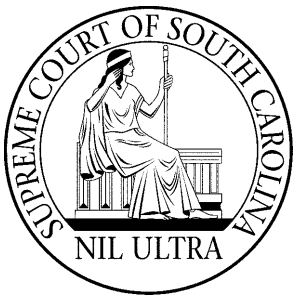

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 12, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

County of Charleston, South Carolina, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appellate Case No. 2015-001309

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

Opinion No. Op. 5495
Heard April 11, 2017 – Filed July 12, 2017

AFFIRMED

Joseph Dawson, III, Bernard E. Ferrara, Jr., Austin Adams Bruner, and Johanna Serrano Gardner, all of the Charleston County Attorney's Office, of North Charleston, for Appellant.

Beacham O. Brooker, Jr., of Brooker Law Offices LLC, and Linda C. McDonald, of the South Carolina Department of Transportation, both of Columbia, for Respondent.

LOCKEMY, C.J.: Charleston County (the County) appeals the circuit court's grant of summary judgment to the South Carolina Department of Transportation (the Department). The County argues the court erred in finding (1) the Department is exempt from complying with the Charleston County Zoning and Land

Development Regulations Ordinance (the ZLDR), and (2) the ZLDR is an unconstitutional tax on the Department's maintenance of the state highway system. We affirm.

FACTS/PROCEDURAL BACKGROUND

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the Planning Act) authorizes local governments in South Carolina to adopt zoning ordinances to regulate land use within their jurisdictions. S.C. Code Ann § 6-29-710 (2004). On November 20, 2001, the Charleston County Council adopted the ZLDR to regulate land use in the unincorporated areas of the County pursuant to the Planning Act. Among other things, the Ordinance regulates tree removal and protection. The County determined:

> Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of storm water and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

ZLDR § 9.4.1.

The ZLDR prohibits the removal of trees prior to the issuance of a zoning permit by the Planning Director. ZLDR § 9.4.2. The ZLDR provides a partial exemption for the Department, allowing it to remove trees without a zoning permit except for the following:

> a. All trees species measuring 6 inches or greater DBH[1] located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of

[1] Diameter Breast Height.

Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.

b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.

c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

ZLDR § 9.4.1.B.3.

On July 18, 2012, the County sent the Department a Notice of Tree Violation for removing three Grand Trees measuring twenty-four inches or greater DBH on Maybank Highway without a permit in violation of the ZLDR. The Notice required the Department to either replace the trees or donate money to the Charleston County Tree Fund.

On August 31, 2012, the Department responded by letter refusing to comply with the ZLDR on the grounds that zoning ordinances that conflict with a state agency's authority are void under the South Carolina Constitution.[2] The Department asserted the County had no legal authority to order the Department to comply with its local tree ordinances in regard to maintenance work within the state highway system. The Department stated the removal of the trees within the Maybank Highway right-of-way was necessary for maintenance purposes and for the safety of the traveling public.

On October 27, 2014, the County filed a declaratory judgment action asking the circuit court to declare the Department is not exempt from the regulatory provisions of the Planning Act or the ZLDR when performing highway

[2] Article VIII, section 14 of the South Carolina Constitution prohibits local governments from enacting ordinances that set aside the administration of a governmental service that has been delegated to state government and requires statewide uniformity.

maintenance in the County. In response, the Department argued the application of the ZLDR to the Department's removal of trees within the state highway system violates the South Carolina Constitution. The Department asserted its maintenance of the state highway system is a governmental service that has been delegated to the Department pursuant to Sections 57-1-30, 57-1-110(1), and 57-5-10 of the South Carolina Code (2006 & Supp. 2016) and requires statewide uniformity.

In early 2015, the Department and the County filed cross-motions for summary judgment. The circuit court denied the County's motion and granted the Department's motion, finding (1) the Department is exempt from complying with the ZLDR pursuant to the South Carolina Constitution, and (2) the ZLDR is an unconstitutional tax on the Department's maintenance of the state highway system. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

LAW/ANALYSIS

I. Constitutional Issue

The County argues the circuit court erred in finding the Department is exempt from complying with the ZLDR pursuant to the South Carolina Constitution. We disagree.

The South Carolina Constitution provides:

> In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: . . . (6) the structure and the

> administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

S.C. Const. art. VIII, § 14.

The legislature determined the Department has a duty to construct and maintain the state highway system in a safe and serviceable condition. S.C. Code Ann. § 57-5-10 (Supp. 2016). In addition, the Department has exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. S.C. Code Ann. § 57-3-110(1) (2006).

The County argues these two statutory provisions do not create a tree protection and preservation exemption for the Department. It further notes these statutes do not require statewide uniformity of protection and preservation of trees along its highways. The County maintains no state law gives the Department exclusive authority over tree protection and removal, and pursuant to section 6-29-770(A) of the South Carolina Code (2004), "[a]gencies, departments and subdivisions of this State that use real property, as owner or tenant, within any county or municipality in this State are subject to the zoning ordinances." The County asserts the ZLDR does not place any prohibition on the Department's maintenance of state highways and notes the ZLDR specifically allows for the removal of trees if they pose a safety hazard. *See* ZLDR § 9.4.5.A.3 (providing tree removal permits may be issued where "[t]rees pose an imminent safety hazard to nearby buildings, or pedestrian or vehicular traffic (as determined by the Planning Director or a qualified arborist)").

The Department does not contest that it is subject to all local zoning ordinances as owner or tenant of real property. However, the Department asserts the maintenance and operation of the state highway system, including tree removal, is a service or function—not ownership of real property. The Department contends that with respect to the state highway system, it is entitled to the exemption contained in article VIII, section 14 of the Constitution as a governmental service or function. The Department argues it has exclusive authority over the state highway system and zoning ordinances which conflict with this authority are void.

We find the Department is exempt from complying with the ZLDR because the ZLDR attempts to limit the Department's exclusive authority to construct and maintain a uniform state highway system. *See* S.C. Const. art. VIII. § 14. (stating municipalities have no authority to set aside "the structure and the administration

of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity"); *Town of Hilton Head Island v. Coal. of Expressway Opponents*, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) ("The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity."); *Brashier v. S.C. Dep't of Transp.*, 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997) ("When construing [a]rticle VIII, section 14, this [c]ourt has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern."). We note that allowing municipalities to control state highway design and maintenance could lead to varied safety standards across the state and jeopardize the safety of the traveling public.

According to the Department, roadside vegetation management is one of the many factors considered in highway design. Decisions to remove or retain trees along state highways are given careful consideration in highway design and maintenance based upon well-settled engineering standards. Here, the Department determined the trees at issue were a hazard to the traveling public. This determination is a responsibility that rests with the Department, as it has exclusive authority over the state highway system, and any ordinances which conflict with this authority are void. *See Colyer v. Thomas*, 268 S.C. 455, 458, 234 S.E.2d 862, 863 (1977) ("It is well settled that where there is a conflict between a State statute and city ordinance, as where an ordinance permits that which a statute prohibits, the ordinance is void.").

