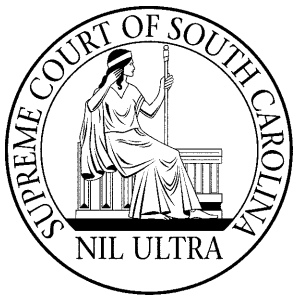

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

December 16, 2002

ADVANCE SHEET NO. 41

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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Whitehead, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Jasper County
L. Henry McKellar, Post-Conviction Judge

Opinion No. 25567
Heard October 22, 2002 - Filed December 16, 2002

REMANDED

Assistant Appellate Defender Aileen Clare, of S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Chief Capital and Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Allen Bullard, Jr., and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for Respondent.

JUSTICE PLEICONES: We ordered the parties to address the issue whether the defense of laches is available to the State where, as here, a post-conviction relief (PCR) applicant has made an Austin[1] claim. We hold that while laches may be pled as an affirmative defense, the State has waived it in this particular action. This matter shall proceed as directed below.

PROCEDURAL HISTORY

In 1992, petitioner's first PCR application was denied after an evidentiary hearing. Appellate review of that order was not sought. Petitioner subsequently filed a second PCR application alleging, among other things, an Austin claim that his first PCR attorney had rendered ineffective assistance of counsel in failing to seek review of the 1992 PCR order. Following an evidentiary hearing on this second PCR application, the circuit court judge found petitioner's testimony credible that his first PCR attorney had failed to perfect certiorari despite petitioner's timely request. Accordingly, the second PCR judge concluded that petitioner was entitled to belated appellate review of the 1992 PCR order.

Petitioner timely sought certiorari to review this second PCR order. See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) (appellate procedure in Austin matter). In the course of preparing the appendix, petitioner's counsel learned that no transcript of the 1992 PCR hearing was available, and petitioned the Court to remand the matter so that the record from that hearing could be reconstructed. See China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968) (trial judge reconstructed record where court reporter records were unavailable). The motion was denied, and the Court instructed the parties to brief "whether, in an instance such as this, a PCR applicant may be barred from seeking Austin review by the doctrine of laches."

ISSUES

1) May laches bar an Austin review?

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

2) May laches properly be raised by the State in this matter?

3) What procedure shall be followed where laches is properly raised as a defense to an Austin claim?

4) How shall the parties in this case proceed?

ANALYSIS

A. Laches

We have held that the PCR statute of limitations found in S. C. Code Ann. §17-27-45(A) (Supp. 2001) does not apply to Austin claims. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999); see also Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (reaffirming Odom). As both petitioner and the State recognize, the doctrine of laches may bar an action such as this where there is no applicable statute of limitations. E.g., Godwin v. Carrigan, 227 S.C. 216, 87 S.E.2d 471 (1955).

Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 256 S.C. 260, 182 S.E.2d 306 (1971). Laches is defined as:

> Neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches.
>
> Hallums v. Hallums, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

We hold that laches may be raised as a defense to an Austin PCR.

B. Applicability in this case

Laches is an affirmative defense that must be pleaded. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. E.g., Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989).

The State neither raised laches in its return to petitioner's second PCR application nor in its motion to dismiss that application. The State has waived its right to raise the affirmative defense of laches in this case. Adams v. B&D, Inc., *supra*.

C. Procedure where laches is raised

In cases where laches is properly raised as a defense to an Austin claim, the PCR court shall hear evidence on this defense at the same time it hears the applicant's Austin claim on the merits. In all such cases, the PCR judge shall make a specific finding on the laches issue as well as a specific finding on the Austin claim. Depending on the nature of these rulings, the following procedures shall be followed if appellate review is sought:

(1) If the PCR judge finds for the applicant on both the Austin claim and the laches defense:
    a) the applicant shall proceed according to the procedure outlined in King v. State, *supra*;
    b) the State may cross-petition for review of the laches ruling;

(2) If the PCR judge finds for the State on both the laches defense and the Austin claim:
    a) petitioner shall file a petition for certiorari addressing both rulings on their merits, and shall include a list of the issues that would be raised were an Austin review granted;

(3) If the PCR judge finds for the State on the laches defense and for petitioner on the Austin claim:
   a) petitioner shall raise the laches issue on the merits in his petition for writ of certiorari, in addition to following the procedure outlined in King v. State, *supra*; and

(4) If the PCR judge finds for petitioner on the laches defense and for the State on the Austin claim;
   a) petitioner shall follow the King v. State procedure;
   b) the State may cross-petition for review of the laches ruling.

