control Board was abolished effective July 1, 2015. *See* 2014 S.C. Act No. 121 (S.22), Part VII, § 19.C. The portions of 15–78–140 referencing the Board were replaced with references to the Fund. The Fund now falls under the authority of the State Fiscal Accountability Authority.

[4] 326 S.C. 6, 482 S.E.2d 768 (1997).

indemnify. *Id.* at 9, 482 S.E.2d at 770. The circuit court found the policy only provided coverage for claims for which immunity had been waived under the Tort Claims Act. *Id.* at 11, 482 S.E.2d at 771. However, the supreme court reversed, holding that the "statutes authorizing [the] Board to purchase insurance for governmental entities do not provide that the *only* risks Board can insure against are those waived under the Tort Claims Act." *Id.* at 12, 482 S.E.2d at 771. The supreme court noted there was no provision in the policy limiting coverage to claims allowed under the Act and concluded the Board's duty to defend or indemnify should not be predicated on whether the Whistleblower action was covered by the Act, but rather by examining the policy's terms to determine whether the policy provided coverage. *Id.* at 12–13, 482 S.E.2d at 772.

Unlike *Town of Duncan*, this case does not involve a question of whether the District's tort liability policy may provide broader coverage than that allowed under the Act. Instead, the issue is whether the legislature intended to allow tort liability policies issued by the Fund pursuant to the Act to contain a pollution exclusion that could act to bar coverage in certain situations. Because this issue involves the interpretation of a statute, our rules of statutory construction apply.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Jones*, 364 S.C. at 230, 612 S.E.2d at 723. "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.* "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Id.* at 232, 612 S.E.2d at 724. "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Id.* "It is generally conceded that insurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy." *Pa. Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 550–51, 320 S.E.2d 458, 461 (Ct. App. 1984).

Based on our review of the Act, we decline to hold the pollution exclusion is void. The District purchased tort liability insurance pursuant to the portion of section 15–78–140(A) allowing a political subdivision to "procure insurance to cover these

risks for which immunity has been waived" by purchasing liability insurance pursuant to section 1–11–140 of the South Carolina Code (Supp. 2015). Section 1–11–140(A) authorizes the State Fiscal Accountability Authority, through the Fund, to provide insurance "so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment." Section 1–11–140(B) provides, "Any political subdivision of the State . . . may procure the insurance for itself and for its employees in the same manner provided for the procurement of this insurance for the State, its entities, and its employees, or in a manner provided by Section 15-78-140." Neither the Act nor section 1–11–140 explicitly state whether a pollution exclusion is a proper addition to a tort liability policy issued through the Fund.

However, the "cross references" to section 1–11–140 direct us to regulation 19–415.1, which was in existence in 1986 when the legislature enacted the Act.[5] *See* 23 S.C. Code Ann. Regs. 19–415.1 (1983); *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956) ("[W]here the language of the statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment."); *see also Young v. S.C. Dep't of Highways & Pub. Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882 (Ct. App. 1985) ("Administrative agencies may be authorized "'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.").

The current version of regulation 19–415.1, which is substantially similar to the older version, states that the regulations contain a codified tort liability policy that is intended "to provide the public with information regarding the nature, terms, and scope of the insurance" provided under section 1–11–140. S.C. Code Ann. Regs. 19–415.1 (2011). That policy is entitled "General Liability Policy" and appears in a subsequent regulation. S.C. Code Ann. Regs. 19–415.3 (2011). Additionally, regulation 19–415.2 clarifies, "The nature, terms and scope of the Insurance Reserve Funds' tort liability is declared in the policy entitled 'General Liability

[5] The current version of the regulation is set forth at S.C. Code Ann. Regs. 19–415.1 (2011). Notably, the current regulation's language has not been updated to reflect the replacement of the Budget and Control Board with the Insurance Reserve Fund.

Policy.'" S.C. Code Ann. Regs. 19–415.2 (2011). Importantly for our analysis, this General Liability Policy contains a pollution exclusion nearly identical to that at issue here. S.C. Code Ann. Regs. 19–415.3 (2011).

We believe this inclusion of such a pollution exclusion is strong evidence that the legislature did not intend to preclude the use of such exclusions, even in policies issued pursuant to the Act. As noted earlier, the Act allows the District certain options for the purchase of tort liability insurance pursuant to section 1–11–140, and the District chose this method of purchase. Because we are satisfied that pollution exclusions are valid in policies issued under the authority of section 1–11–140, we find the pollution exclusion in this case was valid.[6] *See Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.").

II. COVERAGE UNDER THE POLICY

A. Applicability of the Pollution Exclusion

Next, the District asserts the pollution exclusion is inapplicable because it does not mention offensive odors or explain why such odors should be considered as pollution when they are not harmful and not regulated. We disagree.

"Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009). "If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Id.*

"Insurance policies are subject to the general rules of contract construction." *Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d

---

[6] This court has previously upheld coverage exclusions in tort policies issued by the Fund. *See e.g., City of Abbeville v. S.C. Ins. Reserve Fund*, 323 S.C. 60, 61–63, 448 S.E.2d 579, 580–81 (Ct. App. 1994) (holding the Fund was not required to pay for damage to a monument based on an exclusion in the city's tort liability policy that excluded coverage for damage to property in the care, custody, and control of the insured).

492, 495 (2008). "We must give policy language its plain, ordinary, and popular meaning." *Id.* "An insurance policy is to be liberally construed in favor of the insured and strictly construed against the insurer." *Id.* at 628–29, 663 S.E.2d at 495. "Further, exclusions in an insurance policy are always construed most strongly against the insurer." *Id.* at 629, 663 S.E.2d at 495. The insurance company "bears the burden of establishing [an] exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005).