Thus, the circuit court did not err in finding that with respect to the state highway system, the Department is entitled to the exemption found in article VIII, section 14 of the Constitution as a governmental service or function which requires statewide uniformity; accordingly, we affirm the circuit court's grant of summary judgment to the Department.

II. Tax Issue

The County argues the circuit court erred in finding the ZLDR is an unconstitutional tax on the Department's maintenance of the state highway system. In light of our disposition of this case on the grounds discussed above, we need not address this issue. *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 address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

The circuit court's grant of summary judgment to the Department is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John William Dobbins Jr., Appellant.

Appellate Case No. 2013-002134

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

Opinion No. 5496
Heard April 11, 2017 – Filed July 12, 2017

AFFIRMED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Appellant.

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

WILLIAMS, J.: In this criminal appeal, John William Dobbins Jr. appeals his convictions for manufacturing methamphetamine, possession with intent to distribute methamphetamine, unlawful disposal of methamphetamine waste, possession of a schedule-two controlled substance, and possession of a schedule-four controlled substance. Dobbins asserts the circuit court erred in denying his

motion to suppress because law enforcement officers violated the Fourth Amendment by entering his backyard and home without a warrant. We affirm.

FACTS/PROCEDURAL HISTORY

Early in the morning on November 24, 2011, officers with the Laurens County Sheriff's Office received a report of an assault in Waterloo, South Carolina. The victim identified his assailant as Shayla Gaines and reported that Gaines returned to her residence—a camper located approximately three miles away. Four officers went to the camper's address around 3:00 A.M. with the intent of arresting Gaines.[1]

During his in camera testimony, Deputy Hodges stated he was familiar with the residence prior to arriving at the camper because he knew Dobbins "professionally" and knew Dobbins lived at that address. Deputy Hodges stated that, upon arrival, Corporal Nick Moye—one of the four initial responding officers—went to the rear of the camper to "make sure everything was [secure]," while Deputy Hodges and Lieutenant Marlon Higginbotham went to the front door of the camper. While walking to the front door of the camper, the officers noticed the unmistakable and "overwhelming" odor of methamphetamine being manufactured.[2] Deputy Hodges then knocked several times on the camper's door, prompting Dobbins to answer. Once Dobbins opened the door, Deputy Hodges announced they were with the sheriff's department and stated they were searching for Gaines. At that point, Dobbins "slammed the door in [their] face," and the two officers forced the door open and entered the camper.

Once inside the camper, Deputy Hodges noted the methamphetamine odor intensified. While the officers did not find Gaines in their search of the camper, they did find methamphetamine, methamphetamine by-product, scales, and a white, powdery substance in plain view on the countertops. Additionally, officers

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[1] The four officers did not have an arrest warrant for Gaines.

[2] While testifying both at the pretrial hearing and at trial, Deputy Hodges described the odor as a "strong chemical smell" that "burns your nose" and "takes your breath," specifically noting that it smells similar to "Coleman camp fuel mixed in with other chemicals." Deputy Hodges further stated it was a "one in a million" smell.

found an active "one pot" methamphetamine lab—a plastic bottle that was emitting smoke and contained all the ingredients for making methamphetamine—sitting on the toilet in the bathroom. Deputy Hodges testified they "went back out and asked [Dobbins] to sign a consent to search form" when they realized Gaines was not in the camper.[3] After obtaining Dobbins' consent, officers conducted a more thorough search of Dobbins' camper and found more items associated with manufacturing methamphetamine.

Dobbins was indicted for manufacturing methamphetamine, possession with intent to distribute methamphetamine, unlawful disposal of methamphetamine waste, and two counts of possession of a controlled substance. Prior to trial, Dobbins moved to suppress all evidence seized from his residence because "it was obtained without a search warrant when [officers] entered the premises." The State asserted exigent circumstances existed—officers were searching for Gaines and smelled methamphetamine—permitting the officers to make a warrantless entry. After hearing Deputy Hodges' in camera testimony, the circuit court denied Dobbins' motion to suppress and explained exigent circumstances justified the initial entry into the camper.[4]

The jury convicted Dobbins on all counts following trial. The circuit court sentenced Dobbins to concurrent terms of imprisonment of one year for the two possession offenses, five years for unlawful disposal of methamphetamine waste, twenty-five years for manufacturing methamphetamine, and twenty-five years for possession with intent to distribute methamphetamine. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010) (quoting *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001)). "The admission of evidence is

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[3] After the initial sweep of the camper, Dobbins was detained and subsequently signed a consent to search form while in the presence of Corporal Moye. Dobbins did not challenge the validity of his consent to search in this appeal.

[4] In particular, the circuit court noted the officers were justified in their search because the camper had "the potential of being moved," the officers smelled methamphetamine, and Dobbins was uncooperative.

within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Johnson*, 410 S.C. 10, 17, 763 S.E.2d 36, 40 (Ct. App. 2014) (quoting *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision." *State v. Abdullah*, 357 S.C. 344, 349–50, 592 S.E.2d 344, 347 (Ct. App. 2004).

LAW/ANALYSIS

I. Exigent Circumstances

Dobbins asserts the circuit court erred in denying his motion to suppress because the State failed to prove exigent circumstances supported their intrusions under the Fourth Amendment and the seizure of evidence from Dobbins' home resulted directly and indirectly from their violations. We disagree.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures through its exclusionary rule. U.S. CONST. amend IV. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133 (1990). An individual in a private residence normally expects privacy, free of governmental intrusion not authorized by a warrant, and society recognizes this as a justifiable expectation. *State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009). As such, a warrantless search is inherently unreasonable, and thus, it violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Johnson*, 410 S.C. at 18, 763 S.E.2d at 41.

Nevertheless, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Herring*, 387 S.C. at 210, 692 S.E.2d at 494 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). Under the Fourth Amendment, an action is reasonable "as long as the circumstances, viewed objectively, justify [the] action." *Herring*, 387 S.C. at 210, 692 S.E.2d at 494 (alteration in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). "In the Fourth Amendment context, a court is

concerned with determining whether a reasonable officer would be moved to take action." *State v. Wright* (*Wright 2016*), 416 S.C. 353, 369, 785 S.E.2d 479, 487 (Ct. App. 2016) (quoting *State v. Wright* (*Wright 2011*), 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011)). When a warrantless search falls within one of the well-established exceptions to the Fourth Amendment's warrant requirement, the search will survive constitutional scrutiny. *Abdullah*, 357 S.C. at 350, 592 S.E.2d at 348.

"To survive a Fourth Amendment challenge to a warrantless search, the State must establish the officer had probable cause and demonstrate one of the exceptions to the prohibition against warrantless searches and seizures applies." *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015). "The exigent circumstances doctrine provides an exception to the Fourth Amendment['s] protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." *Abdullah*, 357 S.C. at 351, 592 S.E.2d at 348. Under the exigent circumstances exception, "[a] fairly perceived need to act on the spot may justify [an officer's warrantless] entry and search . . . ." *Herring*, 387 S.C. at 210, 692 S.E.2d at 494 (citing *Schmerber v. California*, 384 U.S. 757, 770–71 (1966)). The Fourth Amendment does not prevent an officer from making a warrantless entry and search if the officer reasonably believes there is a risk that the evidence will be destroyed before he or she can obtain a search warrant. *See United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991) ("The police need not . . . produce concrete proof that the occupants of the room were on the verge of destroying evidence; rather, the proper inquiry focuses on what an objective officer could reasonably believe."); *id.* (finding a reasonable officer could "reasonably conclude" that a room's occupants would try to dispose of drug evidence before an officer could obtain a warrant, especially when police had already identified themselves prior to smelling the odor of marijuana).

