OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41

October 31, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Page

None

UNPUBLISHED OPINIONS

2005-MO-054 - Robert Manes, et al. v. Rita B. Thomas and L. J. Thomas
(Jasper County - Judge Jackson V. Gregory)

PETITIONS - UNITED STATES SUPREME COURT

2004-OR-01115 - S.C. Dept. of Social Services v. Diana and John Holden Pending

2005-OR-00357 - Donald J. Strable v. State Pending

25886 - State v. Bobby Lee Holmes Granted 09/27/05

25991 - Gay Ellen Coon v. James Moore Coon Pending

PETITIONS FOR REHEARING

25854 - L-J, Inc. v. Bituminous Fire Pending

26022 - Strategic Resources Co., et al. v. BCS Life Insurance Co., et al. Pending

26035 - Linda Gail Marcum v. Donald Mayon Bowden, et al. Pending

26036 - Rudolph Barnes v. Cohen Dry Wall Pending

26042 - State v. Edward Freiburger Pending

26047 - Stonhard, Inc. v. Carolina Flooring Specialists, Inc., et al. Pending

2005-MO-043 - Frances Walsh v. Joyce Woods Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

4035- The State v. Jacqueline Mekler 15

4036-The State v. Victor Pichardo and Lorenzo Victoria Reyes 31

4037-Eagle Container Co., LLC and Jeffrey D. Spotts, as personal representative of the estate of Alfred D. Spotts v. County of Newberry, a political subdivision, and Susie Berry, in her capacity as Zoning Administrator of Newberry County 49

4038-The State v. Phillip H. Crocker, III 72

UNPUBLISHED OPINIONS

2005-UP-558-The State v. Roger L. Arbogast
(Spartanburg, Judge Larry R. Patterson)

2005-UP-559-Donnell Grooms v. Marvin D. Wagner, Jr. and Dorchester County
(Charleston, Judge Thomas L. Hughston, Jr.)

2005-UP-560-The State v. David Epps
(Williamsburg, Judge Clifton Newman)

2005-UP-561-The State v. John Christopher Johnson
(Williamsburg, Judge Howard P. King)

2005-UP-562-The State v. Roddy Lee Tedder
(Florence, Judge Clifton Newman)

2005-UP-563-The State v. Roy Holmes
(Beaufort, Judge Jackson v. Gregory)

2005-UP-564-Elouise Gardner v. Letitia Gladney
(Richland, Judge Berry L. Mobley)

2005-UP-565-The State v. Theius Robert Singleton
(Spartanburg, Judge James C. Williams, Jr.)

2005-UP-566-Donna A. Green v. GKN Automotive
(Richland, Judge Reginald I. Lloyd)

PETITIONS FOR REHEARING

4011-State v. Nicholson	Pending
4018-Wellman v. Square D	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4032-A&I, Inc. v. Gore	Pending
2005-UP-481-Stanley v. City of Columbia	Pending
2005-UP-517-Turbeville v. Wilson	Pending
2005-UP-520-State v. E. Adams	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-534-State v. M. Brown	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-539-Tharington v. Votor	Pending
2005-UP-541-State v. S. Cunningham	Pending
2005-UP-543-Jamrok v. Rogers et al.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3745-Henson v. International (H. Hunt)	Pending
3776-Boyd v. Southern Bell	Pending

3777-State v. Childers	Pending
3780-Pope v. Gordon	Pending
3787-State v. Horton	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending

3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending

3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3943-Arnal v. Arnal	Pending
3947-Chassereau v. Global-Sun Pools	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3954-Nationwide Mutual Ins. v. Erwood	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending

3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3970-State v. C. Davis	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore)	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3996-Bass v. Isochem	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4005-Waters v. Southern Farm Bureau	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
2003-UP-642-State v. Moyers	Pending

2003-UP-716-State v. Perkins	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending

2004-UP-487-State v. Burnett	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending

2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending

2005-UP-046-CCDSS v. Grant	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-149-Kosich v. Decker Industries, Inc.	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-155-CCDSS v. King	Pending
2005-UP-160-Smiley v. SCDHEC/OCRM	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-173-DiMarco v. DiMarco	Pending
2005-UP-174-Suber v. Suber	Pending

2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-200-Cooper v. Permanent General	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-224-Dallas et al. v. Todd et al.	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending

2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jacqueline Mekler, Appellant.

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

Opinion No. 4035
Heard September 14, 2005 – Filed October 31, 2005

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor David Michael Pascoe, Jr., of St. Matthews, for Respondent.

HUFF, J.: In this criminal case, Jacqueline Mekler appeals following her conviction for murder. Mekler asserts the trial judge erred in (1) refusing to allow her to impeach one of the State's witnesses, the deceased's wife, with evidence that the witness expressed fear of the deceased after a domestic dispute when the witness denied she was ever afraid of the victim; (2) refusing to allow evidence appellant was aware of the deceased's prior act of violence against the wife and the wife's property, as this was relevant to appellant's claim of self-defense; and (3) refusing to instruct the jury on the law of involuntary manslaughter because appellant asserted a self-defense theory, where there was evidence appellant armed herself in self-defense but discharged the gun due to her reckless handling of the weapon. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On the night of March 8, 2002, officers responded to a call at the home of Mekler after receiving a report that a man had been shot. When the first officer arrived, he found a man lying face down on the ground and observed two women standing near the porch of the home. The women approached him and one of them, Mekler, told the officer she "just shot the person who was lying on the ground." The victim, Phillip Bubba Spires (hereinafter Bubba), was transported to the hospital with gun shot wounds to the chest. The medical personnel lost Bubba's pulse on the way to the hospital and Bubba was later pronounced dead at the hospital. An autopsy revealed Bubba died from a single gunshot that caused numerous pellets to hit and enter his body, resulting in damage to vital organs. Deputy Richard Combs arrived on the scene and took a statement from Mekler.[1] Mekler told Deputy Combs that she had been sitting on her porch with Bubba's wife, Robette Spires, talking and drinking when Bubba pulled up in her yard

[1]After the initial statement to the first officer on the scene, Mekler was advised of her rights before any further statements were given by her, and there is no issue as to the voluntariness of any of her statements.

in his truck. Bubba began screaming and yelling at Robette, asking why she was not at home and stating that she should have called him. Mekler told Bubba to leave several times. After a few minutes of "yelling back and forth," Bubba left in his truck. A few minutes later, Bubba returned on foot. This time, Bubba had a knife in his hand. Bubba came onto the porch and the screaming and yelling started again. Mekler went into her house and retrieved a sixteen-gauge shotgun. When she returned to the porch, Bubba still had a knife in his hand. Bubba continuously tried to get Robette to leave with him. Mekler told Bubba several times to leave or she would shoot him. Mekler was afraid Bubba was going to hurt Robette if Robette left with him. Mekler stated she did not remember pulling the trigger, nor the shotgun going off, and the next thing she knew, Bubba grabbed his chest and Robette said, "You shot him."

Deputy Combs also took a statement from Robette that night. Robette told him that she and Mekler had been talking and drinking on the front porch when Bubba pulled up in the yard in his truck. Bubba started yelling and screaming at her, "Why aren't you home? You should have called and told me where you were." Mekler told Bubba several times to leave. Bubba left a few minutes later and, a few minutes after that, returned on foot. When Bubba came back, he had a knife in his hand. Mekler, at that time, went into the house and retrieved a sixteen-gauge shotgun. Mekler told Bubba several times to leave or she would shoot him. Robette asked Bubba why he had the knife, and he stated "it's not for you, it's for the dog in case it tries to attack me." Robette did not think Mekler heard Bubba say that. Robette stated she believed that Mekler believed she was protecting Robette.

Detective Rhonda Bamberg testified that as she transported Mekler to the Orangeburg County Sheriff's Office, Mekler began to tell her about the incident. Mekler told the detective that she and Robette were drinking and talking when Bubba came up in his truck. Bubba "got out and began to carry on about why Robette was not home and why she didn't call." Mekler told Bubba he needed to calm down or leave. Bubba got in his truck and left. A little while later, Bubba

returned, brandishing a knife. Mekler told Bubba he did not need a knife. Mekler grabbed her dog that was chained to the front porch. Bubba said the knife was for the dog. Mekler told Bubba that if he were to quiet down, the dog would stop. Mekler told Bubba to leave or she would shoot him. Mekler stated Bubba was a big man and she was afraid of him. Bubba would not leave. Mekler went into the house and came out again. "She brought the gun down and don't (sic) remember the shot, but Robette said, Jackie, you've shot him." Mekler said, "No, I didn't." Robette said, "Yes, you did." Mekler told Robette to go call 9-1-1. Mekler again stated that she was afraid of Bubba and that he would not leave.

Once at the Sheriff's Office, Mekler gave another statement, this time to Detective Rush. Mekler told the detective that she and Robette were sitting on her porch drinking and talking. One of Robette's daughters pulled into the yard and told Robette that Bubba had called and wanted Robette to call him when she got home. Thereafter, Bubba pulled up in his truck, got out and then began "screaming and crying at Robette." Bubba said, "Why are you doing this to me? Didn't they tell you to call me?" Robette said, "Yes," and began walking toward Bubba. Then Bubba started yelling at Robette saying "Why are you here? Why haven't you called me?" Mekler described Bubba as "loud and showing himself." Mekler stated she was afraid Bubba was going to hit Robette, and stated Bubba was "flailing around" and possibly hit his truck. Mekler walked down to Bubba and asked him to come sit with them and talk. Bubba kept yelling at Robette, and the two women tried to calm him. Bubba kept yelling and Mekler told him that if he did not calm down, he would have to leave because he could not act that way in her yard. Bubba replied, "this is my wife and I'll act any way I want." Robette told Bubba he could not "show out like that" in Mekler's yard. Bubba ran into the street and yelled that he was not in the yard and asked what Mekler was "going to do now." Mekler told him she would call the police. Bubba continued to yell at them. Mekler told him she kept a gun and Bubba replied, "Bring it on." Bubba then got in his truck and left. Robette, who had gone back to the porch and sat down, stated that Bubba was expecting her to "go up there." Mekler advised Robette she should not go, but should give

Bubba time to cool down. About five minutes later, Bubba walked into Mekler's yard and started yelling again. Mekler told Bubba he needed to go home. Mekler then went to her bedroom and got the shotgun, moving it to her living room, but did not take it outside. When she went back outside, Bubba started coming up the walk and Mekler's dog was "going crazy." Mekler told Bubba to stop because the dog would bite him. Mekler grabbed the dog, and that is when she saw a knife in Bubba's hand. Mekler told Bubba he could not come up there with a knife in his hand. Bubba stated the knife was for the dog. Mekler told him "You can't come on the porch with a knife in your hand like that." She told Bubba to leave again and that she would walk to the store and call the police. Mekler stated, however, that she was not going to leave to go to the store because she was afraid of what Bubba might do to Robette. Mekler further stated that she was really afraid for both Robette and herself. Mekler turned around to get the gun, but before she did, she told Bubba to leave. She then retrieved the gun and brought it out on the porch. Bubba was standing on the walk, but was not as close as he was when Mekler went into the house. Mekler stated, "He wouldn't leave, and I wasn't trying to shoot him, and I didn't mean for the gun to fire, but I did cock the gun, and I must have had my finger on the trigger. When the gun went off, it shocked me. Robette said, Jackie, you shot him. I said, no, I didn't. She said, yes, you did. And I said, there's no way." Robette again said that Bubba was shot and Mekler told her to go call 9-1-1.

The State presented the testimony of Robette Spires at the trial. Robette testified that she and Mekler were drinking alcohol on Mekler's front porch on the night in question. It was after dark when Bubba drove up to Mekler's house in his pick-up truck. Bubba got out of the truck and started hollering, wanting to know why she had not called him back. Robette stated Bubba "was crying, he was upset, it wasn't a violent, mean (sic)." He was asking why she had not called him, why she was doing this, and why she would not come home. Bubba came into the yard but did not come onto the porch. Robette did not remember Bubba ever cursing, threatening or putting his hands on either her or Mekler. Robette did not remember at what point the knife came out, but she did remember Bubba saying it was for the dog.