We hold the pollution exclusion applies because the odors at issue in this case can be properly classified as "fumes" or "gases," both of which are listed in the exclusion. Giving these words their plain and ordinary meaning, we find the word "gas" is defined as "a substance that can be used to produce a poisonous, asphyxiating, or irritant atmosphere" and "fume" is defined as "a smoke, vapor, or gas esp[ecially] when irritating or offensive." *Merriam Webster's Collegiate Dictionary*, 472, 481 (10th ed. 1993). Although the District argues the odors must be harmful in some way to be considered pollutants, we decline to impose such a limitation on the plain language of the policy and believe the fact that the odors were comprised of irritating and offensive gases suffices to demonstrate the odors are encompassed within the ordinary meaning of the pollution exclusion's terminology. Notably, this holding comports with several other jurisdictions holding that foul odors are encompassed by such pollution exclusions. *See City of Spokane v. United Nat. Ins. Co.*, 190 F.Supp.2d 1209, 1221 (E.D. Wash. 2002) (holding pollution exclusions "clearly and unambiguously" excluded coverage for losses related to odors emanating from a compost facility); *Kruger Commodities, Inc. v. U.S. Fidelity and Guar.*, 923 F.Supp. 1474, 1479–80 (M.D. Ala. 1996) (finding a pollution exclusion applied to odors produced by an animal rendering plant even though the relevant chemicals were not hazardous and did not violate environmental laws); *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154, 160 (Minn. Ct. App. 2007) (finding the substance of a complaint alleging harm from gases and odors emanating from manure at a nearby pig farm was "plainly covered" by a policy's pollution exclusion that mentioned gases and fumes); *City of Bremerton v. Harbor Ins. Co.*, 963 P.2d 194, 195–98 (Wash. Ct. App. 1998) (finding no coverage for damages resulting from a treatment plant's emission of foul odors and toxic gases when a pollution exclusion "unambiguously exclude[d] claims arising from 'fumes' and 'gases'").

B. Applicability of the Exception to the Pollution Exclusion

The District argues that even if the pollution exclusion applies, the exception to the exclusion operates to require coverage because the circumstances surrounding the release of the odors were unique and unexpected. We disagree.

The exception applies if "such discharge, dispersal, release or escape [of pollutants] is sudden and accidental." The term "sudden" has been held to be ambiguous, and must be interpreted as "unexpected." *See Greenville Cty. v. Ins. Reserve Fund*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994) (holding the word "sudden" in an exception to a pollution exclusion was ambiguous and should be interpreted as "unexpected"). "[I]t is the insured who bears the burden of proving an exception to [an] exclusion." *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 642 n.5, 594 S.E.2d 455, 460 n.5 (2004).

In *Helena Chemical*, a chemical company filed a declaratory judgment action seeking reimbursement from various insurers after they denied coverage for costs spent cleaning up pollution at three sites. *Id.* at 634–35, 594 S.E.2d at 456–57. The circuit court granted summary judgment in favor of the insurers, finding the chemical company's claims fell under the policies' pollution exclusion, which contained an exception stating "this exclusion does not apply if such discharge, release or escape is sudden and accidental." *Id.* at 635, 641, 594 S.E.2d at 457, 460.

On appeal, the supreme court explained, "[P]roperty damage caused by pollution arising from ordinary business operations is not covered. But if the damage were caused by a 'sudden and accidental' discharge, release, or escape of pollutants, then the insurers must provide coverage." *Id.* at 641, 594 S.E.2d at 460. The court then noted that based on the holding in *Greenville County*, the term "sudden" was to be interpreted as unexpected. *Id.* at 641, 594 S.E.2d at 460.

Ultimately, the court concluded the chemical company's contamination of the sites was the result of its routine business operations and was not unexpected. *Id.* at 642, 594 S.E.2d at 460. Notably, one employee testified that when the chemical company ground its pesticide into dust, some of the dust escaped out of the processing area into the atmosphere despite the use of dust collectors. *Id.* at 642–43, 594 S.E.2d at 461. Another employee stated that dust that spilled onto the floor

was swept up, put back into a blender, and bagged. *Id.* at 643, 594 S.E.2d at 461. Employees also testified that bags of pesticide occasionally broke open and liquid pesticide routinely spilled during the loading, transport, and unloading process. *Id.* at 643–44, 594 S.E.2d at 461.

We hold the releases of the odors here were not accidental and unexpected, thus, the exception does not apply. Brazell testified the air release valve was essential to the operation of the sewer line because it prevented the lines from exploding. Brazell also stated the District was aware that when the sewer pumps turned on, they would force air containing hydrogen sulfide into the environment. Although Brazell stated it was impossible to know when the pumps would turn on during a given day, he also acknowledged the pumps usually turned on several times a day. Accordingly, the District's knowledge that the pumps would turn on occasionally is sufficient to demonstrate that the releasing of the odors was not only expected, it was a necessary function of the line's normal operations.

Although the District asserts this situation was unexpected due to the magnitude and impact of the odors upon the residents at this particular location, we are not persuaded by this argument. Despite the District's efforts to mask or limit the odors at this particular location, the release of the valve gases was a routine and expected function of the system. Thus, the circuit court properly declined to apply the pollution exclusion's exception.[7]

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

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

---

[7] The Fund raised an additional sustaining ground that the damages sought by Brown in the underlying action do not qualify as "property damage" as defined by the Policy. However, we decline to address this argument given our disposition of the prior issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hidria, USA, Inc., Appellant,

v.

Delo, d.d., d/b/a Slovenske Novice, Respondent.

Appellate Case No. 2013-000690

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5394
Heard January 7, 2015 – Filed March 23, 2016

AFFIRMED

Phillip E. Reeves and Nicholas Andrew Farr, both of Gallivan, White & Boyd, PA, of Greenville, for Appellant.

Wallace K. Lightsey and Meliah Bowers Jefferson, both of Wyche Law Firm, of Greenville, for Respondent.