Exigent circumstances—such as imminent destruction of evidence, the potential for a suspect to flee, or a risk of danger to police or others—may justify a warrantless entry, but absent hot pursuit, there must be at least probable cause to believe the exigent circumstances were present. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). "Probable cause is a 'commonsense, nontechnical conception[ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Morris*, 411 S.C. at 580, 769 S.E.2d at 859 (alterations in original) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)). "Probable cause is defined as a good faith belief that a

person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013) (quoting *Wortman v. City of Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)). "[D]etermining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances." *Morris*, 411 S.C. at 581, 769 S.E.2d at 859. The distinctive odor of a drug alone is a sufficient basis to establish probable cause when a law enforcement official, familiar with the unique smell of that drug, recognizes its odor. *See State v. Lane*, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978) ("[I]t is evident that the odor [of marijuana] emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana.").

Initially, we note Dobbins argues officers violated the Fourth Amendment when they entered into the curtilage of his residence—his backyard—without an exigent circumstance justifying their presence. However, upon our review of the record, we find Dobbins failed to raise this argument to the circuit court at the suppression hearing. Specifically, we note that, in issuing its ruling, the circuit court stated it found "exigent circumstances existing to justify the initial entry *into the residence*." (emphasis added). Moreover, the circuit court did not address what area was included in the curtilage of the camper. *See United States v. Dunn*, 480 U.S. 294, 301 (1987) (identifying the four factors courts should consider in deciding whether an area is part of the curtilage of the home). Thus, we find this aspect of Dobbins' argument is not preserved for appellate review. *See State v. Moore*, 357 S.C. 458, 464, 593 S.E.2d 608, 612 (2004) (holding an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review); *see also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Next, evidence in the record supports finding the officers had probable cause. Testimony during the pretrial hearing and at trial established Deputy Hodges' familiarity with the "one in a million" smell of methamphetamine from prior experience. Moreover, the reporting officers testified to the almost immediate presence of a strong odor of methamphetamine on the premises when they arrived. Therefore, we find that, given his prior experience with the unique odor of methamphetamine, Deputy Hodges' detection of the odor upon his arrival at the

camper was a sufficient basis for establishing probable cause. *See Lane*, 271 S.C. at 72, 245 S.E.2d at 116.

Last, Dobbins asserts the circuit court erred in finding the State presented sufficient evidence to support its intrusion under the Fourth Amendment because the State alleged the following two exigent circumstances: (1) the need to find Gaines and (2) the investigation of the presence of methamphetamine. Conversely, the State asserts the odor of an active methamphetamine lab created an exigent circumstance requiring immediate action due to the risk associated with methamphetamine production and the realistic danger that Dobbins would destroy evidence after he realized law enforcement was at his door.

Given the totality of the circumstances, including Dobbins' behavior and the presence of the unmistakable odor of methamphetamine, we find an objective officer in a similar situation would be justified to conduct a warrantless search of the camper to prevent the destruction of the drugs and protect the safety of the officers and others. Specifically, we find a cognizable risk to others existed based on the inherently dangerous nature of methamphetamine labs. Further, we find the officers were faced with an immediate threat of evidence being destroyed. *See Grissett*, 925 F.2d at 778 ("[Because] the police had identified themselves before smelling the marijuana, an officer could reasonably conclude that the occupants of the room would attempt to dispose of the evidence before the police could return with a warrant. This is especially true in the case of an easily disposable substance like drugs."); *see also Abdullah*, 357 S.C. at 352, 592 S.E.2d at 348 (holding the totality of the circumstances gave officers reasonable grounds from an objective standard for a search of the premises). In the instant case, the officers were following up on a report of domestic violence. They arrived at the camper, and almost immediately, they detected the strong odor of methamphetamine. Moreover, after announcing themselves and their intentions at the door of the camper, they encountered a very uncooperative Dobbins. Both of these factors lend support for our conclusion the officers had no time to secure a search warrant because of exigent circumstances.

Therefore, we find the circuit court did not err in denying Dobbins' motion to suppress because the State presented sufficient evidence of exigent circumstances to justify a warrantless entry of Dobbins' camper.

II. Plain View Exception

Dobbins argues the circuit court erred in denying his motion to suppress evidence because the seizure of evidence from his home resulted directly and indirectly from the Fourth Amendment violations. We disagree.

Under the plain view exception, "objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). "The two elements needed to satisfy the plain view exception are (1) the initial intrusion that afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *Wright 2016*, 416 S.C. at 368, 785 S.E.2d at 487.

We affirm the denial of the motion to suppress evidence because the plain view doctrine presents an exception to the Fourth Amendment's warrant requirement. As previously discussed in Part I, we find the initial intrusion, which afforded the officers the plain view, was lawful. Moreover, the second element of the plain view exception is met because Deputy Hodges—who was experienced in methamphetamine detection—testified to finding methamphetamine, methamphetamine by-product, scales, and a white, powdery substance in plain view on the countertops and a "one pot" lab in the bathroom. We find the discovery of methamphetamine in conjunction with the distinct odor of methamphetamine emanating from the camper fully satisfy the second element. Thus, because the two elements of the plain view exception are met, we affirm the findings of the circuit court.

CONCLUSION

Based on the foregoing analysis, the circuit court's denial of Dobbins' motion to suppress the evidence is

AFFIRMED.

KONDUROS, J., and LEE, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kan Enterprises, Inc., d/b/a A1 Food Stores, Appellant,

v.

South Carolina Department of Revenue, Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill, Respondents.

Appellate Case No. 2015-000733

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5497
Submitted June 1, 2017 – Filed July 12, 2017

AFFIRMED

S. Jahue Moore and John C. Bradley, Jr., both of Moore Taylor Law Firm, P.A., of West Columbia; Kenneth E. Allen, of Columbia, for Appellant.

Milton G. Kimpson and Sean G. Ryan, both of Columbia, for Respondent South Carolina Department of Revenue.

Kathleen M. McDaniel, of Callison Tighe & Robinson, LLC, of Columbia, for Respondents Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill.

WILLIAMS, J.: Kan Enterprises, Inc. (Kan), d/b/a A1 Food Stores (A1), appeals the administrative law court's (ALC) denial of its application to renew a permit to sell beer and wine for off-premises consumption. Kan argues the ALC erred in (1) misapplying the law, relying upon unsubstantiated opinion testimony, and failing to support its decision with the evidence; (2) depriving it of a vested interest; and (3) violating its constitutional rights. We affirm.

