The Supreme Court of South Carolina

In the Matter of Anne S. Douds, Petitioner

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 19, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter to the Supreme Court of South Carolina, dated April 2, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 16, 2014

The Supreme Court of South Carolina

In the Matter of Mary Ann Asbill, Petitioner.

O R D E R

The records in the office of the Clerk of the Supreme Court show that on April 8, 1985, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 5, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 16, 2014

The Supreme Court of South Carolina

In the Matter of Annick Isabelle Lenoir-Peek, Petitioner.

O R D E R

The records in the office of the Clerk of the Supreme Court show that on August 12, 1998, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 21, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

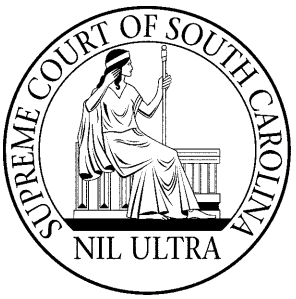
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 16, 2014



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 23, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5201-Phillip D. Grimsley, Sr. v. SLED & State of SC	Pending
5203-James Arthur Teeter, III v. Debra M. Teeter	Pending
5205-Neal Beckman v. Sysco Columbia	Pending
5207-Ted E. Abney v. The State	Pending
5208-Amber Johnson v. Stanley Alexander	Pending
5209-The State v. Tyrone Whatley	Pending
5211-CoastalStates Bank v. Hanover Homes of South Carolina	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-076- Robert H. Breakfield v. Mell Woods	Pending
2014-UP-082-W. Peter Buyck, Jr. v. William Jackson	Pending
2014-UP-084-Douglas E. Stiltner v. USAA Casualty Ins. Co.	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-095-Patricia Johnson v. Staffmark	Pending
2014-UP-103-The State v. David Vice	Pending
2014-UP-110-State v. Raymond Franklin	Pending
2014-UP-111-In the matter of the care and treatment of Dusty Cyr	Pending
2014-UP-113-The State v. Jamaal Hinson	Pending
2014-UP-114-Carolyn M. Powell v. Ashlin B. Potterfield	Pending
2014-UP-117-Scott Lemons v. The McNair Law Firm	Pending
2014-UP-121-Raymond Haselden v. New Hope Church	Pending

2014-UP-122-Ayree Henderson v. The State Pending

2014-UP-123-Trumaine Moorer v. Norfolk Southern Railway Pending

2014-UP-126-Claudia Bryant-Perreira v. IMSCO/TFE Logistics Group Pending

2014-UP-128-3 Chisolm Street Homeowners v. Chisolm Street Partners Pending

2014-UP-143-State v. Jeffrey Dodd Thomas Pending

2014-UP-159-City of Columbia v. William K. Wilson Pending

2014-UP-161-Horry County v. Aquasino Partners Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4832-Crystal Pines v. Phillips Pending

4888-Pope v. Heritage Communities Pending

4895-King v. International Knife Pending

4909-North American Rescue v. Richardson Pending

4956-State v. Diamon D. Fripp Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4973-Byrd v. Livingston Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

4992-Gregory Ford v. Beaufort County Assessor Denied 04/16/14

4995-Keeter v. Alpine Towers International and Sexton Pending

4997-Allegro v. Emmett J. Scully	Pending	
5008-Willie H. Stephens v. CSX Transportation	Pending	
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending	
5011-SCDHEC v. Ann Dreher	Granted	04/16/14
5013-Geneva Watson v. Xtra Mile Driver Training	Pending	
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending	
5017-State v. Christopher Manning	Pending	
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending	
5020-Ricky Rhame v. Charleston Cty. School District	Pending	
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending	
5025-State v. Randy Vickery	Pending	
5031-State v. Demetrius Price	Pending	
5032-LeAndra Lewis v. L.B. Dynasty	Pending	
5041-Carolina First Bank v. BADD	Pending	
5052-State v. Michael Donahue	Pending	
5053-State v. Thomas E. Gilliland	Pending	
5055-Hazel Rivera v. Warren Newton	Pending	
5059-Kellie N. Burnette v. City of Greenville et al.	Pending	
5060-State v. Larry Bradley Brayboy	Pending	
5061-William Walde v. Association Ins. Co.	Pending	
5062-Duke Energy v. SCDHEC	Pending	

5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Denied 04/16/14
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5111-State v. Alonza Dennis	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5113-Regions Bank v. Williams Owens	Pending

5116-Charles A. Hawkins v. Angela D. Hawkins	Pending	
5117-Loida Colonna v. Marlboro Park (2)	Pending	
5118-Gregory Smith v. D.R. Horton	Pending	
5119-State v. Brian Spears	Pending	
5121-State v. Jo Pradubsri	Pending	
5125-State v. Anthony Marquese Martin	Pending	
5126-A. Chakrabarti v. City of Orangeburg	Pending	
5127-Jenean Gibson v. Christopher C. Wright, M.D.	Pending	
5130-Brian Pulliam v. Travelers Indemnity	Pending	
5131-Lauren Proctor v. Whitlark & Whitlark	Pending	
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending	
5137-Ritter and Associates v. Buchanan Volkswagen	Dismissed	04/15/14
5139-H&H Johnson, LLC v. Old Republic National Title	Pending	
5140-Bank of America v. Todd Draper	Pending	
5144-Emma Hamilton v.Martin Color Fi	Pending	
5148-State v. Henry Jermaine Dukes	Pending	
5151-Daisy Simpson v. William Simpson	Pending	
5152-Effie Turpin v. E. Lowther	Pending	
5154-Edward Trimmier v. SCDLLR	Pending	
5156-State v. Manuel Marin	Pending	
5157-State v. Lexie Dial	Pending	

5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending
5161-State v. Lance Williams	Pending
5164-State v. Darren Scott	Pending
5165-Bonnie L. McKinney v. Frank J. Pedery	Pending
5166-Scott F. Lawing v. Univar USA Inc.	Pending
5171-Carolyn M. Nicholson v. SCDSS and State Accident Fund	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5177-State v. Leo Lemire	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. SCDOT	Pending
5188-Mark Teseniar v. Professional Plastering	Pending
2011-UP-129-Nat'l Bank of S.C. v. Ship Ahoy Marina, LLC	Denied 04/16/14
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-152-State v. Kevin Shane Epting	Granted 04/16/14
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending

2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Denied 04/16/14
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Denied 04/16/14
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-570-Wheeler v. Spartanburg Sch. Dist. Six	Granted 04/16/14
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending

2012-UP-580-State v. Kendrick Dennis	Pending	
2012-UP-600-Karen Irby v. Augusta Lawson	Pending	
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending	
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending	
2012-UP-616-State v. Jamel Dwayne Good	Pending	
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending	
2012-UP-647-State v. Danny Ryant	Granted	04/16/14
2012-UP-654-State v. Marion Stewart	Pending	
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending	
2012-UP-663-Carlton Cantrell v. Aiken County	Pending	
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending	
2013-UP-014-Keller v. ING Financial Partners	Pending	
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending	
2013-UP-020-State v. Jason Ray Franks	Pending	
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending	
2013-UP-056-Lippincott v. SCDEW	Pending	
2013-UP-058-State v. Bobby J. Barton	Pending	
2013-UP-062-State v. Christopher Stephens	Pending	
2013-UP-063-State v. Jimmy Lee Sessions	Pending	
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending	
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending	

2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending
2013-UP-125-Caroline LeGrande v. SCE&G	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-189-Thomas J. Torrence v. SCDC	Pending
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-232-Theresa Brown v. Janet Butcher	Pending

2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-296-Ralph Wayne Parsons v. John Wieland Homes	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-304-State v. Johnnie Walker Gaskins	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-317-State v. Antwan McMillan	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Pending

2013-UP-380-Regina Taylor v. William Taylor	Pending	
2013-UP-381-L. G. Elrod v. Berkeley County	Pending	
2013-UP-389-Harold Mosley v. SCDC	Pending	
2013-UP-393-State v. Robert Mondriques Jones	Pending	
2013-UP-403-State v. Kerwin Parker	Pending	
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending	
2013-UP-428-State v. Oran Smith	Pending	
2013-UP-435-State v. Christopher Spriggs	Pending	
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending	
2013-UP-444-Jane RM Doe v. Omar Jaraki	Pending	
2013-UP-459-Shelby King v. Amy Bennett	Pending	
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending	
2013-UP-485-Dr. Robert W. Denton v. Denmark Technical College	Pending	
2013-UP-489-F.M. Haynie v. Paul Cash	Pending	
2013-UP-495-Lashanda Ravenel v. Equivest Financial, LLC	Denied	04/16/14
2014-UP-010-Mell Woods v. John Hinson	Pending	
2014-UP-013-Roderick Bradley v. The State	Pending	

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Christopher Johnson, Petitioner,

v.

Reginald C. Lloyd, Chief, State Law Enforcement Division, and The State of South Carolina, Respondents.

Appellate Case No. 2012-213224

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
The Honorable William H. Seals, Jr., Circuit Court Judge

Opinion No. 27383
Submitted April 15, 2014 – Filed April 23, 2014

REVERSED

Elise Freeman Crosby, of Crosby Law Firm, LLC, of Georgetown, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Geoffrey K. Chambers, Assistant Attorney General Jared Q. Libet, and Assistant Attorney General Adam L Whitsett, all of Columbia, for Respondent.

PER CURIAM: This matter is before this Court by way of a petition for a writ of certiorari seeking review of the Court of Appeals' decision in Johnson v. Lloyd, 399 S.C. 470, 732 S.E.2d 198 (Ct. App. 2012). We grant the petition for a writ of certiorari, dispense with further briefing, and reverse the decision of the Court of Appeals.

Petitioner filed a petition for declaratory judgment seeking an order directing he be removed from the sex offender registry. In each cause of action in his complaint, petitioner asserted he was entitled to an order directing he be removed from the registry. At the declaratory judgment hearing, petitioner argued he was entitled to relief because the requirement that he register as a sex offender was unconstitutional, and he was entitled to the equitable relief of being removed from the registry. The State did not argue petitioner had not pled equitable relief or that he was not entitled to equitable relief. The trial court declined to grant petitioner relief on the constitutional claims, but concluded petitioner was entitled to equitable relief, finding "[u]nder the facts of the Plaintiff's case, the requirements of life long Sex Offender Registry is wildly disproportionate to the underlying conduct."

The State filed a Rule 59(e), SCRCP, Motion to Alter or Amend a Judgment, but did not raise the issue that petitioner failed to argue equitable relief and therefore was not entitled to equitable relief. Instead, the State acknowledged petitioner sought equitable relief at the time of the hearing, and argued the doctrines of laches and estoppel by acquiescence precluded petitioner from being eligible for such relief.

The Court of Appeals found the trial court erred in granting petitioner equitable relief and reversed the trial court's order.

We find the Court of Appeals erred in addressing the merits of this case, as the issue of whether petitioner was entitled to equitable relief was clearly not preserved for review.

"For an issue to be properly preserved it has to be raised and ruled on by the trial court." State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010) (citing State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004)). A party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on. Elam v. S.C.

Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). An issue not properly preserved cannot be raised for the first time on appeal. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994).