MCDONALD, J.: Appellant Hidria USA, Inc. (Hidria) appeals the circuit court's order of dismissal, arguing the court erred in finding it lacked personal jurisdiction over Respondent Delo, d.d., d/b/a Slovenske Novice (Delo). Hidria argues it produced the evidence necessary to support the court's exercise of personal jurisdiction based on Delo's sufficient contacts with South Carolina. Hidria asserts in the alternative that, even if Delo lacked sufficient minimum contacts with South

Carolina, the circuit court erred in dismissing this case because Delo subjected itself to personal jurisdiction by intentionally targeting Hidria in South Carolina. We affirm.

FACTS/PROCEDURAL BACKGROUND

Hidria is a Delaware corporation with its headquarters and principal place of business located in Greenville County, South Carolina. This company, which provides business solutions for multiple industries, regularly transacts business in Greenville and employs persons there.

Delo, a corporation organized and existing under the laws of the Republic of Slovenia, is the publisher of *Slovenske Novice*, a daily newspaper printed and distributed primarily in Slovenia. Delo publishes a print and online version of the newspaper, and *Slovenske Novice* articles are available to anyone accessing the website. Both the print version and the online version are published only in Slovene, a language spoken primarily in Slovenia. Delo does not produce English translations of its publications.

This case arises from two articles published in *Slovenske Novice*—one on December 11, 2011, and one on April 23, 2012—discussing the "luxurious" lifestyle and business dealings of Slovenian businessman Edvard Svetlik. Hidria USA shares common ownership with Hidria, d.d., a Slovenian business entity controlled by Svetlik and his family. As Delo admits, the articles discuss Svetlik's "accumulation and distribution of wealth throughout his family in Slovenia, other European countries, and the United States of America, and compares the Svetlik family's luxurious lifestyle to that of their employees in Slovenia." The articles also reference Svetlik's various business interests, including Hidria.

While Delo denies that its reporter traveled to South Carolina to collect information for the articles, the Delo reporter admitted to corresponding with Hidria employee Darjan Lapanje in gathering information for the April 2012 article.[1] Additionally, the reporter gathered information from several websites maintained by South Carolina governmental entities.

[1] Delo provided these emails in its answers to Hidria's first set of interrogatories; however, they were provided in Slovene.

In its March 7, 2012 complaint, Hidria alleged that South Carolina residents read the articles on *Slovenske Novice*'s website. According to Hidria, Delo "maliciously published the article knowing that it contained falsities concerning the persons and entities targeted therein." Hidria further contended that "[a]s a direct and proximate consequence of [Delo's] publication of the article, the business reputation of Hidria USA has been injured in that because of the irreparable harm to its image and brand . . . , it has been damaged in its ability to sell and market its products." It is Hidria's position that *Slovenske Novice* targeted South Carolina citizens as potential subscribers by publishing articles with content concerning the State of South Carolina.

Delo—through the affidavit of its attorney, Nada Jakopec—admitted it cannot confirm the exact number of South Carolinians who accessed and read the articles at issue. Delo further admitted that it is possible that up to seven South Carolinians viewed the December 2011 article and up to three South Carolinians viewed the April 2012 article. Hidria General Manager Domen Bočkor stated by affidavit that the two articles were "read by all of [Hidria's] employees located in South Carolina" and "by many employees of [Hidria's] customers in South Carolina which directly damaged [Hidria's] relationships with several customers."

Delo filed a motion to dismiss Hidria's complaint for lack of personal jurisdiction on June 15, 2012. Hidria filed an amended complaint on July 5, 2012, and Delo again moved to dismiss on July 23, 2012. While Delo's motion to dismiss was pending, Hidria served jurisdictional discovery on Delo. Delo failed to answer the discovery and, on August 10, 2012, Hidria moved to compel Delo to respond to the discovery requests or, in the alternative, to allow the parties to conduct jurisdictional discovery.

The circuit court heard the two pending motions—Delo's motion to dismiss and Hidria's motion to compel—on August 16, 2012. After hearing arguments and considering Hidria's discovery requests, the circuit court issued an order on October 15, 2012, permitting the parties to conduct discovery on the jurisdictional issues raised in Delo's motion to dismiss. The circuit court held its ruling on the motion to dismiss in abeyance pending completion of the jurisdictional discovery. Delo filed its answers to Hidria's discovery requests under seal. The circuit court subsequently granted Delo's motion to dismiss for lack of personal jurisdiction by order dated January 10, 2013.

On January 18, 2013, Hidria moved to reconsider. The circuit court denied Hidria's motion to reconsider on February 27, 2013. This appeal followed.

STANDARD OF REVIEW

The question of whether a court may exercise personal jurisdiction over a nonresident defendant is one that must be resolved upon the facts of each particular case. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." *Id.*

"It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Id.* "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." *Id.* at 328, 594 S.E.2d at 882. "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012) (quoting *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)).

LAW/ANALYSIS

I. Requisite Minimum Contacts

Hidria argues the circuit court failed to apply the proper test in considering the question of personal jurisdiction. "Personal jurisdiction is exercised as 'general jurisdiction' or 'specific jurisdiction.'" *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. In this case, Hidria concedes that South Carolina's courts do not have general jurisdiction over Delo; thus, our analysis focuses on specific jurisdiction.

"Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum; specific jurisdiction is determined under [section 36-2-803 of the South Carolina Code (2003)]." *Id.* (citing *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)). "The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis." *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839 (quoting *Aviation Assocs. & Consultants, Inc. v.*

Jet Time, Inc., 303 S.C. 502, 505, 402 S.E.2d 177, 179 (1991)). "The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process." *Id.* (citing *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008)).

South Carolina's long-arm statute provides, in relevant part, the following:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
>
> . . . .
>
> (3) commission of a tortious act in whole or in part in this State;
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State . . . .

S.C. Code Ann. § 36-2-803(A) (Supp. 2015).