D. Procedure in this case

Petitioner sought a remand to reconstruct the record of his first PCR hearing. See China v. Parrott, *supra*. We now grant his motion and remand the case to Jasper County for a hearing to reconstruct the first PCR record. This hearing should be held within 45 days of the date this opinion is filed. If the circuit court judge determines that reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed according to King v. State, *supra*.

CONCLUSION

This matter is remanded to the circuit court with instructions to hold a reconstruction hearing promptly.

REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Petitioner,

v.

Scott Wilson and Sharon Zimmer, Defendants,

of whom Scott Wilson is Respondent.

In the interest of a minor under the age of 18.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Gerald C. Smoak, Jr., Family Court Judge

Opinion No. 25568
Heard June 12, 2002 - Filed December 16, 2002

AFFIRMED AS MODIFIED

Richard B. Ness and Michael C. Tanner, of Early & Ness, of Bamberg, for petitioner.

H. Stanley Feldman, of Charleston, and Kelley M. Braithwaite, of Columbia, for respondent.

JUSTICE BURNETT: The Court granted a writ of certiorari to review the decision of the Court of Appeals in South Carolina Dep't of Social Services v. Wilson, 342 S.C. 242, 536 S.E.2d 392 (Ct. App. 2000). We affirm as modified.

FACTS

Pursuant to South Carolina Code Ann. § 20-7-738 (Supp. 2001), Petitioner South Carolina Department of Social Services (DSS) brought this child abuse and/or neglect proceeding in the interest of a minor under the age of 18 against her divorced parents. DSS alleged the minor was, among other claims, sexually abused by her father Respondent Scott Wilson (Wilson) and sought 1) an intervention hearing by the family court, 2) inclusion of Wilson's name in the Central Registry of Child Abuse and Neglect pursuant to South Carolina Code Ann. § 20-7-650(K) (Supp. 2001), 3) approval of a treatment plan, and 4) any other relief deemed necessary and proper.

At the beginning of the intervention hearing, counsel for DSS moved to allow the seventeen-year-old minor to testify outside the presence of her father. Counsel for DSS stated the minor did not want to testify in her father's presence because the allegations involved sexual abuse. Over Wilson's objection, the family court granted DSS' motion.

While the minor testified in the courtroom, Wilson was sequestered in a conference room. Although he could hear his daughter, Wilson and the minor could not see each other. Wilson's attorney remained in the courtroom. Wilson consulted with his attorney during a two minute

break after the minor's direct examination. Cross-examination followed, again outside Wilson's presence.

Ultimately, the family court issued an order finding "DSS has met their burden of proof for threat of harm for sexual abuse perpetrated by [Wilson]." It concluded Wilson "abused or neglected" the minor as defined in South Carolina Code Ann. § 20-7-490 (Supp. 2001)[1] and ordered his name be entered in the Central Registry of Child Abuse and Neglect. Additionally, the family court ordered the minor's custody remain with her mother, noted Wilson had agreed to forego visitation, and ordered counseling for Wilson and his daughter.[2]

Wilson appealed. The Court of Appeals held "the family court's decision to allow [the minor] to testify outside [Wilson's] presence violated due process because it denied him the right of confrontation." Id. S.C. at 244, S.E.2d at 393. The Court granted DSS' petition for a writ of certiorari.

ISSUES

I. Did the Court of Appeals err by determining Wilson has an interest which is protected by due process?

II. Did the Court of Appeals err by adopting the procedures set forth in State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990), for use in intervention proceedings?

III. Did the Court of Appeals fail to consider the effect of its

---

[1]The statute defines "abused or neglected child" as a child who has been harmed or is threatened with harm. S.C. Code Ann. § 20-7-490(2).