FACTS/PROCEDURAL HISTORY

Kan[1] owns A1, a convenience store located at 4101 Monticello Road in the Hyatt Park/Keenan Terrace neighborhood of Columbia, South Carolina. A1 sold beer and wine pursuant to a seven day off-premises beer and wine permit issued by the South Carolina Department of Revenue (DOR) in 2012. On July 31, 2014, Kan filed an application with the DOR to renew the permit.[2] Although Kan met all of the statutory requirements for renewal, the DOR denied its application based upon timely filed public protests. The written protests included allegations that A1 promoted littering, panhandling, loitering, public drunkenness, and other criminal activity in its vicinity and nearby community.

Kan requested a contested case hearing with the ALC.[3] At the hearing, A1's manager, Vinno "Vinny" Sehgal, testified he had been employed at the store for two years and had about seven years of experience managing convenience stores. Sehgal stated he works at A1 for six to eight hours daily and was also available by phone "24/7." According to Sehgal, A1's employees neither sold alcohol to intoxicated customers nor allowed individuals to drink alcohol in the building or

[1] Kan is a Georgia corporation entirely owned by Hadiya Ahibhai.

[2] Alcohol retailers must apply for permits every two years. *See* S.C. Code Ann. § 61-4-500 (2009).

[3] The ALC subsequently granted the protesters' motions to intervene. The protesters, who are individual respondents with the DOR in this appeal, were Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill.

parking lot. However, Sehgal admitted Kan paid a fine after the South Carolina Law Enforcement Division cited one of its cashiers for selling alcohol to a minor.

In terms of security, Sehgal testified A1 maintains an interior and exterior camera system and employs a security guard during nighttime hours. A large sign is posted at the store's main entrance, which states the consumption of alcohol, narcotics, panhandling, and loitering are prohibited on the premises. Sehgal noted A1's employees check the parking lot and areas around the store three times a day for litter, which he believed could come from customers of other nearby businesses. Two local residents and A1's security guard then testified that A1's condition has improved since Sehgal took over as manager.

Columbia Police Department (CPD) Deputy Chief Melron Kelly testified he was previously assigned in 2012 as regional commander of the city's northern region in which A1 is located. During his time in this role, Kelly reported CPD had some issues of loitering, vagrancy, panhandling, and acts of violence in and around A1. In his experience, Kelly thought A1's practice of selling single cans of beer promoted panhandling and loitering.

Additionally, Kelly reported A1 posed a safety issue to CPD officers due to shootings and injuries to officers during attempted arrests at the store. Kelly thought A1 put a strain on law enforcement because CPD is often forced to "pull extra resources" at the store to ensure the safety of its officers and others. While the management of the nearby convenience stores worked with CPD to deter criminal activity, Kelly believed A1's problems did not improve during the year he spent as regional commander, and the store remained a burden on law enforcement.

Furthermore, Kelly testified A1 "overwhelmingly" had more calls for police services,[4] arrests, instances of violence, and officer-initiated activities than any of the three nearby convenience stores.[5] CPD received 304 calls for police services from A1 in 2011, 351 calls in 2012, 335 calls in 2013, and 324 calls in 2014.

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[4] Kelly explained a "call for services" is when a business owner, his employee, or a citizen calls "911" to receive police assistance at a specific location.

[5] These stores included a Hess convenience store, a Sonoco gas station, and an El Cheapo gas station.

Between the hours of 7 P.M. and 7 A.M., the number of calls for services at A1 increased from 209 in 2012 to 252 in 2014. Kelly reported the number of calls for service at the Hess store was "drastically lower" than those at A1. Additionally, CPD made a total of eighty-three arrests at A1 from 2011 through 2014, compared with sixty arrests at Sonoco, forty-one arrests at Hess, and thirty-seven arrests at El Cheapo during the same four-year period.

CPD Officer Tyson Hass, who had worked in the city's northern region since 2012, reiterated Kelly's concerns with A1. Hass stated A1 had "vagrant issues, alcohol type violations, trespassing, [and] a lot of things that seem[ed] to stem from some sort of alcohol violation." Although he had not performed a specific study on the issue, Hass said he did not see any improvement at A1 during his tenure with the CPD. Hass also relayed that he broke his finger during a scuffle with a suspect resisting arrest at A1. Lieutenant Chris White, CPD's executive officer/assistant commander for the northern region, testified he received more complaints concerning A1 than any other convenience store in the area.

Concerned members of the local community also testified against renewing A1's permit. Christie Savage, president of the Eau Claire Community Council, reported she received numerous complaints from community members about loitering at A1, and she witnessed people congregating next to the store. Dolores Johnson, the director of a nearby residential facility for vulnerable adults, stated individuals frequently congregate in an alley next to one of her buildings after being run off by A1's security guard. In the last two years, Johnson witnessed individuals soliciting, "going to the bathroom," and doing "sexual things" in the alley.

Columbia City Councilman Sam Davis testified he received numerous complaints about A1. Councilman Davis believed A1 had a negative impact upon the area's attempted redevelopment. Davis supported his position by noting a nearby former dry cleaning business still remained vacant, despite its otherwise desirable location.

Samuel Munson, who lives approximately 250 feet from A1, maintained the store was a "continuing sore" on the local community. Munson stated he did not allow his eight-year-old son to play in their yard because of the foot traffic caused by A1. Additionally, Munson testified he was forced to pick up litter around his home on a daily basis, and based upon his observations and experience, the litter came from A1's customers. To demonstrate the large volume of litter, Munson brought a

grocery bag of trash he picked up that morning to the hearing, which contained approximately five beer cans and one beer bottle among other various food items.

Ellen Triplett, former president of the Hyatt Park/Keenan Terrace Neighborhood Association, testified that, in all of her years with the neighborhood association, she could "count on one hand the number of meetings where someone wasn't complaining about the A1 and the crime there and the litter there." Triplett stated she witnessed loitering, panhandling, and trash around the area, and claimed it was a "hot spot" for crime based upon the monthly crime reports she received through the neighborhood association. Another former neighborhood association president, Keith McIver, also testified to observing loitering, panhandling, and vandalism at A1 as well as being personally solicited by a prostitute near the store. The neighborhood association's current president, Michael Hill, stated he witnessed two people loitering next to A1 on the morning of the hearing.

On February 20, 2015, the ALC issued a final order denying Kan's application to renew the permit. The ALC found A1 was not a proper location for the sale of alcohol because it imposed an undue burden on law enforcement and had become a detriment to the surrounding community. Kan filed a Rule 59(e), SCRCP, motion to alter or amend judgment, arguing the ALC failed to apply two appellate decisions[6] that articulate a different standard of review for a permit renewal as opposed to an initial issuance. Specifically, Kan asserted the correct determination of renewal applications under *Taylor* and *Byers* is not whether a location is suitable for the sale of alcohol but whether it is "any less suitable for the sale of beer now than during the period of time that it had held a license, and during the period of time since its last renewal." Alternatively, Kan filed a motion for a stay and supersedeas.