Courts have construed South Carolina's long-arm statute, which affords broad power to exercise personal jurisdiction over causes of action arising from tortious acts and injuries in South Carolina, to extend to the outer limits of the due process clause. *See, e.g.*, *Meyer v. Paschal*, 330 S.C. 175, 181, 498 S.E.2d 635, 638 (1998); *Hammond v. Cummins Engine Co.*, 287 S.C. 200, 203, 336 S.E.2d 867, 868 (1985); *see also Cozi Invs. v. Schneider*, 272 S.C. 354, 358, 252 S.E.2d 116, 118 (1979) (stating "South Carolina's Long-Arm Statute has been construed on several occasions as a grant of jurisdiction as broad as constitutionally permissible. Hence, the parameters of [the statute] are restricted only by due process limitations." (citations omitted)).

"Because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process." *Moosally*, 358 S.C. at 329, 594 S.E.2d at 883. "Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 330, 594 S.E.2d at 883 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Aviation Assocs.*, 303 S.C. at 507, 402 S.E.2d at 180).

The determination of whether the requirements of due process are satisfied involves a two-prong analysis of (1) the "power" prong, under which minimum contacts grant a court the "power" to adjudicate the action; and (2) the "fairness" prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). The plaintiff bears the burden of satisfying both tests. *Id.* at 259, 423 S.E.2d at 130. "If either prong fails, the exercise of personal jurisdiction over the [nonresident] defendant fails to comport with the requirements of due process." *Id.* at 260, 423 S.E.2d at 131.

In *Moosally*, this court explained the analysis as follows:

> Under the power prong, a minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. Without minimum contacts, the court does not have the "power" to adjudicate the action. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Whether the constitutional requirement of minimum contacts has been met depends on the facts of each case.
>
> Under the fairness prong, we examine such factors as the burden on the defendant, the extent of the plaintiff's

> interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies.

358 S.C. at 331–32, 594 S.E.2d at 884–85 (citations omitted).

In support of its argument, Hidria claims the circuit court overlooked evidence of Delo's contacts with South Carolina and erred in examining only whether Delo "transacted business" here, instead of considering whether Delo had the requisite minimum contacts. We disagree.

In its order of dismissal, the circuit court held "South Carolina's long-arm statute does not apply to this case because [Delo] has not transacted any business in this State" that "would subject it to the long-arm statute." The circuit court supported its conclusion that Delo did not "purposefully avail" itself of the laws of this State by finding (1) Delo has not conducted any business in South Carolina; (2) Delo has no subscribers in South Carolina; (3) Delo does not solicit advertisers in South Carolina; (4) Delo has no bank accounts or registered agents in South Carolina; and (5) Delo has no record of ever sending agents or employees to South Carolina to collect information for any publication.

While residents of South Carolina could access the articles on Delo's website, Delo does not have any online subscribers in South Carolina, nor is there evidence of Delo directing any online business activity towards this State. Further, Delo does not publish its articles in the English language in any manner, whether in hard copy or online. Hence, we agree with the circuit court that the mere accessibility of the articles via the unilateral use of the Internet by someone located in South Carolina does not satisfy the traditional minimum contacts analysis under the facts of this case.

Comparably, *Moosally* involved a defamation claim brought against a source, the author, and the publisher of a book of national interest that was widely distributed in South Carolina. 358 S.C. at 320, 594 S.E.2d at 878. There, this court considered whether to uphold the circuit court's dismissal of the defendants, all nonresidents, for lack of personal jurisdiction. *See id.* at 328, 594 S.E.2d at 882. The court found that the source, who had given information to the author about the subject matter, did not "purposefully avail" himself of the privilege of doing business in South Carolina; thus, South Carolina courts could not exercise jurisdiction over him. *Id*. at 333, 594 S.E.2d at 885.

With regard to the author of the book, the *Moosally* court also determined that South Carolina had no jurisdiction, even though the author wrote a book on a topic of national interest. The court explained its reasoning:

> [A]n individual does not "purposefully avail" himself of the laws of this State merely by virtue of having authored a single literary work on a topic of national interest.
>
> Because the subject matter of [the author's] manuscript was an event of national interest that occurred outside South Carolina, it does not follow that his activity of pressing pen to paper was directed to the residents of South Carolina. The fruits of his labor—be it in literary or in cinematic form—arrived in South Carolina not through his efforts, but through the efforts of others, and therefore cannot serve as the basis for jurisdiction.

Id. at 334, 594 S.E.2d 885.

The *Moosally* court did hold, however, that South Carolina could exercise personal jurisdiction over the publisher of the book, W.W. Norton. *Id.* at 334, 594 S.E.2d at 886. In support of their argument, the *Moosally* appellants cited *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in which the United States Supreme Court applied the minimum contacts analysis after a New York resident brought a libel suit in New Hampshire against a nationally circulated magazine publisher incorporated in Ohio. The Court held the sale of 10,000 to 15,000 copies of the magazine in New Hampshire each month was sufficient to support the assertion of jurisdiction in a libel action based on the magazine's contents. Further, the Court noted, "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Keeton*, 465 U.S. at 774; *see also Burger King*, 471 U.S. at 473 ("[A] publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story.").

The *Moosally* court emphasized that, like the publisher in *Keeton*, W.W. Norton had "continually endeavored to exploit the South Carolina market." *Moosally*, 358 S.C. at 335, 594 S.E.2d at 886.

> W.W. Norton produced discovery documents and responses including a list of approximately 315 bookstores in South Carolina in which W.W. Norton sold books. Many of these books are sold to educational institutions in South Carolina. . . .
>
> W.W. Norton has published 7,852 titles in the past twenty years and admits "[i]t is fair to assume that at least one copy of each title was distributed in South Carolina." A number of W.W. Norton's employees cover South Carolina as sales representatives and visit college campuses for the purpose of selling books. W.W. Norton has had small book fairs in South Carolina, a media demo, and has hosted a breakfast for the English Department at the College of Charleston. That the Charleston County Public Library system alone owns 2,900 titles published by W.W. Norton is a testament to the publishing company's commercial presence within South Carolina.