[2]The minor was five years old when her parents divorced. She lived with Wilson since the divorce until four months before the family court hearing. By consent, permanent custody was awarded to the minor's mother before the intervention hearing.

decision on Family Court Rule 22 and South Carolina Code Ann. § 19-1-180 (Supp. 2001)?

IV. Did the Court of Appeals err by holding the minor's testimony outside Wilson's presence was insufficient to comport with due process?

ANALYSIS

INTERVENTION PROCEEDINGS

The General Assembly has enacted a comprehensive scheme to administer child welfare services. S.C. Code Ann. § 20-7-480 *et seq.* (Supp. 2001). The stated purpose of the intake provision is to, among other goals, "establish an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate" and "establish fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members." S.C. Code Ann. § 20-7-480(B)(2) and (4) (Supp. 2001).

DSS has the statutory duty to investigate all reports of suspected child abuse and neglect. S.C. Code Ann. § 20-7-650. After investigation, DSS "may petition the family court for authority to intervene and provide protective services without removal of custody if the department determines by a preponderance of the evidence that the child is an abused or neglected child and that the child cannot be protected from harm without intervention."[3] S.C. Code Ann. § 20-7-738(A).

After the hearing, the family court may order intervention and protective services if it finds the allegations of the petition are supported by a preponderance of the evidence, including a finding that the child is an abused

[3]Other options, including removal of the child from parental custody, are available. S.C. Code Ann. § 20-7-736.

or neglected child as defined in Section 20-7-490 and the child cannot be protected from further harm without intervention. S.C. Code Ann. § 20-7-738(D). If the family court finds there is a preponderance of evidence the defendant physically or sexually abused or willfully or recklessly neglected the child, it must order the person be entered in the Central Registry of Child Abuse and Neglect. S.C. Code Ann. § 20-7-650(K)(1).[4] The statutory proceeding is "a civil action aimed at protection of a child, not a criminal action geared toward punishing a defendant." Beaufort County Dep't of Social Serv. v. Strahan, 310 S.C. 553, 554, 426 S.E.2d 331, 332 (Ct. App. 1992).

DUE PROCESS

The Fourteenth Amendment to the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . .". "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrisey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). The requirements in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur. South Carolina Dep't of Social Serv. v. Beeks, 325 S.C. 243, 481 S.E.2d 703 (1997); Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976) (in determining the process which is due, court will consider the private interest affected by the proceeding, the risk of error created by the chosen procedure, and the countervailing governmental interest supporting challenged procedure). The fundamental requirement of

[4]A person's name remains on the registry for seven years. Information contained in the Central Registry of Child Abuse and Neglect is confidential. However, a lengthy list of exceptions authorizes certain persons access to the information. S.C. Code Ann. § 20-7-690(A). For example, law enforcement agencies and solicitors investigating suspected child abuse may obtain information contained on the registry. S.C. Code Ann. § 20-7-690(B)(4) and (19). In addition, the "perpetrator" may be disclosed "when screening of an individual's background is required by statute or regulation for employment, licensing, or any other purposes. . .". S.C. Code Ann. § 20-7-690(J).

due process is the opportunity to be heard at a meaningful time and in a meaningful manner. South Carolina Dep't of Social Serv. v. Beeks, supra.

"Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.E.2d 287 (1970); see South Carolina Dep't of Social Serv. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confrontation applies in civil context). Confrontation includes the right to be physically present during the presentation of testimony. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). Due process is not violated where a party is not given the opportunity to confront witnesses so long as there has been a meaningful opportunity to be heard. South Carolina Dep't of Social Serv. v. Holden, supra.

I.

DSS claims the Court of Appeals erred by determining Wilson had an interest which was protected by due process because the intervention proceeding did not affect his life, liberty, or property. We disagree.