On March 19, 2015, the ALC issued an order granting in part and denying in part Kan's Rule 59(e) motion as well as an amended final order clarifying its rulings. Addressing Kan's position that the supreme court created a different standard of review for permit renewals, the ALC found:

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[6] *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973); *Byers v. S.C. Alcoholic Beverage Control Comm'n*, 281 S.C. 566, 316 S.E.2d 705 (Ct. App. 1984).

> *Taylor* and *Byers* do not stand for the proposition that businesses that continue to have problems with littering, loitering, and other activities requiring constant calls to law enforcement without any noticeable improvements can simply continue to operate in a like manner as long as they were able to get permitted under like conditions beforehand.

Last, the ALC denied Kan's motion for a stay and supersedeas. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act[7] (APA) governs appellate review of ALC decisions. S.C. Code Ann. § 1-23-610(A) (Supp. 2016). The APA provides:

> The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2016). Accordingly, the ALC's decision "should not be overturned unless it is unsupported by substantial evidence or

[7] S.C. Code Ann. §§ 1-23-310 through -400 (2005 & Supp. 2016).

controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." *Id.* at 605, 670 S.E.2d at 676.

LAW/ANALYSIS

I. Permit Renewal

Kan first argues the ALC misapplied *Taylor* in reviewing its renewal application. Even if the ALC correctly applied the law, Kan contends the court relied upon unsubstantiated opinion testimony and failed to base its decision on the evidence. We disagree.

Section 61-4-520 of the South Carolina Code (2009) generally sets forth the requirements an applicant must satisfy to be authorized to sell retail beer or wine in this state. Importantly, DOR cannot issue a permit unless it determines that the location of the applicant's business is a "proper one." S.C. Code Ann. § 61-4-520(5) (2009). Although the statute does not define what constitutes a "proper" location for the retail sale of beer and wine, this court "recognizes the rather broad discretion vested in the [fact-finder] in determining the fitness or suitability of a particular location." *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 595, 281 S.E.2d 118, 120 (1981). In deciding whether a location is a proper one, the fact-finder may consider any evidence showing adverse circumstances. *Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984). Thus, "[t]his determination of suitability is not solely a function of geography but involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community." *Id.* The court should weigh evidence of the location's burden on law enforcement in deciding its suitability. *See Moore v. S.C. Alcoholic Beverage Control Comm'n*, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); *Fowler v. Lewis*, 260 S.C. 54, 57, 194 S.E.2d 191, 192 (1973).

In *Taylor*, our supreme court addressed an administrative finding that the location of a neighborhood grocery store and filling station, which had previously operated under beer permits, was unsuitable for the sale of alcohol. 261 S.C. at 169–70, 198 S.E.2d at 801. The now-defunct Alcoholic Beverage Control Commission (ABC)

denied the store owner's application for an off-premises beer permit after hearing several witnesses in opposition. *Id.* The witnesses testified the business's location lacked adequate police protection and passing motorists often threw beer cans into neighboring yards. *Id.* at 170, 198 S.E.2d at 802. Additionally, the witnesses claimed the store's sale of beer would, *inter alia*, cause neighborhood disturbances, threaten the safety of children, lead to dangerous traffic, and reduce nearby property values. *Id.*

On appeal, however, the circuit court reversed the ABC's decision as entirely without evidentiary support and ordered the issuance of the permit. *Id.* at 170, 198 S.E.2d at 801. The supreme court subsequently upheld the circuit court's decision. *Id.* at 172, 198 S.E.2d at 803. Specifically, the supreme court agreed that the relevant testimony by the opposition's witnesses consisted entirely of factually unsupported opinions and conclusions. *Id.* at 171, 198 S.E.2d at 802. Moreover, the supreme court indicated the ABC had issued beer permits for the business's location for approximately five years prior to the contested application and the record was "devoid of any showing that the location is any less suitable for the sale of beer now than during the prior (5) year period."[8] *Taylor*, 261 S.C. at 171–72, 198 S.E.2d at 802.

In the instant case, Kan argues the ALC misapplied *Taylor* to this case, stating no evidence was presented at the hearing showing that A1's location was any less suitable for the sale of beer and wine now than in the last twenty years it has operated under a permit or its last renewal in 2012. In other words, Kan seems to contend that, under *Taylor*, the DOR may not deny an off-premises permit renewal unless it is proven that conditions surrounding a proposed location are *worse* than at the time of the permit's initial issuance or last renewal.

Contrary to Kan's position, we find *Taylor* does not articulate a more lenient suitability standard for the renewal of an off-premises permit as opposed to its initial issuance. Although the supreme court in *Taylor* considered the fact that the grocery store had operated under prior beer permits, the ultimate inquiry remained

[8] Similarly in *Byers*, this court cited *Taylor* in finding the record was devoid of any showing that a club was less suitable for the sale of beer than in the twenty years in which it had operated under beer permits. *Byers*, 281 S.C. at 569, 316 S.E.2d at 707.

whether its location was a proper one for the sale of beer. *See id.* at 172, 198 S.E.2d at 802 ("The order of [the ABC] denying the permit assigns no factual basis or reason for its finding of unsuitability and the record before us reveals none."). Upon our review of the record in the instant case, substantial evidence[9] supports the ALC's findings that conditions at A1 made it unsuitable for the sale of alcohol.

CPD officials testified about the vast prevalence of crime at and near A1 and the strain the store put on law enforcement resources. From that standpoint, CPD's empirical data revealed A1 had not improved—and had even deteriorated—since 2012. A1 had significantly more calls for police services and arrests than any of the three nearby convenience stores from 2011 to 2014, and nighttime calls for police services increased during that period.[10] Furthermore, local community members testified A1 had not improved. Unlike the speculative opinion testimony by the witnesses in *Taylor*, the community members in this case supported their conclusions with their own personal observations and experiences with loitering, littering, panhandling, and other criminal activity at or near A1.[11]

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[9] The supreme court decided *Taylor* under the previous "any evidence" standard for administrative appeals, which the APA has since changed to the "substantial evidence" standard of review. *See Schudel v. S.C. Alcoholic Beverage Control Comm'n*, 276 S.C. 138, 139–40, 276 S.E.2d 308, 308–09 (1981) (holding the APA changed the standard of review for alcohol permit cases to substantial evidence).

[10] On appeal, Kan argues the increase in calls for service are explained by Sehgal's testimony that he instructed A1's employees to call the police in response to criminal activity and "not to take matters into their own hands." Even though such instruction is laudable, the ALC properly considered this evidence as relevant on the extent of crime at A1 and its undue burden on law enforcement. *See Moore*, 308 S.C. at 162, 417 S.E.2d at 557 (considering a proposed location's burden on law enforcement when determining its suitability to sell alcohol).