Because the State failed to argue that petitioner was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review. We therefore reverse the Court of Appeals' opinion on preservation grounds.

REVERSED

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Daniel Nathan Hughey, Respondent.

Appellate Case No. 2014-000411

ORDER

Based on motion, this Court has lifted the interim suspension of respondent.

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

Columbia, South Carolina

April 17, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Digital Ally, Inc., Respondent,

v.

Light-N-Up, LLC, and Steven Shepherd, Appellants.

Appellate Case No. 2013-000648

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

Opinion No. 5221
Heard March 3, 2014 – Filed April 23, 2014

AFFIRMED

Scott Franklin Talley, of Talley Law Firm, P.A., of Spartanburg, for Appellants.

David L. Walsh, of Gaines & Walsh, of Spartanburg, for Respondent.

SHORT, J.: Light-N-Up, LLC, and Steven Shepherd (collectively, Light-N-Up) appeal from an order finding a judgment of Digital Ally, Inc. (Digital Ally) obtained in Missouri was a valid judgment that could be enforced in South Carolina. Light-N-Up argues the Missouri Long Arm Statute does not trump the parties' agreement that Kansas law would apply and exclusive jurisdiction was in the state or federal courts located in Kansas. We affirm.

FACTS

Digital Ally is a Nevada corporation with its principal offices located in Kansas. It is registered to do business in Missouri, where its manufacturing facility is located. Light-N-Up is a South Carolina limited liability corporation located in Spartanburg County, South Carolina. Shepherd is a member of Light-N-Up and a resident of Spartanburg County. Light-N-Up entered into a series of contracts with Digital Ally to purchase products for use in its business of equipping police and government vehicles. However, Digital Ally alleged Light-N-Up failed to pay for the products and owed Digital Ally a total of $67,523.72.

Digital Ally filed a petition for recovery of monies in Jackson County, Missouri. It alleged personal jurisdiction and venue were appropriate in Missouri because the delivery of the products by Digital Ally to Light-N-Up occurred in Jackson County. Digital Ally also alleged causes of action for breach of contract, fraud and intentional deceit, and negligent misrepresentation.

Light-N-Up did not file an answer within the time prescribed by Missouri statutes; thus, Digital Ally filed a motion for default judgment. A hearing on the matter was held in Missouri. After the hearing, the Missouri court entered an order for default judgment against Light-N-Up. Subsequently, Digital Ally filed the Missouri default judgment in Spartanburg County, South Carolina.

In response, Light-N-Up filed a motion for relief from the foreign judgment, alleging Missouri did not have jurisdiction over Light-N-Up. After a hearing, the South Carolina trial court confirmed the foreign judgment. The court's order stated Light-N-Up failed to present any evidence showing the Missouri court lacked jurisdiction. It found Light-N-Up transacted business in Missouri, contracted with Digital Ally in Missouri, and allegedly committed torts in Missouri.

Light-N-Up filed a motion for reconsideration or to alter or amend judgment, asserting there was no evidence Light-N-Up transacted business or committed any torts in Missouri. In an amended order confirming the foreign judgment, the trial court again denied Light-N-Up's motion for relief from the Missouri judgment. However, the order provided Light-N-Up presented evidence the parties' contracts included a forum selection clause stating Kansas law would govern the contracts, and noted Shepherd stated in his affidavit that Light-N-Up has "never operated or done business in the State of Missouri." The order also clarified Light-N-Up

contracted with Digital Ally in Kansas, and Digital Ally shipped the products from its factory in Missouri. This appeal followed.

STANDARD OF REVIEW

"An action to enforce a foreign judgment is an action at law." *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 149, 628 S.E.2d 43, 44 (2006). In an action at law, tried by a judge without a jury, this court accepts the findings of the trial court if there is any evidence to support the findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Light-N-Up argues the trial court erred in finding the Missouri judgment in favor of Digital Ally was a valid judgment that could be enforced in South Carolina. We disagree.

Article IV, Section 1 of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." U.S. Const. art. IV, § 1. "[U]nder the Full Faith and Credit Clause, personal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction." *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. 497, 501, 681 S.E.2d 575, 577 (2009) (footnote omitted). However, " '[a] judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution.' " *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009) (quoting 50 C.J.S. *Judgments* § 986 (1997)). "Where the court of the issuing state has fully and fairly litigated and finally decided the question of jurisdiction, further inquiry into the jurisdiction of the issuing court is precluded." *Pitts v. Fink*, 389 S.C. 156, 162, 698 S.E.2d 626, 629 (Ct. App. 2010) (citing *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). "Otherwise, 'before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree.'" *Id.* at 162-63, 698 S.E.2d at 629 (quoting *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982)). In this case, Light-N-Up did not appear in the Missouri action. Thus, before the South Carolina trial court gave full faith and credit to the Missouri judgment, it could properly inquire into the jurisdictional basis of the Missouri decree.

"Pursuant to South Carolina's version of the Uniform Enforcement of Foreign Judgments Act (UEFJA), a judgment debtor is permitted to file a motion for relief from judgment or a notice of defense to a foreign judgment on any ground for which relief from a judgment of this state is allowed." *Id.* at 162, 698 S.E.2d at 629 (citing S.C. Code Ann. § 15-35-940(A) (2005)). In *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. at 504-05, 681 S.E.2d at 579-80, our supreme court determined the last sentence of section 15-35-940(B) of the South Carolina Code violated the Full Faith and Credit Clause of the United States Constitution by shifting the burden of proving personal jurisdiction to the creditor if the debtor filed a motion for relief from judgment or a notice of defense to the foreign judgment.[1]

Thus, in challenging that Missouri's judgment was a valid judgment that could be enforced in South Carolina, Light-N-Up bore the burden of overcoming, by the record or by extrinsic evidence, the constitutionally mandated presumption of the foreign judgment's regularity. Light-N-Up did not appear in Missouri, and the Missouri court entered a default judgment against Light-N-Up. "When determining the validity and effect of a foreign judgment based on lack of personal jurisdiction, courts look to the law of the state that rendered the judgment." *Pitts*, 389 S.C. at 163, 698 S.E.2d at 629. Therefore, to ascertain whether the Missouri court properly exercised jurisdiction over Light-N-Up, the trial court was required to consult Missouri law regarding personal jurisdiction.

Missouri law provides that "[w]hen a non-resident defendant raises the issue of lack of personal jurisdiction, the burden is cast upon the plaintiff to prove, first, that the defendant had sufficient minimum contacts with Missouri to satisfy due process requirements and, second, that the suit arose out of an activity enumerated in the long-arm statute." *Elaine K. v. Augusta Hotel Assocs. Ltd. P'ship*, 850 S.W.2d 376, 378 (Mo. Ct. App. 1993). "Due process requires that in order to subject a defendant to an in personam judgment, he must have enough minimum

---

[1] The court held only the last sentence of section 15-35-940(B) is offensive and could be severed, leaving the statute "complete in itself, wholly independent of that which is rejected, and [the remainder] is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution." *Id.* (quoting *Sojourner v. Town of St. George*, 383 S.C. 171, 177, 679 S.E.2d 182, 186 (2009)).

contacts with the forum state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* "In judging minimum contacts, a court properly focuses upon the relationship among the defendant, the forum and the litigation." *Id.* "The basic due process test is whether the defendant has 'purposefully availed itself of the privilege of conducting activities within the forum state.'" *Id.* (quoting *State ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 607 (Mo. Ct. App. 1987)).

Missouri's long arm statute, found in section 506.500(1) of the Annotated Missouri Statutes, provides in pertinent part:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;
>
> (3) The commission of a tortious act within this state . . . .

Mo. Ann. Stat. § 506.500(1) (1, 2, and 3) (West 2013).

The South Carolina trial court was required to determine whether Light-N-Up overcame the presumption of the correctness of Missouri's judgment. The trial court's first order found Light-N-Up failed to present any evidence regarding the lack of jurisdiction of the Missouri court. It further found the facts indicated Light-N-Up "transacted business, contracted with [Digital Ally] and allegedly committed torts, all within Missouri." Therefore, the trial court confirmed the foreign judgment was a valid judgment that is enforceable in South Carolina. In the trial court's amended order confirming the foreign judgment, the court again denied Light-N-Up's motion for relief from the foreign judgment. The court acknowledged Light-N-Up presented evidence the contracts contained a forum selection clause stating Kansas law governed the contracts. The court also noted

Light-N-Up presented Shepherd's affidavit stating Light-N-Up had "never operated or done business in the State of Missouri." However, the court found that while Light-N-Up contracted with Digital Ally in Kansas, the goods were shipped from Digital Ally's factory in Missouri; thus, the Missouri long arm statute conferred proper personal and subject matter jurisdiction over Light-N-Up to the Missouri court.

We find, based on the facts before us, the requisite minimum contacts existed to satisfy due process requirements. Digital Ally presented evidence Light-N-Up entered into six contracts for products from Digital Ally's manufacturing facility in Missouri; Digital Ally presented evidence Light-N-Up arranged for thirty-day financing with Digital Ally in Missouri; and Digital Ally presented evidence each invoice sent to Light-N-Up instructed it to mail its payments to Missouri. *See St. Jude Med., Inc. v. Lifecare Int'l, Inc.*, 250 F.3d 587, 592 (8th Cir. 2001) (finding sufficient minimum contacts, in part, because the contract contemplated products manufactured in the forum state and payments were made to the forum state); *cf. Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 455 (8th Cir. 1977) (finding due process prevented jurisdiction where the contracts were not negotiated or executed in the forum, would not be performed there, and the goods involved neither originated from nor were destined there). Moreover, as stated in the contracts, Digital Ally shipped its products free on board ("F.O.B.")[2] at Digital Ally's manufacturing facility in Missouri; thus, Light-N-Up took delivery

---

[2] Section 400.2-319 of the Annotated Missouri Statutes provides:

> (1) Unless otherwise agreed the term "F.O.B." (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (section 400.2-504) and bear the expense and risk of putting them into the possession of the carrier . . . .

Mo. Ann. Stat. § 400.2-319(1)(a) (West 2013).

of the products in Missouri.[3] An F.O.B. term and payments to the forum state are factors to consider in a minimum contacts analysis, although each, alone, are not dispositive. *See Scullin Steel Co. v. Nat'l Ry. Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982) (finding the making of payments in the forum state and the provision for delivery within the forum state are secondary or ancillary factors that cannot alone provide the "minimum contacts" required by due process); *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 820 n.2 (8th Cir. 1994) (holding that a "delivery term in a contract [such as 'F.O.B.'] [can]not create sufficient contacts to uphold jurisdiction" but "[s]uch delivery terms are not irrelevant to a finding of personal jurisdiction"); *Luv N' care, Ltd.*, 438 F.3d at 471 n.10 ("We have suggested, however, that the existence of a Free On Board ('F.O.B.') term in a contract is one factor to consider in determining whether the defendant has 'minimum contacts' with the forum state."). Therefore, we find this evidence supports the trial court's determination that the Missouri long arm statute conferred proper personal and subject matter jurisdiction over Light-N-Up to the Missouri court. *See Scullin Steel Co.*, 676 F.2d at 312 ("The Missouri courts have liberally construed the statutory requirement of 'transacting any business' within the state for purposes of long-arm jurisdiction.").