During his first trip to the house when Bubba was hollering and crying at Robette, Mekler started hollering back at Bubba telling him to calm down, and if he did so, he could join them for a drink. At one point Mekler told Bubba, "You can't be hollering here, you can't scream, you've got to go, I'm going to shoot you if you don't." Robette claimed she never had the chance to respond to Bubba's questions because when Bubba would scream, Mekler would scream. Bubba finally got in his truck and left, but a few minutes later, he came walking back up the street, apparently having left his truck at Robette's house. When he returned, Bubba was still crying and hollering, saying the same things as before. Robette testified she was embarrassed by Bubba's behavior and then irritated because she could not "get a word in between [Bubba and Mekler]." When Bubba came back the second time, the dog was chained to the porch and was barking. Bubba made it to the steps, but could come no further because the dog would have reached him. When Mekler saw the knife, she told Bubba to put it away. Bubba responded that the knife was for the dog. At that point, Robette claims she stood up and began walking away, toward her home. She did not remember seeing Mekler go inside to get the shotgun, but she remembered seeing her come out with the gun. Robette stated she was leaving because Bubba and Mekler were hollering and she had "had enough." She stated she did not think Mekler would use the shotgun. At the moment the shot was fired, Robette had stepped off the porch and was heading away and did not actually see Mekler shoot Bubba. Robette saw a flash of light over her shoulder and as she turned, Bubba said, "She shot me." Bubba began walking toward Robette. He told her he loved her, and then fell to the ground.

Mekler took the stand and testified in her own defense. She stated that on the night of the incident, she and Robette were on her porch talking when Bubba pulled into her yard, jumped out of his truck, and began screaming and hollering at Robette. He was yelling, "Why aren't you home, why are you here, why do you keep doing this to me?" Robette walked down into the yard to talk to him, but Bubba continued to scream and yell. He started flailing around, and may have hit the truck. Mekler stated she became afraid Bubba was going to hit

Robette. Mekler did not call the police because she did not have a phone, and she did not walk to the store to use the phone because she was not going to leave Robette "with [Bubba] in that state." At some point Bubba left, driving down the street. Robette and Mekler sat back down and Robette told Mekler Bubba had pulled into Robette's yard and that he was expecting Robette to come up there. Mekler told her not to go there yet, but to let him calm down, stating to Robette that she was scared for Robette to go up there. Robette then said she would not go up there. As they were sitting on the porch, Mekler's dog "Fuzzy" began to bark. Fuzzy was sitting in a chair and was chained to the porch. The dog got up and was "looking in that direction" barking when Robette said, "there's Bubba." Mekler looked and observed Bubba walking quickly into her yard, coming up the walk. As Bubba reached the steps, Fuzzy jumped down the steps and stopped Bubba's momentum. Mekler stepped down and grabbed Fuzzy saying to Bubba, "What are you doing? Have you lost your mind?" Bubba was still screaming and hollering at Robette, "You're going to come with me. Why are you still here?" Mekler told Bubba he needed to go home. Bubba would not back up any farther, so Mekler reached down to grab Fuzzy with her other hand. As she did, she noticed the knife in Bubba's hand. Mekler asked Bubba, "What is wrong with you? You pull a knife on me?" Bubba replied the knife was for the dog. Mekler then stated, "Bubba, the dog is between me and you." Bubba then said, "Well, she's my wife, and . . . I'm going to get her." Mekler replied, "No, you're not." She told Bubba to calm down and that he needed to go home. She told him, "You can't come on the porch like that, with a knife." Bubba said, "That's my wife and I will do what I want to with her." Mekler again told Bubba he would not, and that he needed to leave. Mekler handed the chain on Fuzzy to Robette. Robette asked Bubba why he pulled a knife, and at that point, Mekler stepped inside and got her shotgun. Mekler testified she retrieved the shotgun because there was no stopping Bubba, she had pleaded with him to leave, he came back to her home on foot, she was scared, and he had told her there was nothing that was going to stop him from coming on the porch. When Mekler came back out with the shotgun, Bubba had stepped back about a foot. She had already told Bubba earlier that she kept a loaded gun, and he was still standing there, holding the knife.

Mekler told him to "please go home." Bubba stated that he was not going anywhere, he was going to come up on the porch, and he was going to get Robette and did not mind going through Mekler to get her. Mekler stated she was really scared, and at some point, she cocked the gun. As she was cocking the gun, Bubba leaned to the right and the gun fired. Mekler stated she did not remember pulling the trigger. Robette said, "Jackie, you shot him." Mekler told her, "No, I didn't." Robette said, "Yes, you did." Mekler again replied, "No, I didn't." When Robette again stated that she had shot him, Mekler told Robette to call 9-1-1.

On cross-examination, the solicitor asked Mekler if she meant to shoot Bubba. Mekler responded that she "meant for [Bubba] to stop." When asked again if she meant to shoot him, Mekler stated, "I wanted to live." She further stated, "I would never want to shoot anybody." The solicitor again asked her if she meant to shoot Bubba. Mekler testified that she got the gun, she cocked the hammer, she wanted to live, and that she wanted Robette to live. The solicitor again asked Mekler whether she meant to shoot him or she did not mean to shoot him. Mekler replied that she was scared, that Bubba would not stop, that Bubba moved, "and then the gun fired." Mekler stated that when she advised Bubba she had a gun, she did not contemplate using it at that point, but was just trying to scare him. Neither did she contemplate using it when she went inside and moved it from her bedroom to a place near the front door. The solicitor asked Mekler why she pointed the gun at Bubba with the hammer cocked back and her finger on the trigger if she did not intend to shoot Bubba. Mekler stated she did not have the gun at shoulder level and did not have it pointed at him. Rather, she claimed she had the gun resting on her hip in order to cock the hammer back. When asked by the solicitor if she was "defending this case on the grounds that [she] had to kill him, Mekler replied, "Yes." The solicitor then stated, "you're telling me that you didn't mean to shoot him, and that you had the gun down here?" Mekler replied that she was trying to cock the gun. The solicitor stated Mekler must have had her finger on the trigger and Mekler replied that her finger must have slipped "and got on the trigger," and that she did not remember pulling the trigger.

LAW/ANALYSIS

I. Failure to allow evidence to impeach Robette

Mekler first contends the trial judge erred in failing to allow her to impeach Robette, after Robette denied on the stand that she had ever been afraid of Bubba, with evidence Robette told a police officer during a prior dispute that she was afraid of Bubba and that Bubba had threatened to kill Robette. Mekler argues the evidence was relevant to the credibility of Robette and therefore the trial judge erroneously excluded the evidence. We disagree.

During defense counsel's cross-examination of Robette, he asked if it was her testimony that she was not afraid of Bubba the night of the shooting. Robette replied that she was not. She testified she was mad at him for hollering at her, but she was not scared. Counsel then asked Robette if she had been scared of Bubba before. Robette denied that she had ever been scared of him, claiming she had only been mad at him. At this point, the trial judge excused the jury and counsel informed the court he wished to inquire about an incident at Robette's home on December 29, 2001, about two months and nine days prior to this shooting incident. When the court inquired as to the relevance, counsel stated Robette had testified she was never afraid of Bubba, but he had a report that clearly stated that she was, and the issue was relevant to Robette's credibility. The court then allowed counsel to proffer the evidence. Robette testified in an in camera hearing that her mother had been the one to call the authorities the past December. Robette admitted she told the officer that Bubba had threatened to kill her, but denied telling him she was afraid for her life. She stated she had explained to the officer that she was angry because Bubba put a hole in her door. She stated Bubba was drunk at the time, but she was not scared of him. When counsel began to read from a police report on the incident that Robette indicated she was frightened of Bubba, the court cut counsel off, telling him the issue was an ancillary issue that had nothing to do with the issues in the case.

Counsel again argued to the court that the issue went to Robette's credibility and asked to proffer the officer's testimony. Detective McCord then testified in camera, stating he remembered going to Robette's home on December 29, 2001. Robette told him that Bubba had threatened to kill her and that she was afraid. When Bubba returned to the home he was very boisterous and, using profanity, said he wanted Robette to come outside. At that point, Detective McCord placed Bubba under arrest for criminal domestic violence. Bubba was subsequently convicted as charged. The trial judge ruled it was a collateral issue, it could unduly lengthen the trial, and it might confuse the jury. He determined it had no bearing on any issue in the case at that time and refused admission of the evidence based on Rule 403, SCRE.[2] Robette's cross-examination resumed and she testified that Bubba was not vicious and was not "normally a violent person of any kind." She claimed that his beating on her door was the worst thing Bubba had ever done and it made her angry, but he was drunk at the time and he was not a violent person.

On appeal, Mekler contends the trial judge erred in excluding the impeachment evidence. She argues the evidence was admissible under Rule 608(c), SCRE, and because it was proper cross-examination under the rule, the trial judge abused his discretion in denying its admission. We disagree. First it must be noted that Rule 608(c) provides, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Here, Mekler did not proffer the evidence to show "bias, prejudice, or any motive to misrepresent" on the part of Robette. Rather, counsel continuously stated he was offering the evidence to

---

[2]This rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

generally attack Robette's credibility. Thus, Mekler cannot rely on Rule 608(c) to show the evidence was proper.

Further, we note case law supports our finding that the trial judge committed no error in denying the admission of this evidence. In State v. Beckham, 334 S.C. 302, 320-21, 513 S.E.2d 606, 615 (1999), appellant asserted on appeal that the trial judge erred in excluding impeachment evidence of certain phone calls conceivably made by a witness to a Myrtle Beach business after the witness testified that he had not been in contact with anyone from that business for a year or more prior to the trial. Appellant wanted to impeach the witness with these phone records. Our Supreme Court found no error in the exclusion of evidence of the telephone calls holding "[w]hen a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness." Id. at 321, 513 S.E.2d at 615. In the case at hand, because Robette denied she had ever been scared of Bubba, and because this was a matter collateral to the case in chief, there was no error in the trial judge's refusal to allow Mekler to introduce contradictory evidence to impeach Robette.

II. Refusal to allow evidence of appellant's knowledge of decedent's prior act of violence

Mekler next contends the trial judge erred in refusing to allow evidence that Mekler was aware of Bubba's prior act of violence against Robette and Robette's property, arguing the evidence was relevant to Mekler's claim of self-defense and defense of others. We agree.

During direct-examination, Mekler testified she knew of Bubba's reputation for peace and good order and that it was both good and bad. Counsel then asked Mekler whether she was aware of an incident that occurred as a result of which Bubba was convicted of criminal domestic violence. Mekler testified that she was aware of it. On cross-examination, the solicitor questioned Mekler about the events of the night of the shooting. He asked Mekler why she did not simply go

inside her home and lock her door during the incident with Bubba. Mekler responded, "because I knew he would beat in my door, too, and come in." When asked by the solicitor if locking the door and having the shotgun in the house would not have helped, Mekler stated it would not, because "a door would not stop him."

Following his redirect-examination of Mekler, defense counsel asked to proffer some testimony from Mekler regarding her specific knowledge of Bubba having broken the door in Robette's home. The trial judge indicated he would allow the proffer, but he would not let the evidence go before the jury because it was a collateral issue that would unduly lengthen the trial and was not necessary to any issue in the case. He noted he had allowed Mekler to testify that she was aware of Bubba's criminal domestic violence conviction, but he would not allow evidence of the details of the crime. Thereafter, counsel proffered testimony from Mekler that she first became aware of the criminal domestic violence incident involving Bubba and Robette when she heard Bubba "beating in [Robette's] door" from her house. She later learned Bubba had been drinking when he went to Robette's house, threatened Robette, and beat Robette's door until he broke through it with his fists. She became aware that Bubba was arrested for the incident and was later convicted. The trial judge stated, "I specifically decline to permit that testimony."