The Fourteenth Amendment guarantees Wilson a fundamental right to freedom from State interference with his relationship with his daughter. See Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599, 606 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); Greenville County Dep't of Social Serv. v. Bowes, 313 S.C. 188, 194, 437 S.E.2d 107, 111 (1993), quoting Santosky v. Kramer, supra 455 U.S. at 753, 102 S.Ct. at 1394-95, 71 L.Ed.2d at 606 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."). Although DSS' action neither sought to terminate Wilson's parental rights nor remove the minor from Wilson's home, both situations which clearly interfere with a fundamental liberty interest and invoke due

process protections,[5] by initiating this action DSS nonetheless "intervened" in Wilson's relationship with his daughter. Accordingly, the Court of Appeals did not err in finding Wilson has a fundamental liberty interest in his familial relationship which entitles him to some level of due process in an intervention action.

II.

DSS asserts the Court of Appeals erred by adopting the procedures set forth in State v. Murrell, supra, to determine whether the child witness may testify outside the presence of her parent/defendant.

In State v. Murrell, supra, the Court established the circumstances under which and procedures by which a child witness may testify outside the presence of the defendant in a criminal trial via videotaped testimony:

> First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

Id. 302 S.C. at 80-81, 393 S.E.2d at 921.

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[5] Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (because parent has constitutionally protected interest in the relationship with his or her child, state must accord parent a hearing before terminating the relationship); South Carolina Dept. of Social Serv. v. Beeks, supra, (parent's interest in child removal proceeding was "extraordinarily significant" and, therefore, accorded due process protections).

More recently, our Court stated:

> The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant . . . . Denial of face-to-face confrontation is not needed to further state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma.

State v. Bray, 342 S.C. 23, 30, 535 S.E.2d 636, 640 (2000) quoting Maryland v. Craig, 497 U.S. 836, 856-7, 110 S.Ct. 3157, 3169-70, 111 L.Ed.2d 666, 685 (1990).

In State v. Bray, id., the Court indicated its unwillingness to adopt any categorical prerequisites in order for a child witness to testify outside the defendant's presence. The Court nonetheless emphasized the trial judge must make case-specific reasons for use of a procedure which excludes the defendant from being present during the child victim's testimony.

Like criminal matters, an important liberty interest is also at issue in an intervention proceeding. Accordingly, in an intervention proceeding, the child witness' testimony should be given in the presence of the parent/defendant. However, the Court recognizes that in some circumstances it is necessary to protect sensitive witnesses, especially minors, from the trauma of testifying. See State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987) (while it is preferable for child accuser to testify in criminal trial, face-to-face requirement of confrontation may be served by appearance before counsel for cross-examination outside defendant's presence).[6]

[6] As a general principle, where matters affecting a child's welfare are at issue, the best interest of the child is of paramount concern. See Cook v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1978) (custody); Grimsley v. Grimsley, 250 S.C. 389, 158 S.E.2d 197 (1967) (visitation); McCutcheon v. Charleston County Dep't of Social Serv., 302 S.C. 338, 396 S.E.2d 115 (Ct. App. 1990) (adoption)

Consequently, we conclude that while the procedures established in State v. Murrell, supra, are applicable in criminal matters, not intervention hearings, they do provide useful guidance. Accordingly, we adopt a procedure by which the family court may permit a child witness to testify outside the presence of the parent/defendant. The family court must first determine the child would be traumatized by testifying in the presence of her parent/defendant and, therefore, it is necessary for the child to testify outside the presence of the parent/defendant. In determining whether need for this accommodation exists, the family court may consider the child's age, mentality, and any other pertinent information. In making its decision, the family court should consider the testimony of the child and/or other relevant witnesses. We emphasize the family court must make case-specific findings of need for the special accommodation and it must place those particularized findings on the record.

Second, if the family court determines the child witness may testify outside the parent/defendant's presence, the testimony should be given in an environment which indicates the seriousness of the matter. Arrangements should be made for the parent/defendant to hear the child while she testifies. The parent/defendant should have reasonable opportunities to confer with counsel during the child's testimony and the parent/defendant's counsel should have the opportunity to cross-examine the child witness.

We conclude this simple balancing procedure adequately protects the child witness from unnecessary trauma while fairly protecting the parent/defendant's constitutional right to due process, including the right to confrontation.

III.

DSS asserts that requiring the family court to determine whether a child witness may be permitted to testify outside the presence of the parent/defendant will interfere with Family Court Rule 22 and South Carolina Code Ann. § 19-1-180 (Supp. 2001). We disagree.