Because this issue is dispositive, we need not reach Light-N-Up's forum selection clause argument. *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 another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.

---

[3] "[T]he primary purpose of a F.O.B. term is to allocate the risk of damage to goods between buyer and seller." *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 472 (5th Cir. 2006).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Julian Deandre Battle, Appellant.

Appellate Case No. 2011-203746

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

Opinion No. 5222
Heard February 4, 2014 – Filed April 23, 2014

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Solicitor W. Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Appellant Julian Deandre Battle appeals his conviction for murder, arguing the trial court erred in (1) refusing to charge the jury on involuntary manslaughter, and (2) charging the jury that it could consider evidence of Appellant's flight in determining his guilt. We reverse and remand for a new trial because there is evidence to support an involuntary manslaughter charge.

FACTS/PROCEDURAL HISTORY

On December 25, 2009, Appellant attended a gathering with a few relatives and friends—some of whom invited guests of their own, such as Rafael Dodd (Victim)—at the Park West Apartments in Greenville, South Carolina. During the gathering, an argument began between two of the attendees. Appellant attempted to end the argument; however, in doing so, Appellant became involved in an altercation with Victim. During the scuffle, Victim was fatally shot. None of the witnesses to the altercation saw the weapon that was fired.

At trial, Appellant testified as to what transpired during his altercation with Victim. According to Appellant, Victim approached him in an aggressive manner and proceeded to push him and brush up against him. Appellant asserted he "told [Victim] to keep his hands off of me," and Victim responded by pulling out a gun. Appellant then described the struggle that ensued:

> Q: When Mr. Dodd pulled out the gun, what did you do?
>
> A: I grabbed his right hand and I twisted his other hand.
>
> Q: Why did you grab his right hand?
>
> A: Because that's the hand that he had his gun in.
>
> Q: Why were you trying to grab the gun?
>
> A: I was trying to get it away from me. I was trying to get it away from his face and it was pointed towards me and my cousin.
>
> Q: What happened after you tried to grab the gun?
>
> A: I twisted and the gun went off.
>
> Q: Did you intend to pull the trigger to that gun?

A: No, I did.[1]

Q: Did you intend for that gun to go off?

A: No, I didn't.

Appellant testified he "never actually grabbed the gun." However, he indicated his hand may have touched the trigger. Throughout his testimony, Appellant maintained he was not carrying a gun on the night of the shooting, and Victim was shot with his own gun.

Appellant's cousin, Clintonian Dupri Owens, corroborated Appellant's testimony that Victim was the aggressor and initiated the altercation. Additionally, Owens claimed that while Appellant was out on bond, Appellant told him "[Victim] pulled a gun out and [Victim] wanted to shoot him so [Appellant] turned [the gun] around and that was it." Owens testified he did not know Appellant to carry a gun. The State subsequently called Owens's girlfriend, Mikeya Shumate, as a witness. Shumate claimed she observed Appellant carrying a gun on another occasion; however, she admitted she did not see a gun on Appellant on the night of the shooting.

Iona Ooten, a forensic officer with the Greenville County Forensic Division, testified that when she arrived at the crime scene, she found Victim lying on the ground wearing a holster and also found a .45 caliber firearm lying next to his body.[2] Ooten stated no other firearms were found at the crime scene, nor were any bullet fragments or cartridge casings. Ooten also testified she was unable to find any fingerprints on the firearm, magazine, or any of the bullets because it had been raining heavily that day.

Investigator Laura Jones testified she interviewed Appellant shortly after his arrest. She explained that Appellant refused to write a statement, but permitted her to take notes as he described the incident to her. She read aloud her notes, which indicated: "[Victim] put the gun in my face. . . . I grabbed it and turned it back towards him. [Victim] pushed me with his right hand. We struggled and I don't know if I pulled the trigger or not. It went off and I dropped the gun." Investigator

[1] There are numerous typographical errors throughout the trial transcript. Based on Appellant's subsequent testimony, this answer appears to be a typographical error.
[2] At the time of his death, Victim was carrying a valid Tennessee Handgun Permit in his wallet.

Jones testified she was present when the firearm found at the crime scene was unloaded. She described the firearm as being capable of holding seven bullets total when fully loaded. According to Investigator Jones, it would be "physically impossible" to add additional rounds to the firearm "without breaking the spring [inside the magazine]." Investigator Jones stated she believed the firearm found at the crime scene was not the murder weapon because it was "fully loaded." However, she admitted she did not have the firearm tested to verify whether or not it had been fired on the night of the shooting.

James Armstrong, who was qualified as a firearm's expert, testified the firearm recovered from the crime scene had a maximum capacity of six rounds in the magazine, plus an additional round in the chamber. He indicated the firearm was fully loaded with "brass case hollow point projectile[s]." Armstrong explained that wounds from a hollow point projectile are generally identifiable because the projectile is designed to hit a target and then stop and expand as it transfers energy to the target.

Dr. Michael Ward, chief medical examiner for Greenville County, testified he did not find any projectiles or bullet fragments in Victim's body. Dr. Ward indicated he was not able to determine the caliber of bullet that killed Victim. However, he explained that it was "[u]nusual, but certainly possible" for a hollow point projectile to travel through the human body without leaving any fragments behind.

At the close of the case, Appellant requested a jury instruction on involuntary manslaughter. Appellant argued that pursuant to *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991), and *State v. Light*, 363 S.C. 325, 610 S.E.2d 504 (Ct. App. 2005) (*Light I*), *rev'd on other grounds*, 378 S.C. 641, 664 S.E.2d 465 (2008) (*Light II*), a charge of involuntary manslaughter was warranted because there was evidence of a struggle over the gun. The State argued this case did not involve a "true struggle" because Appellant successfully managed to grab Victim's hand and point the gun back at Victim. The trial court declined to charge involuntary manslaughter.

The trial court ultimately charged the jury on murder, voluntary manslaughter, self-defense, and accident. The jury convicted Appellant of murder and possession of a weapon during the commission of a violent crime. The trial court sentenced Appellant to life imprisonment for the murder charge and five years' imprisonment for the weapons charge.

STANDARD OF REVIEW

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

LAW/ANALYSIS

I. Involuntary Manslaughter Charge

Appellant argues the trial court erred in refusing to charge the jury on involuntary manslaughter in light of his testimony that Victim was shot while the two men struggled over Victim's gun. We agree.

"Involuntary manslaughter is defined as (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional." *Tisdale v. State*, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008). "Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." *Id.*

"The law to be charged must be determined from the evidence presented at trial." *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). "A trial court should refuse to charge the lesser-included offense of involuntary manslaughter *only* where there is no evidence the defendant committed the lesser offense." *Mekler*, 379 S.C. at 15, 664 S.E.2d at 479 (emphasis added).

Appellant cites *Light II*, for the proposition that his testimony, by itself, was sufficient to warrant an involuntary manslaughter charge. He submits that because South Carolina applies an "any evidence" standard, it is irrelevant that there was conflicting evidence showing Victim's gun was not the murder weapon. On the

other hand, the State contends the instant case is distinguishable from *Light II* because it involves a struggle over a weapon that was not used in the killing. Moreover, the State cites to both *Tisdale* and *Casey* as further support that evidence of a struggle will only support an involuntary manslaughter instruction if the struggle was for control over the murder weapon.

In *Casey*, 305 S.C. at 446, 409 S.E.2d at 391–92, the defendant accidentally shot the victim while struggling with a third person over a gun. Our supreme court noted that it had previously recognized evidence of a struggle between only the defendant and the victim as sufficient evidence for submission of an involuntary manslaughter instruction to the jury. *Id.* at 447, 409 S.E.2d at 392. Nevertheless, the court concluded, "This principle is no less applicable where the defendant, in struggling with a third person over a gun, shoots the victim." *Id.* In reaching this conclusion, the court iterated the standard for submission of an involuntary manslaughter instruction to the jury as follows: "It has long been the law in this State that 'to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatever* tending to reduce the crime from murder to manslaughter.'" *Id.* (quoting *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969)).

Subsequently, in *Light II*, our supreme court cited *Casey* to support its holding that Light was entitled to a charge of involuntary manslaughter. 378 S.C. at 649, 664 S.E.2d at 469. Therein, Light gave "inconsistent" accounts of the events that led to his girlfriend's death. *Id.* at 648, 664 S.E.2d at 468. Light initially claimed he emerged from the bathroom in his home to find his girlfriend holding a rifle, and the rifle discharged when he tried to distract his girlfriend by swinging his left arm to get the rifle out of her hand. *Id.* at 644, 664 S.E.2d at 466. Light later changed his story, admitting he took the rifle from his girlfriend before it was fired. *Id.* At trial, Light testified he became scared when his girlfriend pointed the rifle and screamed at him, so he tried to knock the rifle away with his left hand. *Id.* at 645–66, 664 S.E.2d at 467. He further testified that after he jerked the rifle away from his girlfriend, he stumbled back several feet and the rifle accidentally discharged. *Id.* at 646, 664 S.E.2d at 467. Contrary to Light's testimony, the State's pathologist opined that the victim's wounds were consistent with a purposeful shooting and inconsistent with an accidental shooting. *Id.* at 645, 664 S.E.2d at 467.

In spite of Light's conflicting stories and the pathologist's testimony indicating the killing was intentional, the supreme court in *Light II* concluded there was evidence to support a charge of involuntary manslaughter. *Id.* at 648–49, 664 S.E.2d at 468–69. The court first found there was evidence Light recklessly handled the gun and,

therefore, was guilty under the definition of involuntary manslaughter—a lawful act with reckless disregard for the safety of others. *Id.* at 648, 664 S.E.2d at 468–69. The court explained "according to [Light's] testimony, [he] took the loaded gun from [the victim] who was threatening him with it," and "[the gun] fired almost immediately after he took possession of it." *Id.* at 648, 664 S.E.2d at 469. Second, relying on *Casey*, the court found an involuntary manslaughter charge was appropriate given the fact Light struggled with the victim over the weapon. *Id.* at 648–49, 664 S.E.2d at 469.

Similarly, in *Tisdale*, 378 S.C. at 126, 662 S.E.2d at 412, a post-conviction relief case, our supreme court concluded counsel was ineffective for failing to request an involuntary manslaughter charge. Therein, Tisdale claimed the victim, who was a passenger in Tisdale's vehicle, pulled out a gun and shot at him when he refused to drive the victim to a particular destination. *Id.* at 124, 662 S.E.2d at 412. Tisdale testified that when he saw the victim pull the gun, he struggled with the victim for control of the weapon. *Id.* He asserted that while he and the victim were struggling, the gun accidentally went off while in the victim's hand. *Id.* A pathologist testified there were two bullet wounds to the left side of the victim's head slightly behind the ear. *Id.* at 125 n.2, 662 S.E.2d at 412 n.2. The PCR court found trial counsel was not ineffective for failing to request a charge on accident or involuntary manslaughter, reasoning the fact the victim was shot twice in the back of the head was completely inconsistent with either accident or involuntary manslaughter. *Id.* at 125, 662 S.E.2d at 412. On appeal, our supreme court rejected this reasoning, stating: "The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim." *Id.* at 126, 662 S.E.2d at 412. The court further determined Tisdale's testimony that there was a struggle between him and the victim was sufficient to support the submission of the involuntary manslaughter charge to the jury. *Id.* at 125–26, 662 S.E.2d at 412.