Id. at 335–36, 594 S.E.2d at 886. As W.W. Norton directed its activities toward citizens of South Carolina, it could "reasonably anticipate being haled into court here in a libel action based on the contents of one of its publications." *Id.* at 336, 594 S.E.2d at 886. The court concluded, "W.W. Norton's continual practice of marketing and distributing books in South Carolina satisfies the power prong of the due process analysis." *Id.*

Conversely, Delo did not sell copies of its newspapers in South Carolina, did not employ any sales representatives to market its publication in South Carolina, and did not publish the articles in question directly in South Carolina. Delo merely posted the articles on its website, which is accessible worldwide. Hidria produced no evidence to refute Delo's showing that Delo has no commercial presence in, and derives no revenue from, South Carolina.

Moreover, Hidria's argument that the Internet availability of Delo's articles subjects Delo to personal jurisdiction in South Carolina fails in light of the *Moosally* analysis as applied to its author defendant. *See Aviation Assocs.*, 303 S.C. at 507, 402 S.E.2d at 180 ("[T]he focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity.").

Hidria contends that *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009), supports a finding that Delo engaged in contacts sufficient to establish personal jurisdiction in South Carolina. We disagree.

In *Leggett*, a New York insurance company issued a personal automobile liability policy to a New York couple that covered several of the couple's cars, including one used by the couple's son, who attended Coastal Carolina University. *Id.* at 70, 686 S.E.2d at 703. During the policy period, the son became a South Carolina resident and acquired title of the car from his father. *Id.* Son was involved in an accident with a motorcyclist, who brought suit against Son and his parents for negligence. *Id.* at 70–71, 686 S.E.2d at 703–04. The motorcyclist also sought a declaratory judgment that the New York insurer was obligated to provide coverage for the damages sustained in the accident. *Id.* at 71, 686 S.E.2d at 704.

The New York insurance company argued the court lacked personal jurisdiction due to its lack of the requisite minimum contacts with South Carolina. *Id.* This court disagreed, holding that, although the insurer issued no policies directly to South Carolinians, (1) the policy's coverage territory included South Carolina, (2) insurer had notice that an insured vehicle was being kept in South Carolina by Son, and (3) Son's mother informed the insurer's agent that he would be taking the vehicle to South Carolina. *Id.* at 76, 686 S.E.2d at 706. These facts were sufficient to establish the required minimum contacts as the out-of-state insurance company "purposely availed" itself of the benefits of conducting business in South Carolina. *Id.*

As the circuit court correctly detailed in its order of dismissal, Hidria has made no such showing as to Delo. Therefore, *Leggett* is distinguishable from the instant case. Accordingly, because we find Delo lacked sufficient contacts with South Carolina, we affirm the circuit court's order of dismissal for lack of personal jurisdiction over Delo.

2. "Effects Test"

Alternatively, Hidria argues that, even if Delo lacked sufficient minimum contacts with South Carolina, the circuit court erred in dismissing Hidria's complaint because personal jurisdiction over Delo was acquired when Delo intentionally targeted Hidria in South Carolina. As Hidria cannot demonstrate that South Carolina has personal jurisdiction over Delo under the "effects test" established by

the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), we disagree.[2]

In *Calder*, a California actress brought a libel suit in a California state court against a reporter and an editor of the Florida-based *National Enquirer*. 465 U.S. at 784. The claim arose from an article written and edited by the defendants in Florida for publication in the *National Enquirer* weekly newspaper, which had a circulation in California of approximately 600,000 issues. *Id.* at 784–85. The editor of the newspaper testified that he was a Florida resident and had only visited California twice: once for pleasure prior to the article's publication and once to testify in an unrelated matter. *Id.* at 786. The reporter testified that he visited California six to twelve times per year for business, but he had not visited the state in connection with his preparation of the article and he conducted his research through telephone calls to sources in California. *Id.* at 785–86. The Supreme Court applied the "effects test" to hold that California's assertion of personal jurisdiction over the defendants was consistent with due process. *Id.* at 788.

"Rather than focusing only on the defendant's conduct within or contacts with the forum, the 'effects test' set forth in *Calder* allows long-arm jurisdiction to be based on the effects within the forum of tortious conduct outside the forum." *Pitts v. Fink*, 389 S.C. 156, 167, 698 S.E.2d 626, 632 (Ct. App. 2010) (citing *Calder*, 465 U.S. at 787). To satisfy this test, a plaintiff must establish three elements: "(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity." *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n.7 (4th Cir. 2003). South Carolina has not specifically adopted *Calder*'s "effects test." *See Pitts*, 389 S.C. at 168, 698 S.E.2d at 632 ("While courts are split in their interpretation of the breadth of the *Calder* 'effects test,' courts unanimously agree the test requires that the defendant commit an intentional tort aimed at the forum state").

Although South Carolina has not had the opportunity to fully consider the "effects test," the United States Court of Appeals for the Fourth Circuit has provided helpful analyses. In *Young v. New Haven Advocate*, the Fourth Circuit held that, in

[2] We recognize that our supreme court has not adopted the "effects test;" however, Hidira raised the question of the "effects test" before the circuit court and in this appeal. Therefore, we address it here.

a defamation context, to show that the forum "can be said to be the focal point of the tortious activity," a plaintiff must establish that the speaker "manifested an intent to target and focus on" the readers of the forum state. 315 F.3d 256, 263 (4th Cir. 2002).