In <u>State v. Day</u>, 341 S.C. 410, 535 S.E.2d 431 (2000), our Supreme Court found the trial judge committed reversible error by excluding testimony of a past violent act that was closely related in time and occasion to the homicide in that case. Specifically, Day, who was claiming self-defense in his prosecution for the murder of Renew, sought to introduce evidence that Renew had previously held a gun to the head of witness Szumowicz for eighteen hours as he drove around Aiken County, accusing Szumowicz of being involved with others in a drug trafficking scheme at his residence. <u>Id.</u> at 420, 535 S.E.2d at 436. The trial judge ruled that specific instances of Renew's conduct were inadmissible, but allowed Szumowicz's opinion testimony as to whether Renew was a violent person. <u>Id.</u> The Supreme Court stated that "[i]n the murder prosecution of one pleading self-defense against

an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." Id. at 419-20, 535 S.E.2d at 436. The court noted that the prior act of violence against Szumowicz occurred only four months prior to Renew's death, and held the evidence was admissible to prove Day had a reasonable apprehension of violence from Renew, an essential element of his self-defense claim. Id. at 421, 535 S.E.2d at 437.

In the case at hand, the prior act of violence by Bubba against Robette occurred less than three months prior to Bubba's death and was so closely connected at point of time to indicate Bubba's state of mind at the time of the shooting. The prior incident of criminal domestic violence was also admissible to prove Mekler had a reasonable apprehension of great bodily harm from Bubba, an essential element of Mekler's claim of self-defense as well as her claim of defense of others.

We also find the State opened the door to this testimony when it questioned Mekler about why she did not retreat behind a locked door. See State v. Curtis, 356 S.C. 622, 632-33, 591 S.E.2d 600, 605 (2004); State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003) (when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially). Evidence that Bubba had "beat [Robette's] door until he broke through it with his fists" was clearly relevant to this line of questioning by the State, and Mekler should have been allowed to introduce this specific instance of violence by Bubba to explain why she did not feel she could safely lock herself behind her door.

III. Failure to charge the jury on the law of involuntary manslaughter

Mekler finally contends the trial judge erred in refusing to instruct the jury on involuntary manslaughter. We agree.

At the close of the evidence, defense counsel requested a jury instruction on involuntary manslaughter. The trial judge found there was a strong inference from Mekler's testimony that she "certainly intended to shoot [Bubba]." He noted Mekler said she was afraid of Bubba and was protecting herself and quoted Mekler as saying, "I meant to stop him." The trial judge thus determined involuntary manslaughter would be an inappropriate charge based on what he "perceive[d] to be self-defense."

The law to be charged must be determined from the evidence presented at trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense. State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). Stated another way, if there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004).

Involuntary manslaughter is (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, while engaged in a lawful activity with reckless disregard for the safety of others. Chatman, 336 S.C. at 152, 519 S.E.2d at 101. A person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. Crosby, 355 S.C. at 52, 584 S.E.2d at 112; State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The negligent handling of a gun

can support a finding of involuntary manslaughter. Burriss, 334 S.C. at 265, 513 S.E.2d at 109.

Here, there is evidence that would support a finding Mekler was lawfully armed in self-defense at the time of the fatal shooting. Further, there is ample evidence from which the jury could infer Mekler did not intentionally discharge the shotgun. Although Mekler stated on cross-examination that she had cocked the gun and "meant for [Bubba] to stop," she clearly testified on direct that, as she was cocking the gun, Bubba leaned to the right "and the gun fired." Mekler specifically testified she did not remember pulling the trigger. Mekler also consistently maintained in her statements to police that she did not remember pulling the trigger. In her detailed statement taken at the Sheriff's Office, Mekler stated she was not trying to shoot Bubba, and did not mean for the gun to fire. She indicated when the gun went off, it shocked her. Mekler also consistently stated that when Robette told Mekler she had shot Bubba, Mekler replied in disbelief that she had not. She further testified during cross-examination that her finger must have slipped "and got on the trigger," and that she did not remember pulling the trigger.

In Crosby, the facts showed Crosby was involved in an incident with a group of people when the victim began charging at Crosby with his hand behind his back. Crosby indicated that he pulled out a gun, closed eyes and pulled the trigger, but he did not know he pulled the trigger. Crosby, 355 S.C. at 50, 584 S.E.2d at 111. Our Supreme Court found, in spite of Crosby's admission that he closed his eyes and pulled the trigger, Crosby immediately added that he did not even know that he pulled the trigger. The fact that there may have been evidence showing the shooting was intentional did not negate the other inferences that could be drawn from all the evidence. Thus, the court found Crosby was entitled to a jury charge on the law of involuntary manslaughter. Id. at 53, 584 S.E.2d at 112-13.

We likewise hold, given the evidence adduced at trial, Mekler was entitled to have the jury charged on the law of involuntary manslaughter. Because there is evidence from which the jury could

have inferred Mekler did not intentionally discharge the shotgun, the trial judge erroneously concluded an involuntary manslaughter charge was precluded by Mekler's self-defense claim.

CONCLUSION

Based on the foregoing, we hold the trial judge erred in excluding testimony of the past violent act by Bubba that was closely related in time and occasion to the shooting death of Bubba. We further hold the trial judge erred in failing to instruct the jury on the law of involuntary manslaughter. For the foregoing reasons, Mekler's murder conviction is

REVERSED AND REMANDED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Victor Pichardo and Lorenzo Victoria Reyes, Respondents.

Appeal From Colleton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 4036
Heard October 12, 2005 – Filed October 31, 2005

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Appellant.

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Respondent Victor Pichardo.

James G. Longtin, of Walterboro, for Respondent Lorenzo Victoria Reyes.

ANDERSON, J.: Victor Pichardo and Lorenzo Victoria Reyes were indicted for trafficking in heroin. Prior to trial, Pichardo and Reyes made separate and identical motions to suppress drug evidence discovered in the search of Reyes' automobile. The circuit judge granted the motions. The State appeals the order suppressing the drug evidence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On September 18, 2002, Pichardo and Reyes were traveling north on I-95 in a vehicle owned by Reyes. Pichardo was driving the vehicle and Reyes was in the front passenger seat. Colleton County Sheriff's Deputy Christopher Stevers stopped the vehicle "[f]or failure to maintain a lane." Pichardo told Stevers that Reyes owned the vehicle and that he was driving because Reyes was sleepy.

Deputy Stevers called Deputy William G. Polk for backup. Stevers asked Polk if he could speak Spanish to assist the interrogation.

Deputy Stevers requested Pichardo's license. Pichardo stated he left his license at home. Pichardo informed Stevers that he and Reyes were traveling from Miami to New York City. Stevers advised Pichardo that he was going to give him "a warning ticket for no license." Stevers asked Pichardo to exit the vehicle and stand behind the trunk so he could give him the warning ticket.

Deputy Stevers then approached Reyes and asked for his license and the vehicle registration, which Reyes handed to Stevers. Deputy Stevers "noticed a lot of nervousness about Mr. Reyes while he was sitting in the front seat of the car." Stevers asked Reyes to exit the vehicle and stand behind the trunk with Pichardo. Stevers instructed Reyes that he would have to drive since Pichardo did not have his driver's license with him.

Reyes related to Stevers that he and Pichardo had been in Miami and were driving to New York, where they live. Reyes walked to the rear of the car to exchange positions with Pichardo as driver. At that time, Deputy Stevers: (1) told the men to have a good day and be careful; (2) shook Pichardo's hand; (3) returned their paperwork; and (4) turned away from the men. Stevers then turned back around and "asked [Pichardo and Reyes] if [he] could ask them a question and they both turned to [him]." Stevers "explained to them the situation that we have on I-95, especially since 9-11, with persons running illegal contraband up and down the highway and weapons and so forth . . . and then asked both of them for consent to search the vehicle." Stevers declared Pichardo and Reyes "both nodded in the affirmative." Pichardo claimed he "told [Stevers], I got no problem with that but this is not my car."

After Deputy Polk arrived, he initiated a pat-down of Pichardo and Reyes for safety purposes. Deputy Polk asked Pichardo and Reyes if they had a "pistola." Polk stated: "That's what I normally do when I have Spanish persons."

During the search of the vehicle, Stevers discovered "a kilo" of heroin hidden inside the right rear passenger door.

At the suppression hearing, Pichardo testified that Reyes "don't speak English at all." Pichardo professed that, when he and Reyes are together, Pichardo "talk[s] most of the time for him because he don't understand [English]." Pichardo, who speaks English, said Reyes does not use English except for an occasional request for a cigarette or "a couple of words" like "yes or no but understanding any conversation at all is difficult." Pichardo was not asked to translate anything for Reyes when the stop occurred. According to Pichardo, when Reyes joined him at the rear of the vehicle, Reyes asked Pichardo "what the officer was asking." Pichardo told Reyes that Deputy Stevers "was trying to argue permission to search the car." Pichardo informed Reyes he told the deputy that he did not object to the search but that the car belonged to Reyes. Pichardo claimed Stevers did not ask Reyes for consent to search. Pichardo declared Stevers "went straight to the car."

Sharon Folk, an interpreter and expert in Spanish language and Spanish culture and a professor at the University of South Carolina, Salkehatchie campus, opined that Reyes spoke little or no English, did not "understand" English and had a very limited education.

Reyes testified, through an interpreter, that he speaks "very little" English. He explained he could not understand any of the questions Stevers asked him. He stated that, on the day he was stopped on the interstate, no one asked him for permission to search his vehicle. Reyes declared he "didn't know that they were going to look in the car." When asked if he gave the police permission to search his car, Reyes replied: "No, because I didn't understand what they were saying." Reyes is originally from the Dominican Republic and has maintained a permanent residence in the United States for only three years.

Reyes presented affidavits from several inmates that were in the Colleton County jail with him. These affidavits attested to Reyes' reliance on Spanish for communication.

Deputy Stevers testified regarding his conversation with Reyes. When Stevers asked Reyes for the vehicle registration, Reyes handed it to him. While sitting in the vehicle, Reyes related that he and Pichardo had been visiting family in Miami and were driving to New York City. Stevers stated that, when he asked if he could search the vehicle, Reyes "nodded in the affirmative and said yes or something to that effect." Stevers opined that Reyes "understood what [he] was asking for."

At the hearing, the Solicitor stipulated Deputy Stevers did not tell Pichardo and Reyes they were free to leave. The Solicitor declared: "Your Honor, now that I've reviewed my report here, I had another case that Stevers was involved in, and I believe your recollection is correct here that he told him to have a good day. He did not say you're free to go." Stevers testified: "I told [Pichardo] to have a good day, they were free to go."

A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Porter v. South Carolina

Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998); Kirkland v. Allcraft Steel Co., 329 S.C. 389, 496 S.E.2d 624 (1998); South Carolina Dep't of Transp. v. Richardson, 335 S.C. 278, 516 S.E.2d 3 (Ct. App. 1999). Stipulations are binding upon those who make them. Id.; see also Webster v. Holly Hill Lumber Co., 268 S.C. 416, 234 S.E.2d 232 (1977) (stating a stipulation is an agreement, an understanding, that is to be construed like a contract, to effect the intent of the parties); State v. Anderson, 318 S.C. 395, 399-400, 458 S.E.2d 56, 58 (Ct. App. 1995) ("Generally, a stipulation is an agreement between the parties to which there must be mutual assent."); Black's Law Dictionary 1415 (6th ed. 1990) (defining a stipulation as a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues."). The court must accept stipulations as binding upon the parties.