The above-cited cases establish that evidence of a struggle over the murder weapon supports submission of an involuntary manslaughter charge to the jury. The instant case is slightly distinguishable because it involves a dispute as to whether the struggle was for control of the actual murder weapon. However, our jurisprudence makes clear that when determining whether a charge on involuntary manslaughter is proper, the trial court must look to the presence of evidence, not its weight. *See Casey*, 305 S.C. at 447, 409 S.E.2d at 392 (stating a charge on involuntary manslaughter is only properly refused when there is "*no evidence whatever* tending to reduce the crime from murder to manslaughter"); *State v. Funchess*, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (stating "the [p]resence of evidence to

sustain the crime of a lesser degree determines whether it should be submitted to the jury." (citing *State v. Hicks*, 84 S.E.2d 545, 547 (N.C. App. 1954))). The task of determining the weight of the evidence lies within the exclusive province of the jury. *United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the *jury* is the lie detector." (citation and quotation marks omitted)); *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) (stating "the weight of the evidence is a question for the jury"). Consistent with these principles, our supreme court has determined there was sufficient evidence to warrant an involuntary manslaughter charge in situations where the appellant's version of events seemed improbable and there was conflicting evidence showing an intentional killing. *See Light II*, 378 S.C. at 645, 648, 664 S.E.2d at 467, 468–69 (holding an involuntary manslaughter charge was warranted where petitioner testified he took the gun from the victim's hands and, immediately thereafter, the gun went off even though petitioner had "inconsistent stories," and the pathologist testified victim's wounds were "consistent with a purposeful shooting"); *Tisdale*, 378 S.C. at 125–26, 662 S.E.2d at 412 (holding an involuntary manslaughter charge was appropriate where there was evidence petitioner and victim struggled for control of the gun despite "[t]he fact that victim's wounds may have been inconsistent with petitioner's testimony"). Therefore, in spite of the unique circumstances presented in the instant case, the focus of our inquiry remains the same—whether there was *no* evidence tending to reduce the crime from murder to manslaughter.

At trial, Appellant testified that he and Victim struggled for control of Victim's gun, and that Victim was ultimately shot and killed by his own gun. Appellant's testimony was contradicted by two witnesses who indicated the gun discovered at the crime scene next to Victim's body was fully loaded. However, this contradictory testimony was not overwhelming evidence that Appellant intentionally killed Victim considering no test was performed to confirm whether the gun was ever fired that night, no bullet fragments or projectiles were recovered during the investigation, and none of the witnesses present during the altercation saw the gun fire. Therefore, Appellant's testimony that he struggled with Victim over the murder weapon was sufficient evidence to support a charge of involuntary manslaughter. Moreover, there was evidence Appellant recklessly handled the gun because, according to Appellant's testimony, his hand may have touched the trigger as he struggled for control over the gun. *See Light II*, 378 S.C. at 648, 664 S.E.2d at 469 (holding the petitioner was entitled to a charge on involuntary manslaughter because there was evidence showing the petitioner recklessly handled the gun, where petitioner testified that the gun fired almost immediately after he grabbed

the gun from the victim). In light of this evidence, we find the trial court erred in refusing to instruct the jury on involuntary manslaughter.

Although the trial court erred in refusing to instruct the jury on involuntary manslaughter, such error is subject to a harmless error analysis. *See State v. Middleton*, Op. No. 27358 (S.C. Sup. Ct. filed February 26, 2014) (Shearouse Adv. Sh. No. 8 at 45, 49 n.2) (holding a trial court's refusal to give a jury charge on a lesser-included offense that is supported by the evidence is subject to harmless error analysis). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Id.* (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (citation omitted). "Thus, whether or not the error was harmless is a fact-intensive inquiry." *Id.*

In *Middleton*, the appellant deliberately drove up to a stopped vehicle and shot at the two passengers at least five times. *Id.* at 46. None of the bullets struck the passengers because one of them jumped into the driver's seat and ran the appellant off the road. *Id.* However, one of the passengers sustained a few cuts from the broken glass. *Id.* The appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. *Id.* The trial court charged the jury on the lesser-included offense of assault and battery in the first degree as to the injured passenger, but refused to charge the lesser-included offense as to the uninjured passenger. *Id* at 46, 48. On appeal, our supreme court found "[t]he trial judge misconstrued the statutory definition of assault and battery in the first degree as requiring an injury to the victim." *Id.* at 48. However, the court found the trial court's refusal to give an instruction on the lesser-included offense was harmless error because "the only conclusion established by the evidence is that Appellant was guilty of attempted murder." *Id.* at 50–51.

Unlike *Middleton*, the evidence in the present case does not support one clear-cut conclusion. As noted above, there was conflicting evidence as to whether Victim was shot during a struggle over the murder weapon. Testimony from two witnesses indicated the gun discovered next to Victim's body was fully loaded and, consequently, was not the murder weapon. However, no bullet fragments or projectiles were recovered during the investigation and none of the witnesses present during the altercation actually saw the gun that was fired. Moreover,

Appellant testified he was unarmed on the night of the shooting. According to Appellant, Victim initiated the altercation, and when Victim drew his gun, a struggle ensued, resulting in Victim being shot by his own weapon. Appellant's testimony, if believed, points to the killing being unintentional. Therefore, we cannot construe the evidence in this case as only showing Appellant intentionally killed Victim. Accordingly, we find the trial court's refusal to charge involuntary manslaughter was not harmless beyond a reasonable doubt.

II. Charge on Flight as Evidence of Guilt

Appellant also asserts the trial court erred in charging the jury that it could consider evidence of flight in determining his guilt. Although our determination concerning the trial court's refusal to charge involuntary manslaughter is dispositive of this appeal, we note that Appellant did not preserve his argument regarding flight as evidence of guilt. At trial, it was the State that objected to the trial court's instruction on flight. Appellant did not join in the State's objection; instead, Appellant argued the instruction was proper. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (holding an issue must be raised to and ruled upon by the trial court to be preserved for review); *id.* at 142, 587 S.E.2d at 694 (stating a party may not argue one ground at trial and an alternate ground on appeal).

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence are

REVERSED AND REMANDED.

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald I. Roberts, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164306

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 5223
Heard January 8, 2014 – Filed April 23, 2014

REVERSED AND REMANDED

Jerry Nicholas Theos, of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., of Charleston, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General Matthew J. Friedman, and Assistant Attorney General Ashley R. Wilson, all of Columbia, for Respondent.

HUFF, J.: Following his jury convictions for trafficking in cocaine and possession with intent to distribute (PWID) cocaine within one-half mile proximity of a school, Ronald I. Roberts was sentenced to concurrent terms of twenty-five years imprisonment for the trafficking charge and ten years imprisonment for the

proximity charge. In this belated direct appeal, Roberts contends the trial court erred in (1) failing to grant his motion for directed verdict and (2) failing to dismiss a confusing trafficking indictment which led to a confusing jury verdict. We find the directed verdict issue is not preserved; however, based upon the confusing jury verdict, we reverse Roberts' trafficking conviction and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

In May 2003, the Grand Jury true-billed indictments against Roberts for trafficking in cocaine in an amount between 200 and 400 grams, and PWID cocaine within one-half mile proximity of a school. When the matter was called to trial in August 2006, the solicitor referred to the trafficking indictment as "trafficking cocaine," without mention of any amount. The State thereafter argued the case and presented evidence linking Roberts to the possession of 196.72 grams of cocaine found underneath Roberts' bed in his home, and that Roberts' home was located less than a half-mile from an elementary school. After the State rested, trial counsel made a general motion for directed verdict on both charges, which the trial court denied. The defense then rested without presenting any evidence.

During closing arguments, the solicitor specified that the charge against Roberts involved 100 to 200 grams of the drug and the State was required to prove Roberts was in control of at least 100 grams, with the evidence showing he was in control of around 196 grams of cocaine. The trial court then charged the jury that Roberts was charged with "trafficking cocaine, more than 100 grams" and that, pursuant to the indictment, the State was required to prove beyond a reasonable doubt that the amount of the cocaine "was one hundred grams or more, but less than two hundred grams." The court also stated, although the indictments could not be considered as evidence, the jury foreman was to use the indictments to record the jury's verdict. At the conclusion of the charge, the verdict forms were presented to the jury.

When the jury returned with its verdicts on the two charges, the clerk read from the verdict forms as follows: "Case number 2003-GS-10-3696 (sic),[1] The State of South Carolina versus Ronald Irving Roberts, indicted for trafficking cocaine, **two hundred to four hundred grams**, we the jury find the defendant guilty. Signed by [the] foreperson, dated August 10, 2006." (bolded emphasis added). The clerk

[1] It appears the correct case number for the trafficking charge was 2003-GS-10-3296.

then asked the jurors to raise their hands if that was their verdict, and the record indicates all hands were raised. After the clerk then read the verdict from the PWID proximity indictment finding Roberts guilty of that charge as well, and the jury confirmed that verdict, a bench conference was held off the record. Once back on the record, the clerk, without any explanation, then stated as follows: "As to indictment 2003-GS-10-3296, The State of South Carolina versus Ronald Irving Roberts, indicted for trafficking cocaine, **one hundred to two hundred grams**, we the jury find the defendant guilty. Signed by [the] foreperson, dated August 10, 2006." (bolded emphasis added). The jurors were again asked to confirm that was their verdict by raising their hands, and the record indicates they did so. At this point, trial counsel asked to look at the verdict form. After reviewing it, the following colloquy occurred:

> [Trial Counsel]: Your Honor, there does appear to be a (sic) issue on - - indictment 3296. On the page - - on the side of the indictment form, where the verdict appears, it's typed trafficking cocaine, two hundred, dash, four hundred grams, even though the indictment itself . . . on the other page . . . in excess of two hundred grams and then it was marked through with a one.
>
> . . . I'd not caught that before, . . . and I don't know whether there is any issue about . . was this indictment amended before or after it was presented to the jury - - Grand Jury? I just don't know.
>
> [Court]: All right, so technically it's a lesser included offense that the State elected to go forward with, with the amount being between one hundred and two hundred. Am I wrong?
>
> [Solicitor]: That's correct, your Honor. The official weight was over two hundred in the field weight. The testing came back and it came in slightly under two hundred.
>
> The State proceeds on a lesser included of one hundred/two hundred grams, your Honor.

> [Trial Counsel]: . . . [B]ut was the indictment for in excess of two hundred grams? That's . . . the point.
>
> [Court]: It . . . originally was. But, as you know, many crimes have lesser included offenses.
>
> [Trial Counsel]: But I thought that I was instructed here that this offense does not have a lesser included offense of less than the hundred grams.
>
> Your Honor, we would object to the verdict for the indictment for trafficking cocaine, and would move to dismiss it, . . . - - *I'm not sure whether the jury found my client guilty of more than two hundred grams of cocaine or more than one hundred grams of cocaine by looking at the indictment.*
>
> [Court]: I'll have to deny any motion and let the verdict stand based on the principle of lesser included offense and conforming everything to the evidence that was presented.