[11] Kan contends the ALC cited criminal activity that occurred in an alley it did not own or control. Moreover, Kan argues A1 has become a "scapegoat" for the local community's ills, stating none of the witnesses had personal knowledge that the litter came from its store and not other, nearby businesses. Upon our review, however, Johnson and A1's security guard testified that loiterers would congregate in the subject alley after being directed to leave A1's premises. Additionally,

Nevertheless, Kan submits the ALC ignored Sehgal's testimony about the ways in which A1 was improving security and its overall atmosphere. However, we again acknowledge our limited standard of review concerning administrative matters. *See Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676 (stating the ALC's decision "should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law"). We find substantial evidence from the testimony of law enforcement and local community members supports the ALC's finding that A1 was no longer a suitable location for the off-premises sale of beer and wine. Therefore, we affirm the ALC's decision to deny A1's application to renew the permit.

II. Vested Interest

Kan next argues the DOR's denial of its application for renewal deprives it of a vested interest in its off-premises beer and wine permit. We disagree.

Licenses and permits to sell alcohol are property of the DOR. S.C. Code Ann. § 61-2-140(B) (2009). According to our supreme court:

> Liquor licenses are neither contracts nor rights of property. They are mere permits, issued or granted in the exercise of the police power of the state to do what otherwise would be unlawful to do; and to be enjoyed only so long as the restrictions and conditions governing their continuance are complied with.

Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 57, 26 S.E.2d 22, 25 (1943).

In accordance with the foregoing authorities, we reject Kan's argument that it had any vested interest in the off-premises beer and wine permit issued to it by the DOR. Therefore, we affirm the ALC on this issue.

Samuel Munson testified he observed people throw litter onto his yard after walking from the direction of A1.

III. Constitutional Rights

Last, Kan argues the ALC violated its constitutional rights to due process and equal protection. We find this issue unpreserved.

In its order denying Kan's Rule 59(e), SCRCP, motion, the ALC found Kan did not raise these arguments at the hearing when it had the opportunity to do so, and thus, they were unpreserved. We affirm the ALC's conclusion. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

CONCLUSION

Based on the foregoing analysis, the ALC's decision to deny Kan's application to renew the off-premises beer and wine permit is

AFFIRMED.[12]

SHORT and KONDUROS, JJ., concur.

[12] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Sandy Lynn Westmoreland, Appellant.

Appellate Case No. 2014-002636

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. Op. 5498
Heard April 12, 2017 – Filed July 12, 2017

AFFIRMED IN PART AND REVERSED IN PART

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Caroline M. Scrantom, all of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

THOMAS, J.: Appellant Sandy Lynn Westmoreland appeals his convictions for murder and hit and run involving a death. He argues the trial court erred by allowing the coroner to testify as a lay witness that the cause of the victim's death was a homicide and instructing the jury that voluntary intoxication was not a

defense. We affirm Appellant's conviction for hit and run and reverse his murder conviction.

FACTS/PROCEDURAL HISTORY

A grand jury indicted Appellant in October 2012 for murder and hit and run involving a death. The indictments alleged Appellant purposefully hit Michael Daniels (Victim) with his vehicle and failed to remain at the scene to give information or render aid. The murder indictment claimed Victim died due to his injuries. The solicitor called Appellant's case to trial in December 2014.

Travis Haney testified he was a security guard at Mary Black Hospital and was on duty on March 14, 2012. Haney testified he was walking down a hallway when Victim "stumbled" out of a room crying and with a bloody nose. Haney asserted Appellant was inside the room. Haney testified he contacted the sheriff's office per hospital policy. According to Haney, Victim did not want to press charges against Appellant but wanted to gather his things and leave. Haney asserted he and a deputy walked Appellant to his automobile following his discharge from the hospital and watched him drive away alone.

Deputy Jeffery Valentine testified he responded to a report of Appellant assaulting Victim inside the hospital. Valentine's testimony was consistent with Haney's testimony. Additionally, Valentine testified that when he and Haney escorted Appellant to his vehicle after the initial altercation, Appellant noticed Victim had forcibly entered Appellant's vehicle and absconded with some of Victim's possessions. Valentine claimed Appellant became "pretty upset" when Valentine declined to charge Victim with breaking into the vehicle. The following morning, someone discovered Victim dead in the bushes in the hospital parking lot.

The trial court qualified Dr. John Wren as an expert in pathology. Wren testified Victim died almost immediately due to a "vehicle versus pedestrian encounter." Wren asserted Victim was standing and facing away from the vehicle at the time of the collision.

Jason Bryant testified he was a sergeant and supervisor in the violent crime division and he went to Appellant's house shortly after the incident to question him. According to Bryant, during his initial conversation with Appellant, Appellant claimed he left the hospital without incident and hit a deer on his way

home from the hospital. However, Bryant testified that, after he discussed "discrepancies" with Appellant, he admitted he hit Victim with his vehicle when leaving the hospital. Appellant explained to Bryant he did not "drive well at night" and attempted to pull the vehicle over to allow Victim to get inside when he accidently hit him with the vehicle. According to Bryant, Appellant claimed he stopped and checked on Victim but, after realizing Victim was not breathing, became scared and left the scene.

Michael Duncan testified he was a trooper for the highway patrol and was a member of the Multidisciplinary Accident Investigation Team (MAIT). He asserted the MAIT's primary job was reconstructing traffic incidents, and the trial court qualified Duncan as an expert in "accident reconstruction." Duncan claimed he responded to the scene of Victim's death and performed an investigation. Duncan asserted he found "tire tracks going off into the grass at a sharp angle" and there were no "skid marks" leading to where the tire tracks entered the grass. Duncan concluded the vehicle did not attempt to stop based on his observation that there were "acceleration marks in the grass" beyond where Victim's body was found. He contended the vehicle did not decelerate at the point of impact or after; "[i]t was one continuous motion." Duncan estimated the vehicle's speed at a range of twenty-nine and thirty-seven miles per hour. Duncan also surmised there was "severe steering input" to maneuver this vehicle into the grass to strike Victim. He explained this meant the vehicle "did not just drift off the road" and it was more akin to taking a right hand turn into the grass.

Rusty Clevenger testified he was the coroner for Spartanburg County. Following some preliminary testimony regarding his experience, the State offered Clevenger as an "expert in determining the manner of death." Appellant objected to admitting Clevenger as an expert based on his qualifications. After a short colloquy between the trial court and counsel, the State withdrew its attempt to admit Clevenger as an expert. However, Clevenger proceeded to testify his responsibilities as coroner included determining any deceased's manner of death. He explained any death presents five options when deciding the manner of death: natural, accident, homicide, suicide, and undetermined. Clevenger also explained the process of determining the manner of death included considering the pathologist report and the findings of investigators and law enforcement. Clevenger testified a homicide was "the intentional act of you taking the life of another." In a situation when one person takes the life of another person, he admitted he cannot always determine whether the act was intentional. Clevenger then asserted he "ruled this case a

homicide." Appellant objected and claimed Clevenger gave improper opinion testimony. The trial court responded, "I think coroners are required to give rulings on death by law" and "[h]e's stating what his ruling is. I'll overrule the, the objection."