After hearing oral arguments and reviewing briefs and video evidence, the circuit judge found "the stop was legal and the defendant[s] properly detained." The judge concluded the search was "an exploitation of the original stop." He ruled "there was no reasonable suspicion to further detain or question [Pichardo and Reyes] after Pichardo was given the warning ticket." The judge determined: "I find that [voluntary consent] has not been shown here even by a preponderance of the evidence. As such, I cannot infer voluntary consent and must find that no such voluntary consent was given and that the search is invalid." Finally, the judge held the search was improper because it was "not based upon probable cause or suspicion and was still with the scope of the traffic stop and exploitive of that stop . . .; and that no voluntary consent by Reyes, the foreign speaking owner of the vehicle was ever obtained." The judge suppressed all evidence obtained in the search of Reyes' automobile.

STANDARD OF REVIEW

The appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000);

State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005); State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). The appellate court may only reverse where there is clear error. Id.; see also State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) (holding in a criminal case the appellate court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence unless the findings are clearly erroneous, and its review extends only to determining whether the trial judge abused his discretion).

The "clear error" standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. Easley v. Cromartie, 532 U.S. 234 (2001). Rather, the appellate court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed. Id.

An appellate court must affirm the trial court's ruling if there is any evidence to support the ruling. Brockman, 339 S.C. at 66, 528 S.E.2d at 666. Accordingly, we will apply an "any evidence" standard to the circuit judge's ruling. See State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002).

LAW/ANALYSIS

I. Right to Appeal

Initially, we determine whether the State has the right to appeal the judge's order suppressing the drug evidence.

In South Carolina, the State's right to appeal is defined by our judicial decisions, not statutory law. State v. McKnight, 353 S.C. 238, 577 S.E.2d 456 (2003). Thus, the State's right to appeal in a criminal case is a judicially created right. State v. Belviso, 360 S.C. 112, 600 S.E.2d 68 (Ct. App. 2004).

Our Supreme Court has recognized limited situations where the State may appeal. State v. Holliday, 255 S.C. 142, 177 S.E.2d 541 (1970). A pre-trial order granting the suppression of evidence which significantly impairs

the prosecution of a criminal case is directly appealable. State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985); State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993); see also S.C. Code Ann. § 14-3-330(2)(a) (1977) ("The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n order affecting a substantial right made in an action when such order . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action."). The State has the right to immediately appeal a trial court's suppression of evidence which significantly impairs the prosecution of the case. Belviso, 360 S.C. at 115, 600 S.E.2d at 70.

There is no direct statement emanating from the State in regard to an allegation that the order will significantly impair the prosecution of its case. However, factually and legally, if this court affirms the order of the circuit judge, the prosecution of the case against Pichardo and Reyes is eviscerated and annihilated.

II. Search of Reyes' Vehicle

The State argues the trial court erred in suppressing the evidence obtained from a search of Reyes' vehicle. The State claims the court's findings that the search exploited the traffic stop and there was no voluntary consent by Reyes are not supported by the record. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV; see State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. United States v. Mendenhall, 446 U.S. 544 (1980).

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth

Amendment. Whren v. United States, 517 U.S. 806 (1996); State v. Maybank, 352 S.C. 310, 573 S.E.2d 851 (Ct. App. 2002). Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Whren, 517 U.S. at 810. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. Id. The police may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity. State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000).

The testimony of Deputy Stevers was that he stopped the vehicle because Pichardo failed to maintain his lane. This evidence was not challenged. The vehicle was legally stopped and Pichardo and Reyes detained. However, Pichardo and Reyes contend that, once the traffic stop was concluded, Deputy Stevers needed a reasonable suspicion that some further criminal activity was afoot in order to begin questioning Pichardo and Reyes.

Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. Pennsylvania v. Mimms, 434 U.S. 106 (1977); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002). In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998). However, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime. Id.

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification. Florida v. Royer, 460 U.S. 491 (1983). The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Ferris v. State, 735 A.2d 491 (Md. 1999). Once the purpose of that stop has been fulfilled, the

continued detention of the car and the occupants amounts to a second detention. Id.; see also United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment."); United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."); United States v. Beck, 140 F.3d 1129, 1136 (8th Cir. 1998) ("Because the purposes of [the officer's] initial traffic stop of Beck had been completed . . . [the officer] could not subsequently detain Beck unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify [the officer's] renewed detention of Beck."); People v. Redinger, 906 P.2d 81, 85-86 (Colo. 1995) ("When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens."); Davis v. State, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997) ("[O]nce the reason for the stop has been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.'") (citations omitted).

Once the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional. Fourth Amendment jurisprudence clarified:

> Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter.

United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998) (citations omitted). Thus, a law enforcement officer's continued questioning of a vehicle's driver and passenger outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has become a consensual encounter.

The question in this case is whether Deputy Stevers detained, i.e. "seized" Pichardo and Reyes anew, thereby triggering the Fourth Amendment or simply initiated a consensual encounter invoking no constitutional scrutiny. See State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002); see also Ferris, 735 A.2d at 500 (stating the difficult question was whether the trooper's questioning of Ferris after he issued a citation and returned his driver's license and registration "constituted a detention, and hence raise[d] any Fourth Amendment concerns, or was merely a 'consensual encounter[]' . . . implicating no constitutional overview").

A consensual encounter has been defined as simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. Ferris, 735 A.2d at 500 n.4; Williams, 351 S.C. at 599 n.2, 571 S.E.2d at 708 n.2. Because an individual is free to leave at any time during such an encounter, he is not "seized" within the meaning of the Fourth Amendment. Id.

Mere police questioning does not constitute a seizure for Fourth Amendment purposes. Florida v. Bostick, 501 U.S. 429 (1991); see State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990) ("Not all personal encounters between policemen and citizens involve 'seizures' of persons thereby bringing the Fourth Amendment into play.") (citations omitted), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990). To the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19-20 n.16 (1968). As long as a person remains at liberty to disregard a police

officer's request for information, no constitutional interest is implicated. United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998); Williams, 351 S.C. at 600, 571 S.E.2d at 708.

The test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Michigan v. Chesternut, 486 U.S. 567 (1988); United States v. Analla, 975 F.2d 119 (4th Cir. 1992); see also Sullivan, 138 F.3d at 132 ("The test . . . [is] whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position 'would have felt free to decline the officer's requests or otherwise terminate the encounter.'") (citations omitted). So long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. United States v. Mendenhall, 446 U.S. 544 (1980). The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct taken as a whole. Chesternut, 486 U.S. at 573; Williams, 351 S.C. at 600, 571 S.E.2d at 708. Thus, exactly what constitutes a restraint on liberty sufficient to lead a reasonable person to conclude he is not free to leave varies with the setting in which the police conduct occurs. Id.

Reasonableness is measured in objective terms by examining the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33 (1996); Williams, 351 S.C. at 600, 571 S.E.2d at 708. As a result, the nature of the reasonableness inquiry is highly fact-specific. Id. Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the existence and nature of any prior seizure, whether there was a clear and expressed endpoint to any such prior detention, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or

physical contact. See United States v. Beck, 140 F.3d 1129 (8th Cir. 1998); Ferris v. State, 735 A.2d 491 (Md. 1999).

In determining whether Pichardo and Reyes were seized for purposes of the Fourth Amendment, it must be noted that the detention associated with roadside searches is unlike a mere field interrogation where an officer may question an individual without grounds for suspicion. See Williams, 351 S.C. at 600-01, 571 S.E.2d at 708. Roadside consent searches are instead more akin to an investigatory stop that does involve a detention. Id. A traffic stop, or pre-existing seizure, enhances the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction of liberty. Ferris, 735 A.2d at 502. Such a situation, therefore, is "markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier." Id. (citations omitted).

In the instant case, Stevers returned the "paperwork," gave Pichardo his warning ticket, and told him to "have a nice day." The fact that the officer returned the driver's documentation is not always sufficient to demonstrate that an encounter has become consensual. Daniel v. State, 597 S.E.2d 116 (Ga. 2004). Thus, the return of documents does not conclusively establish that a traffic stop has de-escalated into a consensual encounter. Id.

The Solicitor stipulated that Pichardo was never instructed that he and Reyes could leave. It is well established that the Constitution does not require an officer to inform a motorist he is free to leave before obtaining consent. See Robinette, 519 U.S. at 35 (rejecting per se rule that would render consent involuntary if an officer failed to advise a motorist he was free to go before requesting consent). However, the Supreme Court in Robinette reiterated that such advice was one factor to consider in the overall analysis. Id. at 39. Significantly, in this case the State is bound by the stipulation that Stevers failed to tell Pichardo and Reyes they were free to leave.

The circumstances surrounding the encounter lend support to the circuit judge's conclusion. The two men were isolated while questioned. Stevers requested the two men separately step to the rear of Reyes' vehicle. Two

uniformed police officers were present. Pichardo and Reyes were physically searched. There was an immediate transition from the valid traffic stop to the search such that they may not have realized the initial seizure was over. At this point, the "encounter began to assume the tenor of an investigation." See Williams, 351 S.C. at 602, 571 S.E.2d at 709. Pichardo and Reyes were detained beyond the traffic stop. The facts encompassing Stevers' questioning of Pichardo and Reyes support the conclusion that the men were in fact seized.

These circumstances were sufficiently intimidating such that Pichardo and Reyes "could reasonably have believed that [they were] not free to disregard the police presence and go about [their] business." See Michigan v. Chesternut, 486 U.S. 567, 576 (1988); see also People v. In Interest of H.J., 931 P.2d 1177, 1181 (Colo. 1997) ("It strains credulity to imagine that any citizen, directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel 'free to leave' or 'at liberty to ignore the police presence and go about his business.'") (citations omitted); Ferris, 735 A.2d at 502-03 (enumerating several factors that transmuted a valid traffic stop into an unlawful detention, including the trooper's failure to inform Ferris he was free to leave, the trooper's "request" that Ferris step "to the back of his vehicle to answer a couple of questions," the detention seamlessly followed a pre-existing lawful stop, the trooper removed Ferris from his automobile and separated him from his passenger, the presence of two uniformed law enforcement officers, and the fact that the police cruiser emergency flashers remained operative throughout the entire encounter) (footnote omitted).

Deputy Stevers, by prolonging the initial stop beyond its proper scope, rendered the ensuing encounter more coercive than consensual. As the Ohio Supreme Court explained:

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that

they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow."

State v. Robinette, 685 N.E.2d 762, 770-71 (Ohio 1997); see Ferris, 735 A.2d at 503 ("The moment at which a traffic stop concludes is often a difficult legal question, not readily discernible by a layperson. It is not sound to categorically impute to all drivers the constructive knowledge as to the precise moment at which, objectively, an initially lawful traffic stop terminates, i.e., the time at which the driver may depart."). A traffic stop must have a distinct ending point which is ascertainable to both the officers charged with enforcing the law and the citizens whom they encounter. Daniel v. State, 597 S.E.2d 116 (Ga. 2004).

A routine stop constitutes a Fourth Amendment seizure so that when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists. United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998); see State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) ("To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity."). The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411 (1981); State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. United States v. Sokolow, 490 U.S. 1 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000).

Here, the only evidence at the suppression hearing of reasonable suspicion was Deputy Stevers' testimony that Reyes was nervous. In light of Reyes' inability to speak English, nervousness alone is not sufficient to support reasonable suspicion of "some other crime." Sullivan, 138 F.3d at 131. There was no reasonable suspicion of "some other crime" to further detain or question Pichardo and Reyes after Pichardo was given the warning ticket. Such a search at this point was an exploitation of the original stop rather than a separate and valid search based upon a reasonable suspicion.

When Deputy Stevers asked for consent, he detained anew, triggering the Fourth Amendment. Pichardo and Reyes were unconstitutionally detained.

Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002); see Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (citation omitted); Brown v. State, 372 S.E.2d 514, 516 (Ga. Ct. App. 1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").

Proof of a voluntary consent alone is not sufficient. Williams, 351 S.C. at 604, 571 S.E.2d at 710; Brown, 372 S.E.2d at 516. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. Id.