Trial counsel noted the trial court had declined to give a requested lesser included instruction of trafficking in more than ten but less than 100 grams of cocaine. The court clarified it declined to do so because the evidence showed the amount of drugs involved was 196 grams, and there was no evidence to support a verdict for less than 100 grams of the drug. Trial counsel then asked for the jury to be polled. The clerk informed the jurors he was going to ask them two questions, "Is this your verdict, and is this still your verdict," and proceeded to ask them "Are these your verdicts," and "Are they still your verdicts," to which the jurors each responded affirmatively to both questions. However, the clerk did not mention any weights associated with the trafficking charge nor clarify to which verdict he was referring on the trafficking charge and whether they were affirming a verdict to trafficking between 200 and 400 grams or between 100 and 200 grams of cocaine.

LAW/ANALYSIS

1. Directed Verdict

Roberts first contends the trial court erred in failing to direct a verdict on the trafficking charge. He argues the undisputed evidence presented at trial was that the amount of cocaine retrieved from his home weighed 196.72 grams, and therefore the evidence did not support the indicted offense of trafficking between 200 and 400 grams of cocaine. The State, however, contends this issue is not properly preserved.

After the State rested its case, trial counsel argued only as follows:

> The defendant would move for a judgment of acquittal on the grounds that the State has not offered evidence from which the jury could find, beyond a reasonable doubt, that he was either guilty of trafficking or guilty of possession with intent to distribute within a half-a-mile of the courthouse (sic). I don't care to argue any details.

Notably, trial counsel did not bring to the trial court's attention the discrepancy between the amount of cocaine listed in the indictment and the amount presented as evidence at trial. The trial court denied the motion "based on the evidence that's before the court."

We agree with the State that this issue is not preserved for review. Roberts only made a general motion for directed verdict based upon the sufficiency of the evidence to show he was guilty of trafficking cocaine and PWID within proximity. He never argued, as he does on appeal, that the undisputed evidence showed the amount attributable to him was only 196.72 grams and therefore the evidence did not support the indicted offense of trafficking between 200 and 400 grams of cocaine. Indeed, as shown by the matter raised following the jury's verdict, trial counsel was not even aware, at that time, of any discrepancy between the amount charged in the indictment and the amount of cocaine proved by the State in order to argue the matter at the mid-trial directed verdict stage. *See State v. Sterling*, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012) ("A general directed verdict motion . . .

does not preserve any issue for appeal."); *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appellate review when one ground is raised below and another ground is raised on appeal); *State v. Adams*, 332 S.C. 139, 144, 504 S.E.2d 124, 126 (Ct. App. 1998) (finding, when the only argument made at trial was that the evidence did not rise to the level of a reasonable doubt, and the precise appellate argument was neither raised to nor ruled upon by the trial court, appellant's challenge to the denial of his motion for directed verdict was not preserved for review).

2. Confusing Indictment Leading to Confusing Verdict

The record before us contains a copy of a true-billed, unaltered trafficking indictment, apparently provided to trial counsel pursuant to Rule 5, SCRCrimP, which is captioned "INDICTMENT FOR TRAFFICKING COCAINE *200-400 GRAMS*," with the following charging language in the body of the indictment:

> That Ronald Irving Roberts did in Charleston County on or about March 4, 2003, knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of a controlled substance or a controlled substance analogue, to wit: Cocaine, *in excess of 200.00 grams*. This is in violation of § 44-53-370 of the South Carolina Code of Laws (1976) as amended.

(emphasis added). The back of this indictment, showing the action of the Grand Jury and providing a place to record the verdict, indicates it is an "Indictment for TRAFFICKING COCAINE *200-400 GRAMS*." (emphasis added). Also appearing in the record is an altered version of this indictment which is still captioned "INDICTMENT FOR TRAFFICKING COCAINE *200-400 GRAMS*," but within the body on the indictment includes the number "1" drawn over the number "2," such that the altered version provides Roberts did traffic in cocaine "*in excess of*

100.00 grams." (emphases added). On the back of this altered version, which includes the jury's written notation of a guilty verdict as well as the foreperson's signature and the date, it continues to indicate it is an "Indictment for TRAFFICKING COCAINE *200-400 GRAMS*." (emphasis added).

Roberts asserts error in the trial court's denial of his motion to dismiss his indictment based upon the surreptitiously and partially altered indictment, in conjunction with questioning of the jury as to its verdict. He contends the altered trafficking indictment was confusing, and this in turn led to confusion regarding the jury verdict. Roberts notes that varying amounts were listed on the verdict form used by the jury, which created confusion as to the jury's actual verdict. Roberts also argues the error could not be harmless because the trial court essentially interpreted the jury's action of finding him guilty of trafficking in 100 to 200 grams, denying him his Sixth Amendment right to a jury trial which includes the right to have the jury, rather than the trial court, reach the verdict. He contends the trial court's decision to interpret the jury's verdict in this manner denied him the right to a trial by jury, and his conviction should be reversed.[2] We agree.

First, we find no merit to the State's assertion that this issue is not preserved for review based upon Roberts' failure to object to the indictment prior to the jury being sworn. The State cites to language in *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005), wherein our supreme court held "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." However, in support of this holding, *Gentry* relies on section 17-19-90 of the South Carolina Code, which provides, "Every objection to any indictment for *any defect apparent on the face* thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code Ann. § 17-19-90 (2003) (emphasis added). It is undisputed the parties do not know when, where, or by whom the alteration was made to the original true-billed indictment. At a PCR hearing, trial counsel testified he was associated with the case approximately one week before the trial, at which time he reviewed the discovery file that included the unaltered indictment. However, according to trial counsel, the indictment returned with the jury verdict

[2] Though Roberts actually asks that his "convictions" be reversed, there is no basis for overturning his PWID within proximity conviction, and none is argued by Roberts on appeal. Nor is such an argument preserved for review as it was not raised to the trial court.

included the alteration. Thus, there is no indication that any defect was apparent on the face of the indictment at the time the jury was sworn. Further, it is clear that, under appropriate circumstances, amendments may be made to indictments subsequent to the swearing of the jury. *See Granger v. State*, 333 S.C. 2, 5, 507 S.E.2d 322, 324 (1998) (noting an indictment "may be amended at trial only if the amendment does not change the nature of the offense charged"); S.C. Code Ann. § 17-19-100 (2003) (providing, if it does not change the nature of the offense charged, the court may amend an indictment under certain circumstances, including when "on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof . . .").

More importantly, although the alteration to the indictment is part and parcel to Roberts' argument on this matter, we do not believe the issue on appeal is a challenge to the sufficiency of the indictment or permissibility of amendment. Rather, Roberts challenges the trial court's denial of his post-verdict motion based upon the confusing jury verdict.[3] In so doing, Roberts notes the surreptitious alteration of the indictment which was included in the verdict form delivered by the jury; the fact that the clerk initially announced the verdict as a finding of guilt on the trafficking in cocaine between 200 and 400 grams; that no on-record clarification was made before the clerk inexplicably announced a guilty verdict of trafficking in 100 to 200 grams of cocaine; the jury affirmed both of these verdicts; the jury was never informed they were being asked about two different weight ranges; and, upon polling, the trial court did not specify which of the two different verdicts it was asking the jury to affirm. Roberts does not assert the indictment was somehow defective or deficient, but argues the circumstances surrounding the partial alteration of the indictment presented to the jury for use as a verdict form, along with the subsequent readings of the verdict by the clerk and affirmation and polling of the jury, ultimately resulted in a confusing jury verdict.

On the merits, we find the confusing and questionable circumstances surrounding the jury verdict were such that it led to an ambiguous and uncertain verdict. First,

---

[3] Though trial counsel moved to dismiss the indictment for trafficking, he clearly raised an objection to the confusing verdict, noting he could not discern under the circumstances whether the jury found Roberts guilty of trafficking in the 100 to 200 gram weight, or trafficking in the 200 to 400 gram amount. Further, the trial court stated it would "have to deny *any* motion," by trial counsel in this regard.

there is absolutely no indication of when and by whom the alteration was made to the indictment. There is nothing in the record to show any motion was ever made to amend the indictment or that the trial court granted such motion. Though the trial court treated the matter as if the alteration were a permissible amendment to the indictment,[4] it did not do so until *after* the verdict was already returned. Thus, assuming arguendo that an amendment would have been proper under the facts of this case, nothing in the full record before us[5] shows there was ever any timely, formal amendment of the indictment.[6]

In *Wertz v. State*, 349 S.C. 291, 562 S.E.2d 654 (2002), our supreme court stated as follows:

> A verdict should be certain and import a definite meaning free from ambiguity.
>
> If a party believes there is confusion in the wording of a jury's verdict, that party should call it to the attention of the trial court at the time the verdict is rendered so that any confusion in the verdict's language can be easily cleared up. It is the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it [is] his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial. . . .
>
> A verdict of a jury should be upheld when it is possible to do so, and carry into effect what was clearly the intention of the jury. When a verdict is so confused,

---

[4] *See State v. Means*, 367 S.C. 374, 385-86, 626 S.E.2d 348, 355 (2006) ("Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty.").

[5] Because this matter was initiated by a PCR action, the complete transcript from Roberts' trial is included within the record.

[6] We do not address whether a timely amendment to the indictment would have been permissible in this matter, but simply assume so for the sake of argument.

> however, that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial. Judges and parties should not be required to guess as to what verdict a jury sought to render.

Id. at 296, 562 S.E.2d at 657 (citations and quotation marks omitted). Here, there was an alteration to the indictment, which does not appear to have been timely or formally amended. The indictment was only partially altered and done in such a way that there were inconsistencies in the amount of drugs involved shown in the three places on the altered indictment. Additionally, this altered and inconsistent indictment was used by the jury to record its verdict. Further, trial counsel called the problems with the verdict to the trial court's attention. The court, however, focused on whether trafficking in 100 to 200 grams of cocaine would be a lesser included offense of a charge of trafficking in 200 to 400 grams of cocaine or whether an amendment of the indictment would be permissible as conforming to the evidence presented at trial. Taking into consideration the inconsistencies in the amount of drugs stated in the indictment upon which the jury recorded its verdict and the fact that the clerk first read the guilty verdict to be for the greater amount of drugs and then inexplicably announced the verdict was for the lesser amount, we believe there was ambiguity and confusion as to the jury's verdict. Further, this ambiguity was never clarified after trial counsel called it to the court's attention. In the final polling of the jury, the jurors were not told which drug-amount conviction they were asked to affirm. Considering the totality of the circumstances, we believe the verdict was so confused that it is not absolutely clear what the jury intended to do, and the trial court should have ordered a new trial. *See id.* at 296, 562 S.E.2d at 657 ("When a verdict is so confused . . . that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial.").