Following the State's case, Appellant testified he was involved in a romantic relationship with Victim for approximately eighteen years. Appellant claimed he and Victim went to the hospital on the day in question because he was experiencing stomach pains and bleeding. Appellant claimed his argument with Victim in the hospital room began because Victim spent their last $20 purchasing what he thought was a crack rock but turned out to be a piece of soap. He asserted his walking cane hit Victim's nose by accident during the argument. Appellant contended he was "high" when the hospital discharged him due to all of the medication he had taken. Appellant testified he was driving away from the hospital when he "saw a glimpse of [Victim] way off the road." Appellant claimed he "jerked the car to pull over and pick him up" and he "felt a bump." Appellant admitted he realized what happened so he "turned around and came back" to check on Victim but realized he was dead. Appellant claimed he did not seek help for Victim because he was already dead and he "just flipped out." Appellant asserted it was an accident.

After both parties rested, they discussed a potential jury charge regarding voluntary or involuntary intoxication with the trial court. Appellant objected to a charge on voluntary intoxication because he was taking prescribed medication. Following the discussion, the trial court indicated it would give Appellant time to research case law supporting his argument and would issue its ruling later. Subsequent to closing arguments, the trial court reopened the discussion on intoxication. Appellant maintained his position that a charge on voluntary intoxication would be improper because everything Appellant took was prescribed. The following colloquy then took place:

> THE COURT: Well, I mentioned to all of you the possibility of me charging the jury that they will have to make a finding of fact–
>
> [Appellant's Counsel]: And that will be fine.

THE COURT: –as to whether or not this was a voluntary or involuntary intoxication, if any at all.

[Appellant's Counsel]: And that would be fair, Your Honor.

THE COURT: Because there was evidence there was [no intoxication] according to the doctor.

[Appellant's Counsel]: Yes, sir.

THE COURT: And so if there, if there was no -- if they find that there was no intoxication, it wouldn't be a factor in their determination.

[Appellant's Counsel]: Yes, sir.

THE COURT: If they find that it was voluntarily done, then it's not a defense. If they find that it was involuntarily done, then it would serve as a mitigating factor or a defense to the—to a statute requiring general intent.

[Appellant's Counsel]: Specific intent.

THE COURT: Specific Intent.

[Appellant's Counsel]: Yes, sir, and that would be—we would have no real objection to that. No real objection to that.

THE COURT: So, you would agree to me charging in that fashion?

[Appellant's Counsel]: I would.

During the jury instructions, the trial court issued jury instructions consistent with the above-quoted colloquy. Following the jury instructions, Appellant again stated

he had no objection. The jury returned guilty verdicts for murder and hit and run. The trial court sentenced Appellant to thirty years' imprisonment for murder and twenty-five years' imprisonment for hit and run. The trial court ordered the sentences to run concurrent. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by allowing Clevenger to testify as a lay witness that he determined the cause of death was a homicide, which he defined as an intentional act?

2. Did the trial court err by instructing the jury on voluntary intoxication when there was evidence showing Appellant received medication in the hospital for medical purposes?

CLEVENGER'S TESTIMONY

Appellant argues the trial court erred by allowing Clevenger to testify he determined the manner of death was a homicide because it was impermissible opinion testimony by a lay witness. Specifically, Appellant argues Clevenger was not qualified as an expert and his opinion that Victim's death was a homicide "embraced the ultimate issue to be decided by the jury." Appellant asserts this error was "extraordinarily prejudicial" because he presented an accident defense during trial.

The State argues the trial court did not commit any error by admitting Clevenger's testimony. Specifically, the State argues the testimony was proper because a statute required Clevenger to report the manner of death. The State asserts Clevenger "exemplified the personal knowledge necessary to report that the manner of death was ruled homicide" due to "his statutorily defined role." However, the State acknowledged Clevenger's "testimony assisted the factfinder in winnowing out whether [Victim] died as a result of accident, recklessness, or by the intentional act of another." Despite this acknowledgment, the State claims any error was harmless in light of the other evidence of guilt and it did not contribute to the verdict.

A. Merits

We find the trial court abused its discretion by committing an error of law when it admitted Clevenger's testimony because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE. "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

> If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge . . . ." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id*. at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE).

We find the trial court abused its discretion by committing an error of law when it admitted Clevenger's testimony regarding the cause of Victim's death because it constituted improper opinion testimony from a lay witness. Clevenger's opinion as

to Victim's cause of death was not based on his perceptions. *See* Rule 701(a) (requiring opinion testimony from a lay witness be limited to opinions based on the witness's perceptions). Clevenger testified his determination of Victim's cause of death was based on the findings of the pathologist and the investigation of law enforcement. Thus, Clevenger's opinion regarding the cause of Victim's death was not based on his perceptions or observations but instead was based on his review of the perceptions of others. As a result, his testimony as a lay witness was improper opinion testimony under Rule 701(a).[1] *See Douglas*, 380 S.C. at 502–03, 671 S.E.2d at 608 (finding the trial court was not required to qualify the witness as an expert because she testified only to her personal observations and experiences); *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997) (finding a lay witness could offer his opinion as to what caused a machine to malfunction because his opinion was based "upon his observations and perceptions as the [daily] operator" of the machine).

With regard to the State's claim the trial court properly admitted Clevenger's testimony because a statute requires the coroner to issue a ruling on cause and manner of death, such a statutory requirement does not necessarily render the coroner's ruling admissible during trial. Clevenger's testimony as to his ruling on cause and manner of death must still comport with the rules of evidence to be admissible. *See Bartlett v. State*, 993 So.2d 157, 164 (Fla. Dist. Ct. App. 2008) (explaining "the mere fact that [a statute] required the investigator(s) to determine whether 'there is probable cause that the force that was used was unlawful' does not automatically bootstrap this information into admissible evidence").

Additionally, we disagree with the State's argument that the trial court properly admitted Clevenger's testimony because "homicide" was a term of art and was not a comment on the criminality of Victim's death. In *Commander*, our supreme court found the trial court correctly admitted testimony from the medical examiner, who was qualified as an expert witness, asserting the victim's death was a homicide. 396 S.C. at 267–70, 721 S.E.2d at 420–21. The court explained, under the circumstances of that case, "homicide" meant only that the victim died "by the act,

[1] Because we find Clevenger's testimony violated Rule 701(a) and the trial court erred by admitting it, we need not address whether his testimony also violated Rule 701(b) or Rule 701(c). *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

procurement, or omission of another" and did not comment on the criminality of the death. *Id*. at 265, 721 S.E.2d at 419. However, the court expressly recognized "that, in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury." *Id*. at 268, 721 S.E.2d at 420. As a result, our supreme court adopted the rule allowing a properly qualified expert to testify regarding cause and manner of death "so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." *Id.* at 269, 721 S.E.2d at 421.

Here, we find Clevenger's lay testimony that Victim's death was a homicide, which he defined as an intentional act, was an opinion on Appellant's state of mind and, thus, his guilt under the circumstances of this case. As discussed more fully below, with regard to Appellant's murder indictment, the main issue during trial was whether Appellant intentionally or accidentally hit Victim with his vehicle. There was no dispute that Appellant's actions led to Victim's death. Thus, Clevenger's testimony that Appellant acted intentionally was an opinion on Appellant's state of mind and guilt. Accordingly, we find Clevenger's testimony violated our supreme court's rule pronounced in *Commander*.