The State bears the burden of establishing the voluntariness of the consent. State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). Whether a consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); Mattison, 352 S.C. at 584, 575 S.E.2d at 855. The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the circuit judge. Mattison, 352 S.C. at 584-

85, 575 S.E.2d at 856. A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. Id. There is ample evidence in the record to support the circuit judge's finding that the State failed to meet this burden and there was no voluntary consent to search.

A plethora of evidence in the record buttresses the circuit judge's determination that Pichardo and Reyes were unlawfully detained and that Reyes' purported consent to search was not voluntary. Deputy Stevers initially testified that Reyes gave his consent to the search. However, Stevers thereafter stated he needed to view the video to be certain Reyes responded to Stevers' request to search with a "yes along with a nod." Pichardo and Reyes declared no consent was given or understood by Reyes. Pichardo professed he explained to Reyes what the officer had asked to do. There was expert testimony that Reyes speaks little or no English, did not "understand" English and had a very limited education. Reyes submitted affidavits to the court from several inmates attesting to Reyes' reliance on Spanish for communication. The Stevers video has no audio and was inconclusive in the video rendering of the confrontation. The Polk video had audio but did not include any exchange between Reyes and Stevers in which the consent is alleged. The Stevers video clearly shows Stevers standing on the passenger's side of the vehicle talking across Reyes to Pichardo, who speaks English. The incident report and testimony indicate that Deputy Stevers asked Deputy Polk if he could speak Spanish to assist the interrogation.

The standard of review by the appellate entity is to determine if "any evidence" exists in the record to support the findings of fact and conclusions of law of the circuit judge. We affirm the circuit judge in his ruling that Reyes did not give voluntary consent and there was no valid consent to search the vehicle.

Moreover, the record reveals that Reyes' consent was obtained through Deputy Stevers's exploitation of the unlawful detention. Stevers's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and Stevers's actions in detaining Pichardo and Reyes had no

legal basis. See Williams, 351 S.C. at 605, 571 S.E.2d at 711. The record unquestionably supports the circuit judge's finding that Reyes' consent was not valid. See Robinson, 306 S.C. at 402, 412 S.E.2d at 414; see also Brown, 372 S.E.2d at 516 ("[W]e find that there was no significant lapse of time between the unlawful detention and the consent, that no intervening circumstances dissipated the effect of the unlawful detention and that the deputy's conduct had no arguable legal basis. Therefore, we hold that the consent was the product of the illegal detention, and that the taint of the unreasonable stop was not sufficiently attenuated."); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (stating an appellate court may affirm for any reason appearing in the record on appeal).

CONCLUSION

The heroin found in Reyes' vehicle was discovered through an illegal detention accompanied by a lack of valid consent. Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999); State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (Ct. App. 2004). The trial court, therefore, did not err in suppressing the evidence. See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of the illegality."); Robinson, 306 S.C. at 402, 412 S.E.2d at 414 (suppressing drug evidence as the fruit of an unlawful stop because no attenuating circumstances removed the taint of the illegality from the consent to search); State v. Greene, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct. App. 1997) ("The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded."); People v. Brownlee, 713 N.E.2d 556 (Ill. 1999) (suppressing marijuana as fruit of an illegal detention, where officers legitimately stopped vehicle for investigation of a traffic violation but after returning driver's license and insurance card and stating no citation would be issued officers paused for a couple of

minutes and then asked for and obtained consent to search the vehicle, because during this time the driver and his passengers were detained without reasonable suspicion of any criminal activity).

Accordingly, the circuit judge’s order suppressing the drug evidence is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eagle Container Co., LLC and Jeffrey D. Spotts, as Personal Representative of the Estate of Alfred D. Spotts, **Respondents,**

v.

County of Newberry, a political subdivision, and Susie Berry, in her capacity as Zoning Administrator of Newberry County, **Appellants.**

Appeal From Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4037
Heard October 12, 2005 – Filed October 31, 2005

AFFIRMED

Hardwick Stuart, Jr., of Columbia, for Appellants.

Thomas H. Pope, III, of Newberry, for Respondents.

B. Michael Brackett, of Columbia, for Amicus Curiae Citizens for Responsive Government, Inc.

ANDERSON, J.: Newberry County appeals the trial court's order granting Eagle Container's summary judgment motion to reinstate Eagle Container's landfill permit based on the interpretation of an amending ordinance. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 5, 2001, the County of Newberry adopted the Newberry County Zoning Ordinance No. 12-24-01 ("Zoning Ordinance"). The Zoning Ordinance requires a zoning permit before any building, sign, or structure is erected, constructed, reconstructed, or structurally altered. The Zoning Administrator issues permits provided they are for uses "in conformity with the provision of [the Zoning Ordinance] or for a use authorized by order of the Board of Zoning Appeals."

Article 3 of the Zoning Ordinance establishes zoning districts and lists the general purposes for each zoning district. Section 301 provides R-2 Rural Districts "require large parcels for uses, allow rural and residential uses, including manufactured homes on individual lots, agricultural and related uses, ranching, recreation and hunting, a variety of governmental service uses, and limited business uses."

Article 5 sets forth the zoning district regulations. Section 500 classifies three types of uses for the zoning districts as follows:

> 1. Permitted Uses: Permitted uses listed in the District Use Tables in this division are permitted outright.
>
> 2. Conditional Uses: Conditional uses in the District Use Tables are permitted by the Zoning Administrator without further review upon compliance with the conditions specified in the tables.
>
> 3. Special Exceptions: Special exceptions are permitted after review and approval by the Board of Zoning Appeals upon compliance with the general conditions in the regulations . . . .

Prior to December 11, 2002, the Zoning Ordinance listed construction and demolition landfills ("C&D landfills") under "special exception" uses in R-2 Rural Districts. Pursuant to section 501, a C&D landfill would be permitted as a "special exception" in R-2 Rural Districts:

> [P]rovided the Board of Zoning Appeals determines:
> (1) Approvals shall be conditioned on the applicant receiving all state and federal approvals;
> (2) All uses are a minimum of 1,000 feet from adjoining property lines;
> (3) The use would not constitute a safety hazard or traffic hazard;
> (4) The use is not detrimental to adjacent land uses in the vicinity.

On November 6, 2002, the first reading of Ordinance No. 12-49-02 ("amending ordinance") occurred. The minutes of Newberry County Council for November 6, 2002, provide:

> Mr. Waldrop asked Ms. Bridges to explain [Ordinance No. 12-49-02].
>
> Susan Bridges, Planning/Zoning Director, stated that on page 31 of the Zoning Ordinance, which is the list of Special Exception Uses in R-2, you will see landfill is listed as a permitted use under the Special Exceptions; however, when you look in Article 3, 301, you will see it is not listed there at all under the R-2 Rural Districts. This has been a source of confusion for some applicants who were interested in finding out what was permitted in R-2 and where in particular landfills were permitted. We thought it might need to be added as a clarification only. It is not adding to the use to the district; the district already has that use as a Special Exception.

On November 20, 2002, the second reading of the amending ordinance occurred. The Council minutes provide then-acting Zoning Director, Susan Bridges, was asked to "tell Council in layman's language exactly what doing [sic] [with the amending ordinance]." The Council minutes read:

> Susan Bridges, Planning/Zoning Director, pointed out Article 3, Section 301, District Purpose. There is a list of designing districts all established by the Ordinance and after them is basically a statement of purpose and a list of some of the major uses that are permitted in each of those districts. The R-2 Rural District actually does allow landfills. If you will look in the list of permitted uses in R-2 Rural District, it is listed as a special exception use that requires Board of Zoning Appeals hearing. The approval for landfills shall be conditioned on the applicant receiving all state and federal approvals, all uses are a minimum of 1,000 feet from adjoining property lines, the use would not constitute a safety hazard or traffic

> hazard, and the use is not detrimental to adjacent land uses in the vicinity. The Board of Zoning Appeals would have to hold a public hearing and find for all four of those factors before they could grant permission for a permit to be issued to an applicant.

On December 11, 2002, the Council adopted Ordinance No. 12-49-02 which provides:

> WHEREAS, Ordinance No. 12-24-01 permits various uses in R-2 Rural Districts; and
> WHEREAS, landfills should be allowed in the R-2 Rural District.
>
> NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS:
> Article 3, Section 301 is amended to add text "landfill" to the uses permitted in R-2 Rural District. The text is added to the Newberry County Zoning Ordinance . . . ."

On June 2, 2003, Eagle Container Co., LLC applied for a permit from the County of Newberry to build a C&D landfill on property in an R-2 Rural District of Newberry County. Susan Berry, then-acting Newberry County Zoning Administrator, initially approved Eagle Container's application. On June 4, 2003, Newberry County revoked Eagle Container's permit "on the ground that it was erroneously issued."

Eagle Container commenced a declaratory judgment action on June 17, 2003, seeking an order rescinding the revocation of their landfill permit and reinstating their permit as originally approved. Additionally, Eagle Container petitioned for a writ of mandamus to compel issuance of a permit for the subject site. Eagle Container and Newberry County filed cross motions for summary judgment. The trial court found Eagle Container was entitled to judgment as a matter of law and denied Newberry County's subsequent motion to reconsider.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56 (c) SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B&B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E. 2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if 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 judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.

Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C.1, 605 S.E.2d 744 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C 509, 595 S.E.2d 817 (Ct. App. 2004). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (Ct. App. 2004); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E. 2d 557 (Ct. App. 2004).

LAW/ANALYSIS

I. Interpretation of Legislative Intent

A. Plain Meaning Rule

Newberry County contends the trial court erred in using the "plain meaning" rule to conclude that Eagle Container is entitled to summary judgment. Newberry County asserts the "plain meaning" rule requires reading the amending ordinance as merely amending Article 3, section 301 to

add “to the general statement of intent set forth in Article 3 to be used in the general interpretation and application of the Zoning Ordinance.” We disagree.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature.” Garvin v. State, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Knotts v. S.C. Dept of Natural Resources, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). “The primary purpose in construing a statute is to ascertain legislative intent.” Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

“‘What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.’” Knotts, 348 S.C. at 10, 558 S.E.2d at 516 (quoting Norman J. Singer, Sutherland Statutory Construction, §46.03 at 94 (5th Ed. 1992)); Bayle v. South Carolina Dep’t of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). “The legislature’s intent should be ascertained primarily from the plain language of the statute.” State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996).

“The first question of statutory interpretation is whether the statute’s meaning is clear on its face.” Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning.” Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). “[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” Municipal Ass’n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420

S.E.2d 843, 846 (1992)). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Morgan, 352 S.C. at 366, 574 S.E.2d at 206 (Ct. App. 2002) (citing Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991)). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) (citing Hodges, 341 S.C. 79, 533 S.E.2d 578; Bayle, 344 S.C. at 122, 542 S.E.2d at 739). "When the terms of a statute are clear, the court must apply those terms according to their literal meaning." Georgia-Carolina Bail Bonds, 354 S.C. at 24, 579 S.E.2d at 337 (citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction.")).

We find the "plain meaning" rule is applicable in the instant action and we do not need to resort to the rules of statutory construction because the language of the amending ordinance demonstrates the Council intended to make landfills a permitted use in R-2 Rural Districts. The amending ordinance states that "landfills should be allowed in the R-2 Rural District" and the Zoning Ordinance should be "amended to add text 'landfill' to the uses permitted in R-2 Rural District." (emphasis added). The Council's use of the term "permitted" is significant. Section 201 (86) of the Zoning Ordinance defines the term "permitted use" as "a use permitted outright by district regulations." In contrast, "special exception" uses require approval by the Zoning Board of Appeals. The terms "permitted use" and "special exception" are mutually exclusive. This Court must assume Council understood the distinction between "permitted" uses and "special exception" uses. "There is a presumption that the legislature has knowledge of previous legislation . . . when later statutes are enacted concerning related subjects." State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 174 (2003) (citing State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000); Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993)). Because the amending ordinance

clearly and unambiguously states "landfill" is to be added to the uses "permitted" in an R-2 Rural District, we must interpret the amending ordinance's plain language as changing landfill to a "permitted use." Therefore, we find the trial court did not err in granting Eagle Container's summary judgment motion pursuant to the "plain meaning" rule.