Young involved several articles published by two Connecticut newspapers, both in hard copy and on their respective websites, concerning Connecticut's policy of transferring prisoners to Virginia for long-term incarceration. *Id.* at 259. The articles focused on the conditions in one specific Virginia prison and on the warden of that prison. *Id.* The warden brought a defamation action in Virginia, asserting Virginia had personal jurisdiction because (1) the reporters had made phone calls to Virginia in researching the story; (2) the articles concerned events and conditions in Virginia; (3) the articles were posted on their websites, which could be accessed in Virginia; (4) the warden's reputation was harmed; and (5) he suffered injury in Virginia. *Id.* at 261–62.

Applying *Calder* and its own precedent, *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir. 2002), the Fourth Circuit explained:

> We thus ask whether the newspapers manifested an intent to direct their website content—which included certain articles discussing conditions in a Virginia prison—to a Virginia audience. As we recognized in *ALS Scan*, "a person's act of placing information on the Internet" is not sufficient by itself to "subject[ ] that person to personal jurisdiction in each State in which the information is accessed." Otherwise, a "person placing information on the Internet would be subject to personal jurisdiction in every State," and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted. Thus, the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to "indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state," Virginia. The newspapers must, through the Internet

> postings, manifest an intent to target and focus on Virginia readers.

Young, 315 F.3d at 263 (citations omitted). Because "the overall content of [the] websites is decidedly local," as the majority of the content was directed at a local or state audience, the court stated "it appears that these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets with a place for classified ads. The websites are not designed to attract or serve a Virginia audience." *Id.* The Fourth Circuit ultimately concluded "[t]he newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers" and, therefore, it would violate the defendants' due process rights for a Virginia court to exercise personal jurisdiction over them. *Id.* at 264.

More recently, the United States Supreme Court reached a similar conclusion in *Walden v. Fiore*, 134 S. Ct. 1115 (2014). In *Walden*, a Georgia police officer working as a deputized DEA agent at a Georgia airport searched the respondent airline passengers and seized a large amount of cash. *Id.* at 1119. Respondents alleged that, after they returned to their residence in Nevada, the police officer helped in the drafting of a false probable cause affidavit in support of the cash's forfeiture and forwarded it to the United States Attorney's Office in Georgia. *Id.* at 1119–20. Ultimately, no forfeiture complaint was filed and the money was returned to respondents. *Id.* at 1120.

Respondents filed a tort suit against the Georgia police officer in the United States District Court for the District of Nevada, which dismissed the complaint for lack of personal jurisdiction. *Id.* On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed the dismissal, holding that the district court "could properly exercise jurisdiction over 'the false probable cause affidavit aspect of the case.'" *Id.* at 1120 (citation omitted).

Reversing, the Supreme Court held the district court lacked personal jurisdiction over the police officer because

> Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the

> *forum*—petitioner formed no jurisdictionally relevant contacts with Nevada.
>
> . . . .
>
> Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. . . .
>
> *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way. . . .
>
> Unlike the broad publication of the forum-focused story in *Calder*, the effects of petitioner's conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction.

Walden, 134 S. Ct. at 1124–25.

We find Hidria has failed to demonstrate that Delo had a manifest intent to target South Carolina readers. The undisputed evidence establishes that the *Slovenske Novice* is a Slovenian newspaper—published only in Slovene—directed at its readership of citizens in the Republic of Slovenia on matters of local and national interest. Delo distributes no hard copies of its paper in South Carolina, and web traffic from South Carolinians is insignificant. The two articles in question concern the business activities and lifestyle of a Slovenian businessman, and the few references to Hidria were made in this context. Further, Hidria cannot show that Delo specifically targeted South Carolina readers. Thus, even if our supreme court were to recognize the "effects test," Hidria would be unable to satisfy its

elements. Therefore, the circuit court properly declined to exercise personal jurisdiction over Delo.

CONCLUSION

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

GEATHERS, J., concurs. WILLIAMS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gerald Barrett, Jr., Appellant.

Appellate Case No. 2013-002158

Appeal From Beaufort County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5395
Heard November 10, 2015 – Filed March 23, 2016

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

GEATHERS, J.: Gerald Barrett appeals his conviction for a lewd act upon a minor, arguing the trial court erred in (1) qualifying Kendra Twitty as an expert "mental health professional, specifically in the area of child sexual abuse characteristics," and (2) failing to grant a continuance for him to obtain an expert to dispute her testimony. We affirm.

FACTS/PROCEDURAL HISTORY

A grand jury indicted Barrett for criminal sexual conduct (CSC) with a minor, lewd act upon a minor, and kidnapping for acts he allegedly committed upon Victim. Barrett proceeded to trial and immediately before a Monday morning pretrial motions hearing, he moved for a continuance to obtain an expert in Child Sexual Assault Accommodation Syndrome, arguing the State did not disclose its intention to introduce evidence regarding Child Sexual Assault Accommodation Syndrome until the prior Thursday. The trial court denied the motion because Twitty was previously named as the forensic interviewer assigned to this case. Barrett also moved to prohibit the qualification of Twitty as an expert, use of the term "forensic interviewer," and Twitty's testimony in its entirety, arguing the testimony would amount to vouching or bolstering Victim's testimony. The trial court withheld ruling until after hearing testimony from Victim.

After Victim's testimony, outside the presence of the jury, the State sought to qualify Twitty as an "expert regarding the behavior of and trauma of child sexual abuse victims." The State offered to avoid using the term "Child Sexual Abuse Accommodation Syndrome" as it believed avoiding the term would alleviate any potential confusion by the jury. After additional arguments, the State explained it did not intend to offer her as an expert regarding the syndrome; instead, it sought to offer her as an expert "practitioner of mental health specifically dealing with children [victimized by] child sexual assault." Over Barrett's objection, the trial court ruled Twitty could discuss general behavioral evidence regarding delayed disclosure. The State noted it would first question Twitty regarding the *Kromah*[1] factors for Victim's forensic interview, and then it would seek to qualify Twitty as a mental health expert and offer her expert testimony.