Additionally, we do not believe the matter can be deemed harmless. The most important element of the provision in the Sixth Amendment to the Constitution of the United States that the accused in a criminal prosecution have the right to a speedy and public trial by an impartial jury, is "the right to have the jury, rather than the [trial court], reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). "Thus, although a [trial court] may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, [it] may not direct a verdict for the State, no matter how overwhelming the evidence." *Id.* "The

Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilt." Id. at 280. "Although most constitutional errors have been held amenable to harmless-error analysis, . . . some will always invalidate the conviction." *Id.* at 279. In a "[h]armless-error review," the court looks "to the basis on which the 'jury *actually rested* its verdict,'" such that the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.*

Regardless of how overwhelming the evidence of Roberts' guilt to trafficking in 100 to 200 grams of cocaine, we find the trial court improperly attempted to interpret a confusing verdict, and the error in so doing cannot be considered harmless.[7] Given the confusing verdict, "the safest and best course . . . is to order a new trial." *Wertz*, 349 S.C. at 296, 562 S.E.2d at 657.

CONCLUSION

Based on the foregoing, we reverse Roberts' trafficking conviction and remand for a new trial.

REVERSED AND REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

---

[7] We find no merit to the State's assertion Roberts cannot show he was prejudiced by the *amendment* to the weight of the drugs. As noted, there is nothing to show the indictment was ever formally or timely amended. Further, the question here is not whether amendment of the indictment would have been properly permitted, but whether the circumstances surrounding the jury's verdict showed such confusion that it is not absolutely clear what the jury intended to do. Because the circumstances surrounding the jury verdict were so confused that it cannot be clearly discerned what the jury intended to do, we find the matter cannot be considered harmless.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alex Robinson, Appellant.

Appellate Case No. 2011-203769

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5224
Heard January 8, 2014 – Filed April 23, 2014

REVERSED

Dayne C. Phillips, of Lexington, and Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

FEW, C.J.: Alex Robinson appeals his conviction for trafficking cocaine, arguing the trial court erred in refusing to suppress evidence seized pursuant to a search warrant. We find the search warrant invalid because the affidavit supporting it gave the issuing judge no information as to the confidential informant's reliability. We reverse.

I. Facts and Procedural History

In August 2008, a confidential informant told Sergeant Kent Donald of the Horry County Police Department's narcotics and vice section she could purchase drugs from Robinson's residence. Sergeant Donald and a federal law enforcement agent met with the informant on August 15 to set up the first buy. The informant told the officers that to make the purchase, "she would go meet the other person that was going to supply them with the cocaine." The "other person" was Christopher Oliver. Sergeant Donald testified he "debriefed" the informant after the buy. Describing what the informant told him, Sergeant Donald testified, "When [the informant] got there, . . . Mr. Oliver told her to drop him off away from the residence because the occupants of the house did not want any undue suspicion on their house. So, [the informant] was told to park down the road[,] and [Oliver] would walk to the residence."

Sergeant Donald also testified that on August 22 and September 12, he "met with the confidential informant to search -- wired,[1] I gave her $600 of police buy money. She went and picked Mr. Oliver up[,] and they went again to [Robinson's residence]." While Oliver was inside Robinson's residence, the informant "sat in the car the whole time" and listened to music.

On September 17, Sergeant Donald prepared an affidavit in which he swore the informant—not Oliver—purchased cocaine from Robinson's residence. Sergeant Donald stated,

> A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as 1251 Stoneybrook Dr. in Conway, SC. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

[1] Sergeant Donald later described the "wire" as an audio listening device, which recorded the informant—but not the drug sale—while she sat in her car listening to music and waiting on Oliver to buy the drugs.

Sergeant Donald presented the affidavit to a circuit court judge because "this case had the possibility of going federal," and on September 17 the judge signed a warrant authorizing the search of Robinson's residence. When officers executed the warrant on September 25, they discovered a large plastic bag containing 109.35 grams of cocaine, seven small bags of cocaine, marijuana, ecstasy pills, a scale, video surveillance equipment, and various items connecting Robinson to the residence, such as his mail and photographs of him.

Robinson was indicted for trafficking cocaine, and the State called the case for trial before the same circuit judge who signed the search warrant. The trial court denied his motion to suppress the evidence seized pursuant to the warrant. The jury found him guilty, and the court sentenced him to twenty-five years in prison.

II. The Validity of the Warrant

We address two of Robinson's arguments that the trial court erred by not granting his motion to suppress. First, he argues Sergeant Donald misled the judge who issued the search warrant by knowingly omitting the facts and circumstances of Oliver's involvement in the drug transactions. Second, he argues the warrant is invalid because Sergeant Donald did not present the issuing judge with any information regarding the confidential informant's reliability.

We agree Sergeant Donald omitted key information necessary for the issuing judge to determine whether probable cause existed. We disagree, however, that the omission of the information requires suppression. Regarding Sergeant Donald's failure to provide the issuing judge information about the informant's reliability, we find this failure left no substantial basis on which the judge could determine the existence of probable cause, and thus we order suppression.

A. The Omission of Key Information from the Affidavit

The trial court agreed with the State that the affidavit was accurate despite the omission of Oliver's involvement. The court stated, "This affidavit has -- there's no false statement in this affidavit." We hold the trial court's finding is clearly erroneous. *See State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous.").

Sergeant Donald's affidavit states the "informant . . . purchased . . . cocaine . . . from the occupants of the house," and "the informant has been able to make . . .

purchases of . . . drugs from this residence." During the suppression hearing, however, he testified, "I was working a confidential informant who stated that she knew someone that could purchase some drugs." Describing the individual buys, he testified the informant "would go meet the other person that was going to supply them with the cocaine." Sergeant Donald's affidavit implies, if not expressly states, the informant personally entered the house and purchased cocaine. In actuality, however, assuming what the informant told Sergeant Donald was true, Oliver was the one who purchased cocaine from the occupants of the house while the informant was "park[ed] down the road" listening to music. Sergeant Donald's testimony at the suppression hearing conclusively demonstrates his statements in the affidavit are false.

The State argues Sergeant Donald's statements are true because Oliver was the informant's agent, and through Oliver the informant purchased the drugs. Even if the State is correct that the informant was a purchaser under the law of agency, that is a determination the issuing judge must make—not the officer. *See United States v. Watson*, 703 F.3d 684, 695 n.13 (4th Cir. 2013) ("[T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (citations omitted)); *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct. App. 2007) ("The affidavit must contain sufficient underlying facts and information upon which *the magistrate may make a determination* of probable cause." (emphasis added and citation omitted)). Thus, the officer should have disclosed that the informant purchased cocaine through a purported agent, and should have described the circumstances he believed gave rise to the agency relationship. Because the affidavit represented that the informant was the purchaser, but did not disclose the facts related to agency, the affidavit is false even under the State's agency theory.

Therefore, the trial court's finding that the affidavit contained no false statement is clearly erroneous. Although there is plenty of evidence relating to the trial court's finding, all of this evidence negates—none supports—the trial court's conclusion. *See Brown*, 401 S.C. at 87, 736 S.E.2d at 265 (stating "[in] a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it").

Under *Franks v. Delaware*, however, the court may not order suppression simply because the officer made a false statement in, or omitted key facts from, an

affidavit supporting a search warrant. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978) (establishing the two-prong test for challenging the veracity of a search warrant affidavit). The defendant must also demonstrate "those false statements or omissions were material, *i.e.*, rendered the affidavit unable to 'support a probable cause finding.'" *United States v. McKenzie-Gude*, 671 F.3d 452, 462 (4th Cir. 2011) (quoting *United States v. Allen*, 631 F.3d 164, 171 (4th Cir. 2011)). We find Sergeant Donald's false statement in the affidavit does not require suppression because the existence of probable cause depended on the accuracy of what the informant told Sergeant Donald. In other words, including in the affidavit the correct information about Oliver's involvement would not have changed the fact that probable cause existed, *if* the informant was telling the truth.

B. The Reliability of the Confidential Informant

We find, however, that Sergeant Donald's failure to include in his affidavit any evidence of the informant's reliability renders the warrant invalid. In making a probable cause determination,

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

State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 496 (2009) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

The only information in the affidavit about the events and circumstances at Robinson's residence, and thus the only information provided to the issuing judge regarding the existence of probable cause, came from the informant. As the issuing judge observed during the suppression hearing, "There were drugs there *if* the allegations [in the affidavit] are true." Thus, the existence of probable cause in this case depended entirely on the informant's hearsay statements to Sergeant Donald—whether the informant told the truth—particularly as to (1) whether there were any drugs purchased at all and (2) whether the drugs were purchased from Robinson's residence. Concerning these key points, if the informant gave Sergeant

Donald incorrect information, there would be no probable cause to search Robinson's residence. Therefore, we find it was necessary that Sergeant Donald demonstrate the informant's reliability to the issuing judge. *See State v. Martin*, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001) ("'A warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge.'" (quoting *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000))); *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994) ("The task of a magistrate when determining whether to issue a warrant . . . . includes consideration of the veracity of the person supplying the information and the basis of his or her knowledge." (internal citations omitted)).

III. Suppression

The State argues against suppressing the evidence because it contends the warrant was obtained in good faith and was not so lacking in indicia of probable cause that the law enforcement officers' belief in its validity was unreasonable, and thus should be upheld under *United States v. Leon*, 468 U.S. 897, 919-20, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677, 696-97 (1984). In *Leon*, the Supreme Court established a good faith exception to the exclusionary rule, holding "that when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." *State v. Weston*, 329 S.C. 287, 292, 494 S.E.2d 801, 803-04 (1997) (summarizing *Leon*). The *Leon* Court listed three situations in which the good faith exception cannot apply, one of which is reviewing courts will not defer to a warrant based on an affidavit "that does not provide the magistrate with a substantial basis for determining the existence of probable cause." 468 U.S. at 914-15, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693.

In *State v. Johnson*, 302 S.C. 243, 248, 395 S.E.2d 167, 170 (1990), our supreme court ruled "*Leon* specifically precludes the application of the good faith exception" in a situation indistinguishable from ours. In *Johnson*, "the informant told South Carolina Law Enforcement agents that he had seen a large quantity of cocaine, cash and a gun in Johnson's home" "within the past seventy-two (72) hours." 302 S.C. at 245, 395 S.E.2d at 168. This information, if accurate, would have provided a substantial basis on which the issuing judge could find the existence of probable cause. However, the affidavit "d[id] not set forth any information as to the reliability of the informant." 302 S.C. at 247, 395 S.E.2d at 169. The supreme court stated:

> Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime, or, as in this case, by an unidentified informant.

302 S.C. at 248, 395 S.E.2d at 169 (internal quotation marks omitted).

After concluding "the affidavit . . . did not provide the magistrate with sufficient information concerning the informant's reliability upon which he could base a probable cause determination," the court considered whether the good faith exception applied. 302 S.C. at 248-49, 395 S.E.2d at 169-70. Quoting *Leon*, 468 U.S. at 915, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693, our court found the good faith exception inapplicable:

> [R]eviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

302 S.C. at 248-49, 395 S.E.2d at 170 (internal quotation marks omitted).

As in *Johnson*,[2] Sergeant Donald's affidavit gave the issuing judge no information to assess the reliability of the information on which probable cause could exist. Without such information, the issuing judge was forced to guess whether the

[2] In *Johnson*, the court was unable to determine if the officer supplemented the affidavit with testimony before the issuing judge. *See* 302 S.C. at 249, 395 S.E.2d at 170 (stating "it is not clear from this record whether oral testimony concerning the reliability of the informant was given to the magistrate"). The court remanded for a determination of whether any such supplementation provided the judge with information as to the reliability of the informant. *Id.* Such a remand is unnecessary in this case, however, because Sergeant Donald testified at the suppression hearing he did not supplement his affidavit.

events described in the affidavit actually occurred. Under these circumstances, we cannot defer to the warrant because the affidavit "does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Johnson*, 302 S.C. at 248, 395 S.E.2d at 170 (quoting *Leon*, 468 U.S. at 914-15, 104 S. Ct. at 3416, 82 L. Ed. 2d at 693). We find that given the lack of any basis on which the issuing judge could find the information in the affidavit reliable, the "affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Weston*, 329 S.C. at 293, 494 S.E.2d at 804 (quoting *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421, 82 L. Ed. 2d at 699); *see also id.* (cautioning "*Johnson* should not be read as prohibiting application of the good-faith exception every time an affidavit fails to satisfy the technical requirements of *Gates*").