B. Considering the Statute as a Whole

Newberry County argues the court must interpret the amending ordinance as leaving landfills as "special exception" uses in consideration of the general purpose of the Zoning Ordinance, the inclusion of landfills as "special exceptions" in section 501, and the requirement in section 400 that the most restrictive interpretation of the ordinance will apply when ordinances appear to be at variance. We disagree.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "In construing a statute, the court looks to the language as a whole in light of its manifest purpose." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). "The real purpose and intent of the lawmakers will prevail over the literal import of the words." Id. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Id. (citing Unisun

Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." Id. "The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp., 309 S.C. at 178, 420 S.E.2d at 846).

1. General Purpose of Zoning Ordinance

Newberry County contends the court cannot read the amending ordinance to allow landfills as permitted uses because such a reading goes against the general purposes of the Zoning Ordinance. We disagree.

"The purposes of the zoning ordinance are to implement the land use element of the comprehensive plan set forth in S.C. Code § 6-29-710." Section 6-29-710 of the South Carolina Code (2004) provides in part: "Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting public health, safety, morals, convenience, order, appearance, prosperity, and general welfare."

However, "[i]t is not the prerogative of the courts to pass upon the wisdom of County Council's decision." Bear Enters. v. County of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) (citing Lenardis v. City of Greenville, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct. App. 1994)). "If the propriety of the Council's decision is even 'fairly debatable,' we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed." Id.; see also Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975) ("The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision.").

"Rezoning is a legislative matter, and the court has no power to zone property." Id. "'[T]he governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the courts, and they will not be interfered with unless there is a plain violation of the constitutional rights of citizens.'" Id. (citing Lenardis, 316 S.C. at 472, 450 S.E.2d at 598. "It is incumbent upon [the challenger] to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance." Bear Enterprises, 319 S.C. at 140, 459 S.E.2d at 886 (citing Town of Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1991)).

In the present case, this Court must give effect to the Council's intent unless we find the Council's action was arbitrary and capricious. The Council is in a better position to make zoning decisions to "promote public health" and "protect general welfare." Here, Newberry County makes no argument and this court does not find that the ordinance is arbitrary and capricious. Therefore, the trial court correctly found the general purposes of the Zoning Ordinance do not preclude interpreting the amending ordinance as changing landfills to permitted uses.

2. Consideration of Section 501 and Section 400

Newberry County asserts that the court must give effect to section 501 and section 400 when interpreting the legislative intent from the amending ordinance. We disagree.

The court must interpret the amending ordinance in light of other relevant sections contained in the Zoning Ordinance. "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (citing Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004); Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992)).

In the instant case, section 501 lists “landfills” as a “special exception” use. However, the amending ordinance directly contradicts section 501’s classification of landfills thereby repealing the classification and obviating the need to consider the existence of the “special use” requirements. Because the amending ordinance repeals section 501’s designation of landfills, section 501’s does not need to be considered.

Similarly, the amending ordinance’s direct repeal of section 501 renders section 400 obsolete. Section 400 provides that when requirements in the Zoning Ordinance are at variance with the requirements of any other ordinance “the most restrictive, or that imposing the higher standards shall govern.” Here, the applicable restriction of section 501 is repealed by the amending ordinance leaving only one statute (section 301 as amended) to consider.

The trial court did not fail to consider either section 501 or section 400 when interpreting the amending ordinance.

C. Interpret Amending Ordinance as Clarifying

Newberry County argues that the amending ordinance can and should be interpreted as merely clarifying the Zoning Ordinance to clearly indicate landfills are allowed in R-2 Rural Districts. We disagree.

“A subsequent statutory amendment may be interpreted as clarifying original legislative intent.” Stuckey v. State Budget and Control Board, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (citing Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992)). However, “[i]t will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law.” Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964) (citing 82 C.J.S. Statutes § 384b(2), page 904). “The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citing TNS Mills, Inc. v. South Carolina Dep’t of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)).

We find the amending ordinance cannot be read as merely clarifying the Zoning Ordinance. In Stuckey, the legislature's subsequent adoption of a specific time period was interpreted by the court as "evidence of legislative intent that 'directly' be given a time-related meaning." 339 S.C. at 401, 529 S.E.2d at 708. In Stuckey, the subsequent legislative act added to the original act by providing a time period. Id. Here, the amending ordinance cannot be interpreted as clarifying because there is nothing to clarify; prior to the amending ordinance landfills were clearly allowed in R-2 Rural Districts as special exception uses. To have any effect whatsoever, the amending ordinance must be read as permitting landfills in R-2 Rural Districts without first getting approval from the Board of Zoning. Newberry County's reading would not change the Zoning Ordinance at all, making the amending ordinance's enactment essentially futile. Therefore, the trial court properly held that the amending ordinance could not be interpreted as clarifying the Zoning Ordinance.

II. Repeal by Implication

Newberry County claims the trial court incorrectly held that the amending ordinance repealed by implication section 501. We disagree.

"[R]epeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." Atlas Food Sys. v. Crane Nat'l Vendors, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (citing Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994)). "The repeal of a statute by implication is not favored, and is to be resorted to only in the event of an irreconcilable conflict between the provisions of two statutes," and "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." In the Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980) (citing City of Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 361 (1953)). "It is well settled that repeal by implication is not favored and will not be applied if there is any way to reasonably reconcile the statutes." PalmettoNet, Inc. v. South Carolina Tax Comm'n, 318 S.C. 102, 108, 456 S.E.2d 385, 389 (1995). "As a general rule, a statute of a specific nature is not to be considered as repealed in whole or in part by a later

general statute, unless there is a direct reference to the former or the intent of the legislature to repeal is explicitly implied therein." Spartanburg County Dep't of Soc. Servs. v. Little, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992) (citing City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control, 302 S.C. 161, 394 S.E.2d 327 (1990)).

Here, we find that section 501 was not repealed by implication but rather directly repealed. The intent to repeal section 501 is implied from the language of the amending ordinance. While the amending ordinance did not directly reference section 501, adding "landfill" to the uses "permitted" sufficiently conveys the legislative intent to repeal the section. Hence, the trial court correctly held that the amending ordinance repealed section 501.

III. Last Legislative Expression Rule

Newberry County alleges the trial court incorrectly applied the last legislative expression rule. We disagree.

If the amending ordinance is deemed ambiguous, the rules of statutory construction are employed to determine legislative intent. When a statute is ambiguous, the Court considers the terms of the statute and employs the rules of statutory interpretation. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing Lester v. South Carolina Workers' Comp. Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999)).

"Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails." Ramsey v. County of McCormick, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). "In accordance with the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 51, 26 S.E.2d 22, 24 (1943). "[L]ater legislation supersedes earlier laws addressing the identical issue." Whiteside v. Cherokee Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the

identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Id. (citing Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955)); see also Ramsey, 306 S.C. at 397, 412 S.E.2d at 410.

We find that employing the last legislative expression rule still leads to the conclusion that the Council intended the amending ordinance to change landfills to permitted uses in R-2 Rural Districts. Here, the amending ordinance was not only most recently enacted but specifically added "landfill" to the "uses permitted" in R-2 Rural Districts. Accordingly, the amending ordinance should be given full effect.

Admittedly, "[the last legislative expression rule] is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted." Feldman, 203 S.C. at 54, 26 S.E.2d at 24. However, "the Last Legislative Expression Rule requires that in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment." Williams v. Town of Hilton Head Island, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993). Here, assuming the amending ordinance is ambiguous, we find it is not possible to harmonize section 301 as amended with section 501. A use cannot be simultaneously categorized "permitted" and "special exception". The trial court properly applied the last legislative expression rule because an irreconcilable conflict would otherwise exist between these two sections.

IV. Consideration of Legislative History

Newberry County argues the trial court erred in failing to consider the minutes of the Council as evidence of intent. We disagree.

"If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 76 (1996). "[L]egislative history only can be resorted to for

the purpose of solving doubt, not for the purpose of creating it." Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970). "Legislative enactments are to be construed as they are written, and, unless there is an ambiguity in the legislation, resort to statements by members of a committee will not be considered in construing a particular piece of legislation." Id. "[I]n some instances extrinsic evidence of facts or information (such as legislative history for example) may be necessary and highly probative of the rationality of the legislature's determination." State v. Byrd, 267 S.C. 87, 92, 226 S.E.2d 244, 247 (1976). "But in each case, the court, exercising its sound discretion, must assure itself that the evidence sought to be introduced is necessary for a fair evaluation of the legislative declaration." Id.

We find that legislative history does not need to be considered in this case because the amending ordinance is not ambiguous.

If the amending ordinance were ambiguous, we find the trial court did not err in determining that the Council minutes were unhelpful. We have several concerns with the Council minutes. First, the minutes reflect that Susan Bridges (Bridges), the then-acting Zoning Director, gave a confusing explanation of the existing Zoning Ordinance. Bridges said a landfill is "listed as a permitted use under the Special Exceptions," and "look to list of permitted uses . . . [landfill] is listed as special exception use." However, a "permitted use" cannot be a "special exception" use. Second, the minutes are merely unofficial summaries of comments by a county staff person as noted by the Council secretary. We assume these notes are accurate reflections of the Council meetings. See Berkely Elec. Coop. v. Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992) (stating Council minutes that are "properly authenticated or verified are the only competent evidence of the proceedings . . . ."). Still, properly authenticated minutes that communicate the events of a council meeting do not necessarily convey the intent of the legislature. Here, the court's reliance on confusing statements from the former zoning director would be ill-founded. We find the minutes are not indicative of any "legislative" intent behind the amending ordinance; the trial court did not err in refusing to give weight to these Council minutes.

V. Subject Matter Jurisdiction

The amicus curiae brief raised new issues before this Court. The amicus curiae brief argues the trial court lacked subject matter jurisdiction on the basis of ripeness and because the trial court improperly exercised original jurisdiction. We disagree.

A. Appealability

Initially, we must determine whether the issues raised by the amicus curiae brief are properly before this Court.

Generally, amicus curiae cannot inject new issues into a case; however, courts will consider issues presented by an amicus curiae when the court could raise the issue sua sponte. See 4 Am. Jur.2d Amicus Curiae §7. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Issues not raised and ruled upon in the trial court will not be considered on appeal." Id. "'Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court.'" All Saints Parish v. Protestant Episcopal Church, 358 S.C. 209, 238, 595 S.E.2d 253, 269 (Ct. App. 2004) (citing Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998); see Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("[S]ubject matter jurisdiction ... may be raised at any stage of the proceeding.")). "Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court." Amisub of South Carolina, Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994).

We will address the issues raised by the amicus curiae brief because they involve questions of subject matter jurisdiction and unsettled law in South Carolina.

B. Ripeness

Amicus curiae alleges that Eagle Container's challenge of Newberry County's revocation of a land use permit is not ripe for judicial review because there has been no final determination by the Zoning Board. Amicus curiae assert the court may raise the issue of ripeness sua sponte because subject matter jurisdiction considerations encompass ripeness issues. We disagree.

The question of whether subject matter jurisdiction includes ripeness considerations is a novel issue for this state. Several cases have touched on the possible relationship between the two concepts. The Supreme Court of South Carolina found that "[t]he existence of an actual, justiciable controversy is essential to jurisdiction to render a declaratory judgment," and "[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination . . . ." Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982) (citing Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1971)); see also Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917 (1996). Similarly, this court has held "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy" and that "[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Holden v. Cribb, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct. App. 2002). However, the Supreme Court of South Carolina has also found that "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional,'" and "[t]he failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." Ward v. State, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000) (citing Vaught v. Waites, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989)).