In the presence of the jury, Twitty testified she was a forensic interviewer and counselor/therapist at a children's advocacy and rape crisis center. She described the forensic interview she conducted with Victim. She also summarized her education, training, and experience in the mental health field. The State sought to admit her as an expert "mental health professional working with victims of child sexual abuse and trauma." Barrett objected and proceeded to voir dire. Following

[1] *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500–01 (2013) (outlining the parameters for testimony from forensic interviewers).

voir dire, Barrett again objected to Twitty's qualification. Ultimately, the trial court qualified her as an expert "mental health professional, specifically in the area of child sexual abuse characteristics."

A jury found Barrett guilty of a lewd act upon a minor. The jury found Barrett not guilty of kidnapping and was unable to reach a unanimous decision as to the CSC with a minor charge. The trial court sentenced him to twelve years' imprisonment, suspended upon nine years' imprisonment and four years' probation. The trial court also subjected him to mandatory GPS monitoring, required him to complete a sexual offender treatment program, and placed him on the sex offender registry. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in qualifying an expert witness and admitting her testimony?

2. Did the trial court err in failing to grant a continuance?

LAW/ANALYSIS

I. Expert Witness

Barrett argues the trial court erred in qualifying Twitty as an expert mental health professional in the area of child sexual abuse characteristics and admitting her testimony. We disagree.

Initially, despite the State's contentions otherwise, we find the issue is preserved. During trial, immediately before Twitty's testimony, the State noted it would seek to qualify Twitty as a mental health expert after Twitty addressed the *Kromah* factors related to Victim's interview. Barrett clarified his understanding that the qualification "is only related to delayed disclosure." Thereafter, pursuant to the trial court's directive, Barrett objected to the proffered qualification, questioned Twitty during voir dire, and objected again. *See State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced. However, where a judge makes a ruling on the admission of evidence

on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." (citation omitted)).

As to the merits, we find no reversible error. "The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006).

In support of his argument that the trial court erred in qualifying Twitty as an expert, Barrett relies on *State v. Brown*, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App.), *cert. denied*, (Aug. 6, 2015), and *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015), for the proposition that trial courts are prohibited from qualifying a person as an expert mental health professional in the area of child abuse characteristics and admitting that individual's expert testimony if that individual also conducted the alleged victim's forensic interview.

In *State v. Brown*, this court held the State's expert testimony on child abuse dynamics and delayed disclosures was not inadmissible as being within the ordinary knowledge of the jury; and, the court further held the expert's specialized knowledge of behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse. 411 S.C. at 341–42, 768 S.E.2d at 251. Although the *Brown* court held the expert's testimony was properly admitted, the court distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics. *Id.* at 343–45, 768 S.E.2d at 252–53.

After *Brown*, our supreme court addressed this issue in *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79. In *Anderson*, during an *in camera* hearing prior to trial, the trial court found the witness to be an expert in forensic interviewing. *Id.* However, when the State called the witness at trial, after reviewing her expert qualifications, the State offered the witness as "'an expert in forensic interviewing *and* child abuse assessment.'" *Id.* (emphasis added). Over Anderson's objection, the trial court found the qualification was "'as a forensic interviewer in child abuse

assessment.'" *Id*. Anderson renewed his objection, arguing there had been no previous determination that the witness possessed expertise in child abuse assessment. *Id*. The trial court refused to hold a hearing to determine the existence of this expertise and whether the witness held the necessary qualifications. *Id*. The *Anderson* court held the trial court erred in qualifying the witness as an expert in "'child abuse assessment'" and as an expert in forensic interviewing. *Id.* at 218–19, 776 S.E.2d at 79. The court held the trial court erred in qualifying the witness as an expert in child abuse assessment because of its failure to hold a hearing on the existence of this expertise and determine whether the witness possessed the necessary qualifications. *Id.* at 218, 776 S.E.2d at 79.

Further, our supreme court noted a trial court *may* qualify a person as a child abuse assessment expert, stating, "Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims." *Id.* at 218, 776 S.E.2d at 79 (citing *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004)). Yet, the *Anderson* court went on to caution:

> The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims *runs the risk* that the expert will vouch for the alleged victim's credibility.

Id. at 218–19, 776 S.E.2d at 79 (emphasis added).

Under the specific facts of this case, we affirm as we find no error in Twitty's qualification as an expert mental health professional, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for Victim's credibility. *Cf. Anderson*, 413 S.C. at 218–19, 776 S.E.2d at 79 (holding the trial court's refusal to determine the forensic interviewer's qualification as a child abuse assessment expert was patent error and the appellant suffered prejudice as the result of the expert vouching for the alleged victim's credibility).

We note that although the *Anderson* court offered cautionary advice, it did not prohibit outright the practice of qualifying the forensic interviewer who

conducted the alleged victim's forensic interview as an expert in child abuse assessment. Barrett would have this court issue a blanket rule prohibiting trial courts from qualifying forensic interviewers as expert mental health professionals related to child abuse characteristics *solely* because the interviewer also conducted the forensic interview in the case. However, the *Anderson* court did not issue such a prohibition.

Furthermore, the present case differs significantly from *Anderson*. In *Anderson*, the witness was qualified as an expert in forensic interviewing and child abuse assessment. Here, even though Twitty conducted Victim's forensic interview, she was not qualified as both an expert forensic interviewer and expert mental health professional. Whereas in *Anderson*, the trial court refused to hold a hearing to determine whether the witness held the necessary qualifications; here, the trial court properly found Twitty met the necessary qualifications to offer expertise in the area of behavioral characteristics displayed by child abuse victims. Twitty testified she was a licensed professional counselor, with a master's degree in clinical psychology. She stated most of her training included working specifically with children in situations where there were allegations of abuse. She attended training seminars and education courses regarding sexual abuse and worked on multiple cases involving sexually abused children.