Consequently, *Leon*, *Weston*, and *Johnson* require us to find the good faith exception inapplicable to Robinson's case. We hold the evidence must be suppressed. *See State v. Robinson*, 335 S.C. 620, 632 n.3, 518 S.E.2d 269, 276 n.3 (Ct. App. 1999) (stating "the good faith exception is inapplicable in cases where the affidavit fails to provide the magistrate with a substantial basis for probable cause"); *Adolphe*, 314 S.C. at 93, 441 S.E.2d at 834 (finding the good faith exception was inapplicable because "the affidavit did not contain any information regarding the reliability of the informant").

IV. Remaining Issues

Robinson raises additional issues on appeal, including the argument that the judge should have recused himself because a judge should not hear a motion to suppress evidence seized pursuant to a warrant that judge signed. *Compare Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) (adopting "a *per se* rule of recusal" when the same judge who presided over a criminal trial is asked to preside over a post-conviction relief proceeding for the same defendant), *with State v. Watkins*, 406 S.C. 360, 363-64, 752 S.E.2d 261, 262 (2013) (holding a judge is not automatically disqualified from presiding over a retrial after granting post-conviction relief). Because we find the search warrant was invalid and the evidence must be suppressed, we need not resolve these issues. *See State v. Hepburn*, 406 S.C. 416, 429 n.14, 753 S.E.2d 402, 408 n.14 (2013) (declining to address remaining issues because the court's determination of a prior issue was dispositive).

V. Conclusion

We find the search warrant was invalid because Sergeant Donald gave the issuing judge no information regarding the informant's reliability. Without such information, the affidavit did not provide the issuing judge a substantial basis for a finding of probable cause, the good faith exception does not apply, and the evidence must be suppressed.

REVERSED.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Matthew Ryan Hendricks, Appellant.

Appellate Case No. 2011-203730

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

Opinion No. 5225
Heard March 4, 2014 – Filed April 23, 2014

AFFIRMED

Appellate Defenders Dayne C. Phillips and Carmen Vaughn Ganjehsani, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

FEW, C.J.: Matthew Ryan Hendricks appeals his convictions for kidnapping and two counts of criminal sexual conduct in the first degree. He argues the trial court erred in admitting a recording of the victim's mother's 911 call, in which the mother's statement to the 911 operator repeated the victim's statement of what Hendricks did to her. We find the trial court correctly admitted the victim's

statement, but erroneously admitted the mother's statement. However, we find Hendricks suffered no prejudice from the error, and therefore we affirm.

I. Facts and Procedural History

The State indicted Hendricks for kidnapping and two counts of criminal sexual conduct in the first degree in connection with his alleged rape of the victim. At trial, the victim testified she had known Hendricks for almost four years, and they had an "off and on" romantic relationship during which they often lived together. On the night of September 15, 2010, she heard her house shaking and thought somebody was breaking in. She realized it was Hendricks, who "was not himself at all. He was way out of character." Hendricks accused her of cheating on him, and then hit her on the arm, "jerked [her] up by the hair on [her] head," and took her to a bedroom. Once in the bedroom, Hendricks slammed her head on the floor and told her to undress. She testified, "He tells me to turn over, he doesn't want to see my face." Hendricks then held her down on a bed while he "anally sexually assaulted" her. After the assault, she went to the bathroom, but Hendricks "told [her] to get back in" the bedroom. Hendricks again held her down and "[v]aginally" sexually assaulted her. Afterwards, Hendricks tried to "cuddle," but she refused and he left her house.

The victim testified she could only remember "bits and pieces" of what happened after Hendricks left. She did remember going to the bathroom because she was vaginally and anally bleeding. She took a shower because "there was blood everywhere." After showering, she woke her children and drove them to her mother's house.

Before the victim's mother—Lisa Gilstrap—testified, the State asked the trial court to address the admissibility of the recording of Gilstrap's 911 call. The State argued the recording was admissible as either a present sense impression or an excited utterance. Hendricks objected, but the trial court indicated it would allow the recording into evidence. The State did not play it for the jury at that time.

Gilstrap then testified she received a phone call from her daughter, who was crying and distraught. Her daughter told her Hendricks "had beaten her up and raped and sodomized her." Gilstrap testified that when her daughter arrived at her house, she was shaking and crying, had injuries on her face and arms, and looked like she had been in a fight. Gilstrap explained they first put the children to bed because they

were her daughter's "paramount concern." Gilstrap then drove her daughter to the hospital because her daughter "was not able" to drive. Gilstrap called 911 on the way.

The State then moved to introduce the recording of the 911 call into evidence. Hendricks renewed his objection, but the trial court admitted the recording. The State then played a portion, which contained the following dialogue:

> Operator: Pickens County Sheriff's Office.
>
> Gilstrap: Yes, sir. This is Lisa Gilstrap.
>
> Operator: Um-hum.
>
> Gilstrap: My daughter's boyfriend just broke into her house, and beat her up and raped her. And we're on the way to Easley Hospital. And I was wondering if you could send an officer up there.
>
> Operator: Where did it happen?
>
> Gilstrap: [provides her daughter's address and states her daughter is in the car]
>
> Operator: She's already at the hospital?
>
> Gilstrap: No, I'm fixing to take her. We live—I live in Forest Acres. She's got bruises all over and he sodomized her.
>
> Operator: And what is your daughter's name?
>
> Gilstrap: [provides her daughter's name] She's twenty-two. Her two boys were there. [six-second pause] And his name is Matthew Hendricks.

Hendricks testified in his defense, asserting he and the victim had consensual anal and vaginal intercourse. The jury found Hendricks guilty of kidnapping and two counts of criminal sexual conduct in the first degree, and the trial court sentenced him to eight years in prison.

II. Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" in the statement. Rule 801(c), SCRE. "Hearsay is not admissible" unless an exception applies, or "as provided by . . . other rules . . . or by statute." Rule 802, SCRE. The State argues the recording of Gilstrap's 911 call was admissible under the present sense impression and excited utterance exceptions. *See* Rule 803(1), SCRE (defining present sense impression as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); Rule 803(2), SCRE (defining excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule. Rule 805, SCRE.

A. Issue Preservation

Hendricks did not state his objection to the 911 recording with specificity, which raises concerns about issue preservation. *See* Rule 103(a)(1), SCRE ("Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection . . . appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."). We find, however, the hearsay basis for Hendricks' objection is apparent from the context. The State immediately responded to the objection by citing a case dealing with hearsay exceptions, and specifically argued the recording was admissible under the present sense impression and excited utterance exceptions in Rule 803(1) and (2). Therefore, the objection preserved the issue because it is clear from the record that both the State and the trial court immediately understood Hendricks' objection was based on hearsay. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013) (holding an issue was preserved when "[t]he trial court immediately appeared to understand the objection as a . . . hearsay argument").

B. The Victim's Statement to Gilstrap

Hendricks is correct the 911 recording contains two levels of hearsay. The first level is the victim's statement to Gilstrap reporting the details of the sexual assault and identifying Hendricks as the perpetrator. We find the victim's statement is hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted in the statement—that Hendricks twice sexually assaulted her. *See* Rule 801(c), SCRE.

However, we believe the trial court acted within its discretion to admit this statement as an excited utterance. *See State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (stating the admission of an excited utterance "is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion"). As our supreme court has explained, "the intrinsic reliability of an excited utterance derives from the statement's spontaneity[,] which is determined by the totality of the circumstances surrounding the statement when it was uttered." *State v. Ladner*, 373 S.C. 103, 119-20, 644 S.E.2d 684, 693 (2007); *see also State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002) (explaining "[t]he rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication"); Fed. R. Evid. 803(2) advisory committee's note (stating "[s]pontaneity is the key factor" for admissibility of an excited utterance).

The supreme court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *Washington*, 379 S.C. at 124, 665 S.E.2d at 604.

The victim's statement satisfies these requirements for admission as an excited utterance. Her statement related to Hendricks kidnapping, beating, and raping her. The victim's testimony about her physical and emotional state and Gilstrap's testimony her daughter was shaking, crying, and distraught both show the victim was under the stress of excitement when she made her statement. Gilstrap further testified her daughter was crying, "Momma, Momma, Momma" on the telephone and "just lost it" when she got to Gilstrap's house. Finally, the evidence supports the conclusion the sexual assault caused her stress. *See Sims*, 348 S.C. at 22, 558

S.E.2d at 521 (noting the declarant's demeanor and the severity of the startling event are factors a trial court should consider in determining whether a statement qualifies as an excited utterance). Thus, we find the trial court acted within its discretion to admit the victim's statement.

C. Gilstrap's Statement to the 911 Operator

The second level of hearsay is Gilstrap's statement to the 911 operator repeating her daughter's statement, specifically that her daughter's "boyfriend just broke into her house, and beat her up and raped her. . . . [H]e sodomized her. . . . And his name is Matthew Hendricks." During oral argument, the State argued Gilstrap's statement is not hearsay because it did not offer the statement to prove the truth of the matter asserted in the statement, but rather to explain why the police came to the hospital. We acknowledge there may have been some minimal probative value in admitting the statement for that purpose. However, the reason the police arrived at the hospital was not a significant issue at trial. The probative value in Gilstrap's statement was in the truth of what is asserted in the statement—that Hendricks raped and sodomized her daughter. Consequently, we find Gilstrap's statement is hearsay. *See* Rule 801(c), SCRE.

The State argues Gilstrap's statement is nevertheless admissible as a present sense impression or as an excited utterance. We disagree. There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event. *See* Rule 803(1), SCRE; *see also United States v. Mitchell*, 145 F.3d 572, 576 (3d Cir. 1998) (listing the "three principal requirements" for a statement to be admissible as a present sense impression).

We find the evidence does not support the admission of Gilstrap's statement as a present sense impression. The "event" Gilstrap described in her statement was the rape, which Gilstrap did not perceive. *See generally State v. Davis*, 371 S.C. 170, 180-81 n.9, 638 S.E.2d 57, 63 n.9 (2006) (noting the declarant's statement about a shooting was not admissible as a present sense impression because there was no evidence the declarant saw the shooting). Moreover, though Gilstrap's statement might have been contemporaneous with her daughter's statement, it was not contemporaneous with the rape.