Federal Courts and the courts of other jurisdictions have dealt more directly with the interplay of ripeness and subject matter jurisdiction. The

Sixth Circuit Court of Appeals held: "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." Bigelow v. Michigan Dep't of Natural Res., 970 F.2d 154, 157 (6th Cir. 1992) (quoting, Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir.1990), cert. denied, 502 U.S. 943 (1991)). Likewise, the Texas Court of Appeals recently held that "[r]ipeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented." City of Weslaco v. Borne, 2005 WL 20000842 (Tex. App. 2005) (citing Patterson v. Planned Parenthood, 971 S.W.2d 439, 442 (Tex. 1998)).

We find that, in line with South Carolina case law,[1] the concepts of subject matter jurisdiction and ripeness are separate and distinct. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237, 442 S.E.2d 598, 600 (1994) (citations omitted). In comparison, "[t]he basic rationale of the doctrine of ripeness is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." 2 Am. Jur.2d Administrative Law Section 485 (citations omitted). The concepts of subject matter jurisdiction and ripeness are often discussed simultaneously as they both involve threshold requirements; however, we find the concepts are distinguishable and should be considered separate and distinct issues.

Nevertheless, we find ripeness considerations may be and should be raised sua sponte. Both South Carolina and Federal case law support this ruling. In Baber v. Greenville County, the rule is articulated that courts generally decline to pronounce a declaration wherein the rights of a party are

---

[1] See Ward, 343 S.C. at 17 n.5, 538 S.E.2d at 246 n.5 (distinguishing "prematurity of a case" from subject matter jurisdiction).

contingent upon the happening of some event which cannot be forecast and which may never take place. 327 S.C. 31, 44, 488 S.E.2d 314, 321 (2000) (citing Park v. Safeco Ins. Co., 251 S.C. 410, 162 S.E.2d 709 (1968)). The Supreme Court of the United States found "because issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case or Controversy' sense" and "to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." Kremens v. Bartley, 431 U.S. 119, 136 (1977). Likewise, "before addressing merits of any appeal, [the court] must be convinced that the claim in question is ripe for review, even if neither party has raised the issue." Bigelow v. Michigan Dep't of Natural Res., 970 F.2d 154, 157 (6th Cir. 1992).

In this case, a justiciable claim exists and there is no ripeness issue. The Supreme Court of South Carolina has used a two-factor test for determining ripeness: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. Waters, 321 S.C. 219, 467 S.E.2d 913. Here, the test is satisfied because a real, live case and controversy exists; Eagle Container will have to satisfy the requirements for "special exception" uses if the County's revocation is valid. Moreover, the issue before the court is a declaratory judgment action for determination of legislative intent. "The determination of legislative intent is a matter of law." Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" Id. (citing Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments & Appeals, 316 S.C. 231, 235, 449 S.E.2d 254, 256 (Ct. App. 1994)). Thus, we find that a justiciable claim exists and this case is ripe for review.

C. Jurisdiction of Circuit Court

Amicus curiae contends the trial court improperly exercised original jurisdiction because Eagle Container did not challenge the constitutionality or validity of either the Enabling Act or Zoning Ordinance. We disagree.

"In general, judicial review is appropriate only when appeal is from a final agency order." Smith v. South Carolina Ret. Sys., 336 S.C. 505, 528, 520 S.E.2d 339, 351 (Ct. App. 1999) (citing Garris v. Governing Bd. of South Carolina Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) (citing S.C. Code Ann. § 1-23-380(A)). "'A party aggrieved by the application of an ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief.'" De Pass v. City of Spartanburg, 234 S.C. 198, 198, 107 S.E.2d 350, 351 (1959) (citing 62 C.J.S. Municipal Corporations § 206, p. 384).

In this case, Eagle Container brought a declaratory judgment action not an appeal of an agency decision. Thus, the trial court did not err in exercising original jurisdiction to determine the effect of the amending ordinance.

D. Effect of Declaratory Judgment Action

Amicus curiae suggest that the trial court erred in allowing Eagle Container to use a declaratory judgment action to circumvent the ripeness requirements. We disagree.

"Declaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination." Waters, 321 S.C. at 228 n.7, 467 S.E.2d at 918 n.7 (citing S. Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985)). "Declaratory Judgment Acts are not in general limited by their express terms to cases where there is no other adequate remedy available, but, on the contrary, are expressly made applicable, like ours, without regard to other relief claimed." Southern Ry. Co. v. Order of Ry. Conductors of Am., 210 S.C. 121, 126, 41 S.E.2d 774, 779 (1947). "When there exists a genuine controversy . . . requiring a judicial

determination, the court is not bound to refuse to exercise its power to declare rights and other legal relations merely because there is another remedy available." Id. (citing 16 Am. Jur. § 13, Page 286; Woollard v. Schaffer Stores Co., 5 N.E.2d 829 (N.Y. 1936)).

The claim set forth by Eagle Container involved a justiciable controversy. While Eagle Container had an alternate possibility of relief available (appeal to Board of Zoning), this alternate course required additional measures (satisfying requirement for "special uses"). Thus, the trial court did not err in finding the case ripe for review.

CONCLUSION

We conclude that, under the "plain meaning rule," Ordinance No. 12-49-02 clearly and unambiguously amends the Newberry County Zoning Ordinance to change "landfills" to a permitted use in R-2 Rural Districts. In the alternative, if the ordinance is ambiguous, we find the rules of statutory construction, namely the last legislative expression rule, require giving effect to section 301, as amended, over section 501. Accordingly, the decision of the trial court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
Phillip H. Crocker, III,	Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4038
Heard September 13, 2005 – Filed October 31, 2005

AFFIRMED

John Dennis Delgado, and Kathrine Haggard Hudgins, both of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, Office of the Attorney General; and Solicitor W. Barney Giese, all of Columbia, for Respondent.

KITTREDGE, J.: Phillip H. Crocker, III, was convicted and sentenced in Richland County for murder and trafficking in marijuana. Crocker appeals only from the drug conviction and sentence, contending the State neither alleged nor presented evidence that he committed a drug trafficking offense in Richland County. This contention is embraced in three assignments of error: (1) the denial of his motions to quash the marijuana trafficking indictment and for a directed verdict based on lack of jurisdiction and improper venue; (2) the denial of his motion for a directed verdict based on lack of evidence; and (3) the admission of certain evidence.[1] We affirm.

FACTS

Nathaniel Casey, Jr. (known as "Junior") was murdered when he and his wife, Consuelo, met Crocker in a parking lot in Richland County for the purpose of buying a large amount of marijuana. The relevant facts leading up to this ultimately violent meeting between the Caseys and Crocker are as follows.

Consuelo operated a barbershop in Dillon, South Carolina, and Junior sold marijuana for a living. The Caseys wanted to build a home, and they chose Junior's marijuana business as the way to raise the necessary funds.

---

[1] In challenging the admission of evidence seized from his Charlotte, North Carolina home, the last sentence of Crocker's brief reads: "The appellant's conviction for trafficking in marijuana should be vacated and the conviction for murder should be reversed." This is the only challenge to the murder conviction. Crocker's "Statement of Issues on Appeal" contains no reference or challenge to the murder conviction. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Moreover, conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review. Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that failure to provide argument or supporting authority for an issue renders it abandoned); Jean Hoefer Toal et al., Appellate Practice in South Carolina 75-76 (2d. ed. 2002).

On November 19, 2001, Consuelo told an acquaintance, Willie Jennings, about the plan. She inquired if Jennings could assist the couple with a large purchase in the $40,000 range, or about 50 pounds of marijuana. Jennings said he could put them in touch with a dealer.

The following day, November 20, Jennings returned to the barbershop with the appellant Crocker, who lived in Charlotte, North Carolina. At this meeting Crocker agreed to sell Junior approximately 50 pounds of marijuana. They planned to meet in Columbia, South Carolina, the following day. The exact location would be determined on the way there. Cell phone numbers were exchanged. The meeting concluded, and it was agreed Jennings would be paid $500 for helping broker the deal between Junior and Crocker.

The next day, November 21, Consuelo and Junior left Dillon in their Chevrolet Tahoe between 1:00 and 2:00 in the afternoon and headed for Columbia with $40,000 in cash. Several phone conversations were made via cell phone while en route. Crocker first called the Caseys from near his home in Charlotte. Crocker called the Caseys again around 3:00 p.m., this time from the Blythewood area of Columbia in Richland County. Several more calls were made back and forth in the Columbia area. The parties finally agreed to meet in the Lowe's parking lot, near I-20 on Two Notch Road in Columbia.

When the Caseys arrived in the Lowe's parking lot, Crocker pulled in behind them, driving a dark gray station wagon with wood grain paneling. Crocker backed up his station wagon to the Casey vehicle. Crocker got out and asked Junior to help him transfer the drugs. Junior exited to help Crocker with the lifting of the marijuana, while Consuelo remained in the front seat of the vehicle.

Crocker and Junior transferred a large, blue, Tupperware-like container into the back of the Tahoe. Consuelo noticed a conversation between Junior and Crocker as the purported drugs were placed in the Casey vehicle, but she was unable to hear what was said. Crocker then pulled out a gun and shot Junior, killing him. Crocker fled the scene in his station wagon. Law enforcement responded to the crime scene.

No marijuana was found in the large container, only blankets and a sack of concrete and cinder blocks. On the blue container police found seven fingerprints belonging to Crocker's father, Phillip H. Crocker, II. Also found in the Casey vehicle were two handguns and the $40,000 in cash.

Both Consuelo and Jennings eventually cooperated with police. A search warrant was executed at Crocker's home in Charlotte, where he resided with his father. A number of items were found at the house, including: (1) a half pound bag of marijuana in block form locked in a shed in the back yard; (2) a book on laws pertaining to marijuana; (3) storage containers identical to that found in the Casey's vehicle, all of which contained the same type of blankets; (4) paperwork relating to a 1988 Pontiac 6000 Station Wagon, which had been sold to a third party after Junior's murder; and (5) various weapons and ammunition. Five or six cell phones—which were connected to accounts in different names—were also found.

Prior to trial, Crocker moved to quash the indictment for lack of subject matter jurisdiction, personal jurisdiction, and improper venue. The trial court declined to grant the motions, noting that at the pretrial stage, the record was "factually deprived." The motions were renewed at the directed verdict stage and denied. Crocker also moved to suppress the items seized from his home. The trial court denied the suppression motion with respect to the marijuana and book on marijuana laws found at his residence, among other items.

The jury convicted Crocker of both charges. Crocker was sentenced to thirty years for the murder charge and five years, consecutively, on the trafficking in marijuana charge. Crocker appeals only from the drug-related conviction and sentence.

LAW/ANALYSIS

Crocker's challenge to his trafficking in marijuana conviction is threefold: (1) since the "State failed to allege any facts to support that the defendant committed a trafficking offense in Richland County," the trial court erred in denying his motions to quash and for directed verdict, on jurisdictional and venue grounds; (2) since the "State failed to present

evidence that the [trafficking] offense was committed in Richland County," the trial court erred in denying his directed verdict motion based on jurisdictional and venue grounds, as well as lack of evidence; and (3) the trial court erred in the admission of certain items seized from his home. We address these issues separately, although we recognize the relationship among them.

I. JURISDICTION AND VENUE

A. Subject matter and personal jurisdiction

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). "The circuit court has original jurisdiction in all criminal matters except those where an inferior court is given exclusive jurisdiction." State v. Dudley, 364 S.C. 578, 582, 614 S.E.2d 623, 625 (2005); S.C. Const. art. V, § 11 (Supp. 2004). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). Circuit courts have subject matter jurisdiction over drug trafficking charges. Dudley, 364 S.C. at 582, 614 S.E.2d at 625. Generally, the requirements of subject matter jurisdiction are satisfied when appropriate charges are filed in a competent court. State v. Dudley, 354 S.C. 514, 523, 581 S.E.2d 171, 176 (Ct. App. 2003), aff'd as modified, 364 S.C. 578, 614 S.E.2d 623.