Finally, unlike in *Anderson*, we find Twitty's testimony did not vouch for Victim's veracity or improperly bolster her testimony. The assessment of witness credibility is within the exclusive province of the jury. *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. *See Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (stating it is improper for a solicitor to ask a defendant "to comment on the truthfulness or explain the testimony of an adverse witness" and "the defendant is in effect being pitted against the adverse witness"). Similarly, witnesses may not improperly bolster the testimony of other witnesses. *See Smith v. State*, 386 S.C. 562, 564, 569, 689 S.E.2d 629, 631, 633 (2010) (stating a forensic interviewer's opinion that she found the victim's statement believable "improperly bolstered the [v]ictim's credibility"). "For an expert to comment on the veracity of a child's accusations of sexual abuse is improper." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011).

In *Kromah*, our supreme court held forensic interviewers should avoid (1) stating the child was told to be truthful; (2) providing a direct opinion as to the child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's

believability, such as stating the interviewer has made a compelling finding of abuse; (4) suggesting the interviewer believes the child's allegations; or (5) opining the child's behavior indicated the child was telling the truth. 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). Further, the *Kromah* court held forensic interviewers may testify regarding, among other things, the following: (1) the time, date, and circumstances of the interview; (2) any personal observations regarding the child's behavior or demeanor; or (3) a statement as to events that occurred within the personal knowledge of the interviewer." *Id.*

Barrett argues Twitty's testimony circumvented the mandates outlined in *Kromah*. We disagree. Although Twitty conducted Victim's forensic interview, she was not qualified as an expert forensic interviewer and her testimony fell within the parameters of *Kromah*. Regarding the forensic interview Twitty conducted, she testified as to the date, time, and place of the interview and her personal observations of Victim's demeanor. In fact, Twitty never directly or indirectly commented on the credibility of Victim's accounts of the alleged sexual assault. Moreover, she never addressed the veracity of Victim or opined whether Victim was being truthful.[2] Conversely, on cross-examination, Twitty admitted children lie, she could not give a diagnosis, and she was "certainly not a human lie detector." She elaborated that the focus of her interview was to assess overall child safety and she was "not going in there looking for fact details to prove or not prove child sexual abuse."

---

[2] *See State v. Douglas*, 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009) (finding a forensic interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity); *Brown*, 411 S.C. at 344, 768 S.E.2d at 252 (finding the case distinguishable from other cases involving forensic interviewers because the expert never commented about the credibility of the victims' allegations or testimony, nor did she make any of the statements prohibited in *Kromah*); *cf. State v. McKerley*, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (holding the forensic interviewer's general testimony indicated belief in the victim's truthfulness and was thus inadmissible); *Smith*, 386 S.C. at 564, 569, 689 S.E.2d at 631, 633 (finding the forensic interviewer's opinion testimony that she believed the victim improperly bolstered the victim's credibility).

Importantly, Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited. *Cf. Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (holding the forensic interviewer "vouched for the minor when she testified only to those characteristics [that] she observed in the minor"). Although Twitty explained some of the behavioral patterns Victim exhibited—i.e., delayed reporting and sequence of reporting to peers before adults—she also explained additional characteristics that Victim did not display.

Moreover, we disagree with Barrett's argument that Twitty's expert testimony regarding general behavioral characteristics of sexually abused children was irrelevant and inadmissible. Twitty's expert testimony as a mental health professional was in line with our current jurisprudence. *See Schumpert*, 312 S.C. at 506, 435 S.E.2d at 862 ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."); *State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.").[3]

Accordingly, although the more prudent practice would have been to call an independent mental health professional in lieu of the forensic interviewer to discuss general behavioral characteristics, the trial court did not err in qualifying Twitty and admitting her testimony.

---

[3] *See also Weaverling*, 337 S.C. at 474–75, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)); *Brown*, 411 S.C. at 341–42, 768 S.E.2d at 251 (finding the expert's "specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse").

II. Motion for Continuance

Barrett argues the trial court erred in failing to grant a continuance to allow him to obtain an expert witness to counter Twitty's testimony. We disagree.

"The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice." *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.*

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case[,] its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

Id. (quoting *State v. Babb*, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989)).

In *State v. Nicholson*, 366 S.C. 568, 579, 623 S.E.2d 100, 105 (Ct. App. 2005), Nicholson argued the trial court erred in refusing to grant his motion to suppress the testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sexually abused victim, and Nicholson argued the notice he received was too close in time to the trial for him to prepare an adequate defense. *Id*. This court held:

> The State, however, is not required to provide its witness list to a criminal defendant, and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy. We therefore hold that the trial [court] properly declined to suppress the expert testimony and acted within [its] discretion in refusing to continue the case.

Id. at 579, 623 S.E.2d at 105–06 (footnotes omitted).

Here, Barrett argues he needed additional time to secure an expert to combat Twitty's testimony regarding Child Sexual Assault Accommodation Syndrome.

However, Twitty stated she was not an expert on that topic and preferred not to testify on the subject. The *only* time in which the theory was discussed in front of the jury was when Barrett initiated the topic during recross-examination. Although Twitty discussed delayed disclosure and recantation, those are only two factors in the stages of behavior associated with the syndrome. Prior case law is clear that the topic of general behavioral characteristics of sexually abused children could arise in a CSC case with a minor. *See Weaverling*, 337 S.C. at 474, 523 S.E.2d at 794 (discussing the appellant's argument regarding similar expert testimony and stating "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible"). Therefore, Barrett was on notice that the trial might include testimony regarding general behavioral characteristics of sexually abused minors. Accordingly, the trial court did not abuse its discretion in declining to grant a continuance. *See Nicholson*, 366 S.C. at 579, 623 S.E.2d at 105–06 (holding the trial court acted within its discretion in declining to grant a continuance).

CONCLUSION

Based on the foregoing, we affirm.

SHORT and LOCKEMY, JJ., concur.