The State also argues Gilstrap's statement was admissible as an excited utterance. We recognize Gilstrap must have had an intense emotional reaction when she first heard her daughter had been raped. However, the State has not shown the nature of her reaction was such that it generated the spontaneity that gives an excited utterance its inherent reliability. *See Ladner*, 373 S.C. at 119-20, 644 S.E.2d at 693. Moreover, the State did not show Gilstrap was still under the required stress of excitement when she actually made her statement. *See Davis*, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance").

First, Gilstrap did not immediately call 911 when her daughter called and told her what happened. Instead, she waited for her daughter to arrive at her house, giving her time to reflect on what her daughter told her. *Contra State v. McHoney*, 344 S.C. 85, 94-95, 544 S.E.2d 30, 34-35 (2001) (concluding the declarant's statement was an excited utterance and "inherently reliable" because "[t]here was no time for the [declarant] to reflect on the event"). Second, Gilstrap helped her daughter put the children to bed before calling 911. Third, Gilstrap testified she drove the car because her daughter "was not able." Gilstrap *was* calm enough to drive, and her voice sounds calm on the audio recording of the 911 call.

Finally, the statement itself indicates Gilstrap was not speaking spontaneously, and her process of reflective thought had not been suspended. *See Sims*, 348 S.C. at 20, 558 S.E.2d at 521. Her request that the 911 operator send an officer to the hospital demonstrated the purpose of her call was in large part to initiate criminal prosecution against Hendricks. Gilstrap also told the 911 operator, "He has beat her up before but he has never raped her"; "He has charges pending"; and "I have a trespassing notice on him here." These comments have nothing to do with her daughter's welfare or need for medical attention, but show Gilstrap reflected on these past events and then attempted to convince the 911 operator Hendricks deserved to be prosecuted. *Cf.* Fed. R. Evid. 803(2) advisory committee's note ("The theory of [the excited utterance exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); Rule 803, SCRE, note (providing South Carolina's exception for excited utterances is identical to the federal rule). Thus, we find the record does not support the

admission of the statement as an excited utterance, and the trial court did not act within its discretion when it admitted Gilstrap's statement to the 911 operator.

III. Admission of Gilstrap's Statement Caused No Prejudice

Despite the error in the admission of Gilstrap's statement, we find Hendricks suffered no prejudice. *See State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice."). The substance of Gilstrap's out-of-court statement was already in evidence through her and the victim's trial testimony, before the trial court admitted the 911 recording. Specifically, Gilstrap testified her daughter called and told her Hendricks "had beaten her up and raped and sodomized her." This testimony contained only one level of hearsay and was properly admitted because the victim's statement to Gilstrap qualified as an excited utterance. The victim also testified she called her mother and told her what Hendricks did to her. The victim's testimony was admitted without objection before the admission of the 911 recording.

Hendricks argues the admission of Gilstrap's statement caused him prejudice because it corroborated the victim's trial testimony. He relies on *State v. Whisonant*, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), in which we stated, "'Improper corroboration testimony that is *merely cumulative to the victim's testimony* . . . cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" 335 S.C. at 156, 515 S.E.2d at 772 (emphasis in original) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). However, this case is distinguishable from *Jolly* and *Whisonant* because the evidence that Hendricks argues impermissibly corroborated the victim's testimony was properly admitted in evidence through Gilstrap's trial testimony. Thus, the corroboration that Hendricks contends was improperly achieved by Gilstrap's statement had already been properly accomplished by live testimony. The admission of Gilstrap's statement, therefore, did not prejudice Hendricks because it was cumulative to properly admitted evidence that corroborated the testimony of the victim. Any further corroboration of the victim's trial testimony by Gilstrap's statement on the 911 recording was minimal. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

Accordingly, we find Hendricks has not demonstrated prejudice from the erroneous admission of Gilstrap's statement. *See State v. Brockmeyer*, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013) (holding "the improper admission of hearsay constitutes reversible error only when it results in prejudice, [and because the appellant] failed to show he was prejudiced, [he] failed to show reversible error").

IV. Conclusion

The trial court acted within its discretion to admit the victim's statement on the 911 recording, but erred in admitting Gilstrap's statement. However, we find Hendricks suffered no prejudice from this error. Accordingly, we **AFFIRM**.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Cody Roy Gordon, Respondent.

Appellate Case No. 2013-000515

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5226
Heard March 6, 2014 – Filed April 23, 2014

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Appellant.

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla, for Respondent.

KONDUROS, J.: The State appeals the circuit court's reversal of the magistrate court's conviction of Cody Roy Gordon for driving under the influence (DUI). It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A) of the South Carolina Code (Supp. 2013) because Gordon's head was

not visible on the required recording during one of the field sobriety tests administered. We affirm in part, vacate in part, and remand.

FACTS

On October 29, 2011, the South Carolina Highway Patrol stopped Gordon at a license and registration checkpoint. Officers administered three tests to determine if Gordon was under the influence: the Horizontal-Gaze Nystagmus (HGN) test[1], the walk and turn test, and the one-leg stand test. Following the tests, the officers charged Gordon with DUI. The dashboard camera in the arresting officer's car recorded the events leading to the arrest.

Prior to a trial before the magistrate court, Gordon moved to dismiss the charge on several grounds, including the State's failure to sufficiently record the HGN test because Gordon's head was not visible on the recording during the test. The magistrate denied the motion to dismiss, finding the State properly captured Gordon's conduct on the recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2013) and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Following a trial, a jury convicted Gordon of DUI.

Gordon appealed his conviction to the circuit court. At the hearing before the circuit court, Gordon argued the HGN test could not be seen on the recording. Gordon provided black and white photographs ("stills") of the recording to the circuit court without objection by the State. Following the conclusion of arguments, the circuit court granted Gordon's motion to dismiss. The court found section 56-5-2953(A) requires the defendant's head be visible during the administration of the HGN test, unless an exception in section 56-5-2953(B) applies. The court noted Gordon was "so far out of view in front of the arresting officer's patrol car for the administration of the test and into the dark[,] which

---

[1] "Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system." *State v. Sullivan*, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993). "The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking." *Id.*

prevented [Gordon's] head from being sufficiently visible through the entire administration of the [HGN] test." This appeal followed.

STANDARD OF REVIEW

"In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (2014) ("The appeal [from the magistrate court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). This court will review the decision of the circuit court for errors of law only. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007); *Henderson*, 347 S.C. at 457, 556 S.E.2d at 692. "[Q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013) (internal quotation marks omitted). The circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *Id.*

LAW/ANALYSIS

The State argues the circuit court erred in reversing the magistrate court's conviction of Gordon for DUI. It contends the circuit court erred in finding the State did not comply with section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code (Supp. 2013) because Gordon's head was not visible during the HGN test.[2] It

[2] Any argument that the circuit court erred in reviewing the stills is unpreserved for our review because the State did not object to the circuit court's consideration of the photographs at the hearing. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); *see also State v. Turner*, 373 S.C. 121, 126 n.1, 644 S.E.2d 693, 696 n.1 (2007) (noting argument in-court identification tainted by fact witness shown photo-lineup two times in court not preserved for review because no objection

asserts the statute requires the recording include the field sobriety tests but not that the defendant's head must be visible. It further maintains that even if it is a requirement of the statute, the circuit court's factual finding that Gordon's head was not sufficiently visible during the HGN test lacked evidentiary support.

Section 56-5-2953(A) provides:

> A person who [commits the offense of DUI] must have his conduct at the incident site . . . video recorded.
> (1)(a) The video recording at the incident site must . . .
> (ii) include any field sobriety tests administered . . . .

"As amended in 2009, the current version of section 56-5-2953 expressly requires the recording of field sobriety tests." *Murphy v. State*, 392 S.C. 626, 632 n.4, 709 S.E.2d 685, 688 n.4 (Ct. App. 2011) (citing S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii) (Supp. 2010) ("The video recording at the incident site must: . . . include any field sobriety tests administered." (alteration by court))).

---

made when in-court identification occurred); *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."). Additionally, the State contends the circuit court did not review the recording. However, the record does not indicate whether the circuit court reviewed the recording or not. Gordon indicated at the hearing that all of the evidence had been submitted to the circuit court. The record provides the circuit court conferred with its law clerk off the record after receiving the stills. Gordon asserts that at this time, the circuit court appeared to review the recording on its laptop on the bench with the assistance of its law clerk. The transcript of the hearing states no exhibits were introduced. The State did not put on the record the fact that the circuit court allegedly did not view the recording or raise any objection to the court allegedly not reviewing the recording. The appellant has the burden of providing a sufficient record. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). Generally, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Accordingly, we cannot consider the State's assertion the circuit court did not review the recording.

In *Murphy*, the defendant contended "the videotape of the incident [s]ite d[id] not comply with the statute because it fail[ed] to 'record most of the field sobriety tests.'" *Id.* at 631, 709 S.E.2d at 688. The court applied the prior version of section 56-5-2953, which was in effect at the time of the defendant's arrest, and found "the plain language of the statute does not require that the recording capture a continuous full view of the accused, or capture *all* field sobriety tests. Rather, provided all other requirements are met, the video need only record the accused's conduct." *Id.* at 632, 709 S.E.2d at 688. The version of the statute applied in *Murphy* did not include the explicit requirement that it "include any field sobriety tests administered" as the current version does. § 56-5-2953(A)(1)(a)(ii).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that 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 342-43, 713 S.E.2d at 283.

The purpose of section 56-5-2953 is to create direct evidence of a DUI arrest. *Town of Mt. Pleasant*, 393 S.C. at 347, 713 S.E.2d at 285. Dismissal of a DUI charge is an appropriate remedy provided by section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Town of Mt. Pleasant*, 393 S.C. at 348, 713 S.E.2d at 286. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

The circuit court properly found the magistrate erred in finding the recording was only required to show the conduct of the defendant. The magistrate relied on *Murphy* in making that determination. Although *Murphy* holds that only the conduct of the defendant must be recorded, *Murphy* was based on a prior version of the statute, which did not include the specific language regarding the tests being recorded. The current version of the statute states: "The video recording at the incident site must . . . include any field sobriety tests administered . . . ." § 56-5-2953(A)(1)(a)(ii). Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless. Accordingly, the circuit court correctly found the head must be shown during the HGN test in order for that sobriety test to be recorded, and we affirm that finding.

However, because the magistrate court found the recording only needed to capture the conduct, it did not make any findings as to whether the entire test, including the head, was on camera. The circuit court found Gordon's head was not "sufficiently visible through the entire administration of the [HGN] test." But "'the circuit court, sitting in its appellate capacity, may not engage in fact finding.'" *City of Greer v. Humble*, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013) (quoting *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004)). Because the circuit court engaged in fact finding and the magistrate never made such findings due to its misconstruction of the statute, we vacate the circuit court's finding Gordon's head was not visible and remand the case to the magistrate court.[3] The

[3] The dashcam recording that was available to the circuit court and the magistrate court was part of the record on appeal. This court viewed the recording, but our

magistrate court is to make factual findings in light of the circuit court and our determination that the test must be recorded on camera; specifically for the HGN test, the head has to be visible on the recording.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

---

standard of review, just like the circuit court's standard of review in this matter, does not allow us to make findings of fact. That duty is left solely to the magistrate court. Accordingly, we will not make findings as to what the recording shows.