"Jurisdiction of the offense charged and of the person of the accused is indispensable to a valid conviction." Dudley, 354 S.C. at 522, 581 S.E.2d at 175 (quoting State v. Langford, 223 S.C. 20, 26, 73 S.E.2d 854, 857 (1953)). Two distinct types of jurisdiction exist: (1) jurisdiction of the subject or subject matter, and (2) jurisdiction of the person. Dudley, 354 S.C. at 522, 581 S.E.2d at 175.

We summarily dispose of Crocker's subject matter jurisdiction claim that the State failed to allege any facts that he committed a drug trafficking offense in Richland County, and affirm pursuant to Rule 220(b)(2), SCACR, and the above-cited authorities.

Turning to the second prong of Crocker's jurisdictional challenge, it is generally recognized that jurisdiction over the person in a criminal case lies in the state or county where the crime was committed. 4 Wayne R. LaFave et al., Criminal Procedure § 16.4(c) (2d ed. 1999). The indictment alleged, in pertinent part, that Crocker "did in Richland County on or about November 21, 2001[,] knowingly . . . conspire to sell . . . more than 10 lbs. of Marijuana." During pretrial arguments, the State disputed Crocker's factual recitation, and the trial court denied the motion preliminarily, noting the record was "factually deprived." Clearly, the State alleged a trafficking offense in Richland County, and resolution of Crocker's motion required an evidentiary record. We reject as meritless Crocker's assertion that the trial court erred in denying his directed verdict motion based on a lack of jurisdiction over his person.

The real thrust of Crocker's jurisdictional arguments is that the trial court erred in not granting his directed verdict motion, because the State failed to *prove* any act in furtherance of a conspiracy to traffic in marijuana took place in Richland County.

As we view the evidence in a light most favorable to the State, as we must, we reject the premise of Crocker's assertion that the conspiracy had no connection to Richland County. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (holding that on a directed verdict motion in a criminal case, the evidence must be viewed in the light most favorable to the State). To accept Crocker's factual recitation would have required the trial court—and now us—to abandon the mandated lens through which evidence is viewed in a directed verdict motion in a criminal case. When properly viewed, the record is replete with evidence that many of the actions undertaken by the Caseys and Crocker in furtherance of the alleged conspiracy occurred in Richland County.

Were we to indulge in the fiction that the conspiracy had no nexus to Richland County, we would nevertheless be constrained to reject Crocker's jurisdictional arguments. As relates to a defendant's entitlement to a directed verdict on such grounds, our supreme court has held that "[a] criminal defendant is entitled to a directed verdict when the State fails to present

evidence that the offense was committed in the county alleged in the indictment." State v. Williams, 321 S.C. 327, 333, 468 S.E.2d 626, 630 (1996) (quoting State v. Evans, 307 S.C. 477, 480, 415 S.E.2d 816, 818 (1992), overruled in part by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). But the legal basis for this proposition is venue, not jurisdiction, for the court in Evans observed that "[a]lthough an accused has a right to be tried in the county in which the offense is alleged to have been committed, we hold this right is not jurisdictional." Evans, 307 S.C. at 480, 415 S.E.2d at 818. Evans recognized the merging of jurisdictional and venue principles in prior cases, but "overruled" those cases "[t]o the extent . . . the cases . . . indicate[d] that venue is jurisdictional . . . ." Id. The right to be tried in the county in which the offense is alleged to have been committed, then, is a matter of venue.

B. Venue

Because the trial court had jurisdiction over Crocker—subject matter and personal—the issue is whether venue was properly laid in Richland County. As noted, venue principles entitle a criminal defendant "to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment." State v. Evans, 307 S.C. 477, 480, 415 S.E.2d 816, 818 (1992), overruled in part on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The standard for establishing venue is not a stringent one, for "venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient . . . ." State v. Williams, 321 S.C. 327, 334, 468 S.E.2d 626, 630 (1996). "[W]here some acts material to the offense . . . occur in one county, and some in another, venue is proper in either county." Id.

Crocker was charged with trafficking in marijuana in violation of section 44-53-370(e)(1)(a)(1) of the South Carolina Code (Supp. 2000). One manner in which the State may establish the substantive offense of trafficking in marijuana under this section is to prove that the defendant "conspire[d] to sell" ten or more pounds of marijuana. Section 44-53-370(e)(1). Thus, a defendant may be charged with trafficking under a theory of conspiracy.

A conspiracy is defined as the "combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The gravamen of conspiracy is an agreement or combination." State v. Dudley, 354 S.C. 514, 532, 581 S.E.2d 171, 181 (Ct. App. 2003), aff'd as modified, 364 S.C. 578, 614 S.E.2d 623 (2005). An overt act in furtherance of the conspiracy is not necessary to prove the crime. Id.

"To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." Id. (quoting State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001)). Evidence of direct contact or an explicit agreement between the defendants need not be shown. State v. Barroso, 320 S.C. 1, 8, 462 S.E.2d 862, 868 (Ct. App. 1995), rev'd on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997). "It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture." Id. at 8-9, 462 S.E.2d at 868.

The State presented evidence that the agreement between Crocker and the Caseys was formed in Dillon County. Crocker argues that because he challenges the existence of the agreement itself, acts in furtherance of the purported conspiracy should not be considered in laying venue. Crocker misapprehends the interplay between the law of conspiracy and venue. "Venue of a prosecution for conspiracy may be laid in either the county in which the agreement was entered, or in any county in which an overt act was done by any of the conspirators in furtherance of their common design." State v. Wells, 249 S.C. 249, 259, 153 S.E.2d 904, 909 (1967); see also State v. Hightower, 221 S.C. 91, 97-98, 69 S.E.2d 363, 366 (1952) (noting that "[t]he rule is generally recognized that if the overt act is committed within the court's jurisdiction, the place of the conspiracy is immaterial"). The jury, of course, could not have returned a guilty verdict on the conspiracy indictment without finding the formation of the marijuana trafficking agreement in Dillon County on November 20.

The November 21 meeting in Richland County occurred as a result of the agreement—to traffic in marijuana—made the previous day in Dillon County. Moreover, because numerous phone calls were made in Richland County between Crocker and Junior to determine the location for the transfer of the marijuana, and the meeting occurred in Richland County, ample evidence exists to clear the hurdle necessary to support venue in Richland County. See Williams, 321 S.C. at 333-34, 468 S.E.2d at 630 (holding that venue need not be affirmatively proved). Venue was proper in Richland County.

II. Conspiracy to Traffic in Marijuana

Crocker next claims that he was entitled to a directed verdict because the State failed to prove the existence of a conspiracy to traffic in marijuana. Crocker testified that he had no knowledge of and no involvement in the alleged agreement to traffic marijuana. Specifically, Crocker argues that because no marijuana was actually delivered to the Caseys in Richland County, the only inference supported by the evidence is that the perpetrator's intent was to rob the Caseys, not sell them marijuana. Therefore, he asserts no "meeting of the minds" existed to form the agreement necessary for a conspiracy charge. Of Crocker's various assignments of error, this one is the most fundamentally at odds with our standard of review from the denial of a directed verdict motion, and we reject it.

Crocker asserts that no meeting of the minds can be shown because the perpetrator only pretended to set up a drug sale, but intended from the beginning to rob the Caseys. There are, to be sure, situations where a lack of an agreement is manifest and the absence of a conspiracy may be determined as a matter of law. For example, "one cannot enter into a conspiracy with another who only feigns acquiescence in a crime; such as an informer or undercover agent." State v. Holmes, 277 S.C. 232, 233, 285 S.E.2d 353, 354 (1981). Crocker was neither an informer nor an undercover agent.

We additionally note that the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy. There are sound policy reasons for using an objective standard. The drug culture is not known for attracting paragons of virtue, as courts are often presented with "drug

deals gone bad," and in any event, a subjective test favorable to a defendant would run counter to the well-established standard of review for directed verdict motions. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (holding that on a directed verdict motion in a criminal case, the evidence must be viewed in the light most favorable to the State). For purposes of the trial court's resolution of the directed verdict motion, the evidence, when viewed objectively in the proper light, created a jury question as to the existence of the claimed drug conspiracy.[2]

We find direct evidence of the conspiracy in the testimony of Consuelo and Jennings. They understood that the agreement was for the Caseys to buy marijuana from Crocker, with Jennings to receive $500 for brokering the deal. We find circumstantial evidence in the cell phone calls in Richland County and the Caseys traveling to Richland County with $40,000. We find further circumstantial evidence in the items seized from Crocker's home. Because some evidence indicated the agreement was to traffic in marijuana,

---

[2] Crocker's view that the purported drug deal was never intended—and the perpetrator secretly planned all along to rob the Caseys—is interesting in light of his testimony that he had no involvement in these crimes and was not present in Dillon on November 20, 2001. We decline to accept Crocker's self-serving version of the perpetrator's undisclosed secret intentions, especially when on appeal from the denial of a directed verdict we are required to view the evidence in a light most favorable to the State. If Crocker's argument were adopted as framed, we would be creating a complete defense to a conspiracy charge that would entitle a defendant to a directed verdict on the mere self-serving contention that he (or the perpetrator) never intended to complete the drug transaction. A defendant like Crocker may advance such an argument, and a jury may accept the argument that there was no agreement in the first instance and acquit on the conspiracy charge. But Crocker asks us to rule in his favor on this issue as a matter of law. The presence of evidence in support of the indicted conspiracy offense precludes the direction of a verdict. And the law is contrary to Crocker's position, for a conspiracy may be proven by circumstantial evidence and conduct—objectively viewed—of the parties. State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). These are factual matters for a jury, not the court, to settle.

the question of the existence and nature of the agreement was properly a jury question.

We finally note that Crocker never testified that he planned to rob the Caseys at trial, but instead denied any connection with the transaction. Although the evidence indicates that at some point Crocker decided to withdraw from the marijuana conspiracy and to double-cross the Caseys, the crime of conspiracy was complete at the time the agreement was made. See State v. Woods, 189 S.C. 281, 287-88, 1 S.E.2d 190, 193-94 (1939) (stating that a conspirator seeking to withdraw must affirmatively communicate this intention to his associates); see also State v. Gunn, 313 S.C. 124, 135, 437 S.E.2d 75, 81 (1993) (holding that certain defendants withdrew by communicating their intent to do so to all co-conspirators). The record here is devoid of any suggestion that the perpetrator communicated an intent to withdraw from the conspiracy to Jennings or the Caseys. The presence of evidence establishing the existence of the drug conspiracy, coupled with the absence of evidence of withdrawal from the conspiracy, confirms the correctness of the trial court's decision to deny the directed verdict motion.

III. Motion to Suppress

Crocker's final argument is that the trial court erred in denying his motion to suppress the marijuana brick and book on marijuana laws found at his residence. We disagree.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, an appellant must show both error and resulting prejudice. Recco Tape & Label Co., Inc. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994). "[E]vidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Staten, 364 S.C. 7, 36-37, 610 S.E.2d 823, 838 (Ct. App. 2005); Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); Rule 403, SCRE.

Here, the marijuana and the book on marijuana laws were relevant to establish the nature of the conspiracy. As discussed above, the marijuana was in brick form, indicating intended use in volume sale, not personal consumption. The book on marijuana laws also had some probative value as to the trafficking charge. We cannot say the danger of unfair prejudice from the evidence substantially outweighed its probative value. We thus find no abuse of discretion in the admission of this evidence.

CONCLUSION

We reject Crocker's various challenges to the marijuana trafficking conviction and sentence. We hold that all of Crocker's motions attacking jurisdiction and venue were properly denied. We further hold that sufficient evidence existed that Crocker entered into a conspiracy to sell marijuana to survive his motion for a directed verdict on the trafficking charge. Finally, the trial court acted within its discretion in the admission of the challenged evidence.

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.