Accordingly, we conclude the trial court abused its discretion by committing an error of law when it admitted Clevenger's opinion testimony that Victim's death was a homicide because his testimony violated Rule 701(a).

B. Harmless Error

We find the trial court's error was not harmless as to Appellant's murder conviction because Clevenger's testimony went to the trial's main issue regarding murder and went to the heart of Appellant's defense. However, the error was harmless as to Appellant's conviction for hit and run because it could not reasonably have affected the result of that conviction.

> "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the

> result of the trial is considered harmless. *Id*. A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011). "An officer's improper opinion which goes to the heart of the case is not harmless." *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2015). South Carolina requires the driver of any vehicle involved in an incident resulting in injury or death to give his name, address, and vehicle registration number to the other driver. S.C. Code Ann. § 56-5-1230 (2006). Section 56-5-1230 also requires a driver involved in an incident to render aid to any person injured due to the incident including "making arrangements for the carrying of such person to a physician." *Id*. Additionally, statute mandates a driver involved in an incident resulting in death or injury to a person shall return to and remain at the scene until he has fulfilled all requirements of section 56-5-1230. S.C. Code Ann. § 56-5-1210(A) (2006). A driver who fails to comply with section 56-5-1210(A) is guilty of a felony and "must be imprisoned not less than one year nor more than twenty-five years" when death results. S.C. Code Ann. § 56-5-1210(A)(3) (2006).

In this case, the trial court's error was not harmless with regard to Appellant's murder conviction because the error could reasonably have affected the result of the murder conviction by commenting on the main issue to be decided by the jury and discrediting Appellant's main defense. The main issue during the trial was whether Appellant intentionally or accidentally hit Victim with his vehicle. Appellant testified he was aware his vehicle hit Victim at the time of the incident. However, Appellant claimed the incident was an accident and he did not intentionally hit Victim. The State asserted Appellant intentionally hit Victim and offered physical evidence of the scene and other evidence tending to show Appellant had a motive to hurt Victim. Thus, the main issue for the jury to decide

regarding the murder indictment was whether the incident was the result of an intentional act or an accident. Such a determination likely would have been the deciding factor when assessing whether Appellant acted with malice aforethought, which was an essential element of murder. Clevenger's testimony went directly to the heart of this issue.

Clevenger testified his professional responsibilities included determining a deceased's manner of death. He explained any death presents five options: natural, accident, homicide, suicide, and undetermined. Clevenger defined the homicide option as "the intentional act of you taking the life of another." He then explained he "ruled this case a homicide." Through this testimony, Clevenger offered his opinion that this case involved a homicide, which he defined as an intentional act. Also, one of the other potential manners of death was accident, and he expressly ruled out that option by testifying the case was a homicide. Additionally, in its brief, the State admitted Clevenger's "testimony assisted the factfinder in winnowing out whether [Victim] died as a result of accident, recklessness, or by the intentional act of another." Thus, his testimony went directly to the main issue during trial and the heart of Appellant's defense that the incident was an accident. *See State v. Huckabee*, 419 S.C. 414, 430, 798 S.E.2d 584, 592–93 (Ct. App. 2017) (finding improper testimony was not harmless, in part, because it went to the heart of the appellant's defense), *petition for cert. filed*.

Although the remaining evidence tending to show Appellant intentionally hit Victim was compelling, including the physical and motive evidence, we find Clevenger's testimony could have reasonably impacted the result of the murder conviction and, thus, was not harmless. S*ee Ellis*, 345 S.C. at 178, 547 S.E.2d at 491 (explaining improper testimony that went to the heart of the case was not harmless). Accordingly, we reverse Appellant's murder conviction.

However, the trial court's error was harmless with regard to Appellant's conviction for hit and run. Clevenger's testimony was not direct evidence tending to show Appellant's guilt or innocence for hit and run. Also, his testimony was not an opinion on the main issue for the jury to decide regarding hit and run. Clevenger's testimony was an opinion on Appellant's intent and state of mind shortly before and at the time Appellant hit Victim with his vehicle. As noted above, this was the main issue for the murder conviction. However, whether Appellant intentionally or accidentally hit Victim was mostly irrelevant when deciding whether Appellant was guilty of hit and run. The relevant inquiries for hit and run were whether

Appellant was aware he was involved in an incident involving a vehicle and did he fail to comply with section 56-5-1210(A). The hit and run statutes seek to examine a driver's actions and intent following a vehicle incident. Clevenger's testimony offered no opinion as to Appellant's actions or intent following the incident in this case.

Furthermore, Appellant admitted he realized he hit Victim and stopped to check on him. He also admitted leaving the scene without ever contacting police, rendering aid to Victim, or providing the information required by section 56-5-1210(A) and section 56-5-1230. He claimed he failed to seek help for Victim because he "just flipped out" and Victim was already dead. Thus, Appellant's admissions provided overwhelming evidence of guilt for hit and run. Because Clevenger's testimony was mostly irrelevant with regard to the hit and run conviction and Appellant's testimony provided overwhelming evidence of guilt, Clevenger's testimony could not reasonably have impacted the result of the conviction for hit and run. Therefore, we affirm this conviction.

Accordingly, the trial court erred by admitting Clevenger's testimony because it constituted improper opinion testimony from a lay witness in violation of Rule 701(a). We reverse Appellant's murder conviction because the error was not harmless for that conviction. However, the error was harmless as to Appellant's conviction for hit and run, and we affirm that conviction.

VOLUNTARY INTOXICATION CHARGE

Appellant argues the trial court erred by instructing the jury on voluntary intoxication because the evidence was undisputed the hospital heavily medicated him for medical purposes. Appellant claims he did not waive his objection to a voluntary intoxication charge by merely consenting to a "less damaging" instruction. The State argues this issue is unpreserved because Appellant conceded any objection to the trial court's proposed jury instructions regarding intoxication.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "An issue conceded in a lower court may not be argued on appeal." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998). We decline to address this issue because Appellant conceded any objection to the jury

instructions. Although Appellant initially objected when the State requested an instruction on voluntary intoxication, the trial court later proposed jury instructions related to intoxication. After the trial court explained its proposed instructions on intoxication, Appellant stated, "we would have no real objection to that. No real objection to that." Subsequently, the trial court instructed the jury consistent with its proposal to the parties, and following the instructions, Appellant expressly denied having any objection. Based on these circumstances, Appellant conceded any objection he may have had to the jury instructions on intoxication. Thus, we affirm the trial court's jury instructions.

CONCLUSION

Based on the foregoing, we find the trial court erred by admitting Clevenger's testimony because it was improper opinion testimony from a lay witness in violation of Rule 701(a). We affirm Appellant's conviction for hit and run because the trial court's error was harmless as to that conviction. However, we reverse Appellant's murder conviction because the error was not harmless and could have contributed to the verdict. Additionally, we find Appellant conceded his argument regarding the jury instructions to the trial court.

AFFIRMED IN PART AND REVERSED IN PART.

LOCKEMY, C.J., and HUFF, J., concur.