Rule 22, SCRFC, provides:

> In all matters relating to children, the family court judge shall have the right, within his discretion, to talk with children, individually or together, in private conference. Upon timely request, the court, in its discretion, may permit a guardian ad litem for a child who is being examined, and/or the attorneys representing the parents, if any, to be present during the interview.

Rule 22, SCRFC, provides the family court judge with discretion to speak with the child in private conference. The parent/defendant's due process right to be present when a child *testifies* does not interfere with the application of Rule 22, SCRFC.

South Carolina Code Ann. § 19-1-180 (Supp. 2001) provides for the admission of out-of-court statements made by a child who is less than twelve years old or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of the family court abuse and/or neglect proceeding.[7] Pursuant to the statute,

> (B) An out-of-court statement [attributed to the child] may be admitted if . . .
>
> > 1) the child testifies at the proceeding or testifies by means of video deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement; or
> >
> > (2) (a) the child is found by the court to be unavailable to testify

[7] For various reasons, we question whether Section 19-1-180 applies to the scenario in this action. We nevertheless address the issue due to its importance in family court proceedings.

on any of these grounds:

(i) the child's death;
(ii) the child's physical or mental disability;
(iii) the existence of a privilege involving the child;
(iv) the child's incompetency, including the child's inability to communicate about the offense because of fear;
(v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television[8]; and

(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

Section 19-1-180 (B)(1) does not authorize the exclusion of the parent/defendant at the video deposition, closed circuit television taping, or the proceeding at which the child testifies. In fact, because the statute specifically provides for cross-examination at the time the child testifies, it contemplates the presence of the parent/defendant. See Dep't of Social Serv. v. Wheaton, 323 S.C. 299, 474 S.E.2d 156 (Ct. App. 1995) (Section 19-1-180 provides hearsay statement is admissible if child testifies and submits to cross-examination). Should DSS believe there is a compelling need for the child to testify outside the presence of her parent/defendant, it should file a motion requesting the family court's permission to obtain the child's testimony outside the parent/defendant's presence.

Furthermore, Section 19-1-180 (B)(2) is not affected by our holding in this matter. Section 19-1-180 (B)(2) allows the family court to admit a child's out-of-court statement after deeming the child "unavailable"

[8] See Richland County Dept. of Social Serv. v. Earles, 330 S.C. 24, 496 S.E.2d 864 (1998) (in case applying Section 19-1-180(B)(2)(a)(v), "severe trauma" was met through child's angry and aggressive behavior and extremely severe emotional reaction to discussion of the abuse).

to testify for one of five statutory grounds and determining the statement possesses particularized guarantees of trustworthiness. If the family court makes these determinations, the child does not testify. Our decision in this case applies when a child testifies.

IV.

DSS contends, even though the minor did not testify in the presence of her father, Wilson's due process rights were nonetheless protected by his ability to hear the minor's testimony, his counsel's presence during her testimony, his right to cross-examination, and Wilson's ability to confer with counsel before cross-examination. We disagree.

As discussed above, if the child testifies at an intervention proceeding, the due process right to confrontation requires the child testify in the presence of her parent/defendant unless special circumstances are established. Wilson's ability to hear the minor's testimony, discuss her testimony with counsel, and cross-examine her were insufficient to satisfy due process without the determination the minor would be traumatized by testifying in her father's presence. As conceded by DSS at oral argument, the minor was the key witness against Wilson and she may have been less credible if she had testified in his presence. Because Wilson did not have the opportunity to be heard in a meaningful manner, his due process right was violated. Cf. South Carolina Dep't of Social Serv. v. Holden, supra (where father obtained six month continuance to depose mother but failed to do so, his due process right was not violated through admission of mother's affidavit rather than live testimony in child enforcement proceeding).

The Court of Appeals' opinion is **AFFIRMED AS MODIFIED**.

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

Chief Justice Toal: I respectfully dissent. In my opinion, Wilson's objection to DSS' motion did not preserve the argument he raises on appeal concerning application of the procedures established in *State v. Murrell,* 302 S.C. 77, 393 S.E.2d 919 (1990), to intervention proceedings in family court. Regardless, I believe the examination of Wilson's daughter comported with due process, as she remained in the courtroom setting, Wilson was able to hear the direct and cross-examination of his daughter by live video monitor, and was able to confer with his counsel before cross-examination. *See Murrell,* 302 S.C. at 82, 393 S.E.2d at 922.

As discussed by the majority, in *State v. Murrell,* this Court established procedures by which a child witness could testify outside the presence of the *defendant* in a *criminal* trial. Until the Court of Appeals' decision in this case, these procedures have been limited to *criminal* trials. Although I have no problem with extending the use of these procedures to family court proceedings prospectively, I object to the mandatory, retroactive application of the procedure to this case, in which the family court's failure to make an individualized determination of need was, at most, harmless error.

Wilson has made no showing that he was prejudiced by having his daughter testify outside of his presence, or that DSS could not show the requisite need for his daughter to testify outside of his presence. The family court ensured Wilson's due process rights were protected: Wilson's daughter testified in the courtroom, Wilson was able to hear his daughter testify on direct and cross, and was able to confer with his attorney prior to cross-examination of his daughter. Therefore, I believe his due process rights were not harmed by the court's failure to make an individualized determination of need in this case, and would **REVERSE** the decision of the Court of Appeals on that basis.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Boddie-Noell Properties, Inc., Respondent,

v.

42 Magnolia Partnership and
Robert Mundy, Defendants,

Of whom 42 Magnolia
Partnership is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 25569
Heard October 23, 2002 - Filed December 16, 2002

AFFIRMED AS MODIFIED

Thornwell F. Sowell, of Sowell Gray Stepp & Laffitte, L.L.C., of Columbia, for Petitioner.

Mark W. Hardee, of Lewis, Babcock & Hawkins, L.L.P., of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership, 344 S.C. 474, 544 S.E.2d 279 (Ct. App. 2000). We affirm as modified.

PROCEDURAL BACKGROUND

Respondent Boddie-Noell Properties, Inc. (BNP) sued petitioner 42 Magnolia Partnership (the Partnership) and Robert Mundy[1] for breach of contract, breach of contract accompanied by fraudulent act, and fraud. At the end of trial, the trial court submitted to the jury the fraud claim against both the Partnership and Mundy and the breach of contract claim against the Partnership. The jury returned a verdict in favor of the Partnership and Mundy on the fraud action, but found in favor of BNP on the breach of contract claim. The jury awarded BNP $100,000 in damages. The trial court denied the Partnership's motion for a judgment notwithstanding the verdict (JNOV), and the Partnership appealed. The Court of Appeals affirmed, holding: (1) there was overwhelming evidence of breach of contract; and (2) damages for the breach could be recovered despite BNP's cancellation of the contract. Boddie-Noell, supra.

FACTS[2]

The Partnership developed an apartment complex called 42 Magnolia in Columbia, South Carolina. In February 1994, the Partnership borrowed $6.9 million from the Lincoln National Life Insurance Company (Lincoln) to finance the complex. In June 1994, Southport Financial Asset Management, Inc. (Southport) and the Partnership entered into a purchase and sale agreement where Southport agreed to buy the complex for $10.5 million. Mundy negotiated the purchase agreement for the Partnership, and John Parker represented Southport. As part of the purchase agreement,

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[1] Mundy is the president of Estates, Inc., a real estate development and management company that is also the managing partner of the Partnership.

[2] The reader is directed to the Court of Appeals' opinion for an even more detailed recitation of the facts.

Southport was to assume the $6.9 million mortgage held by Lincoln; the closing date could not be later than September 30, 1994.

In September 1994, BNP entered into a contract with Southport and the Partnership called the "First Amendment to Purchase and Sale Agreement." This contract recognized that Southport assigned its rights under the purchase agreement to BNP and extended the closing date to October 31, 1994.[3] The contract provided that BNP would pay $100,000 as an extension deposit within three days after the contract was executed. The contract further provided that BNP could, at any time prior to 5 p.m. on September 30, "demand and receive a complete refund of the Extension Deposit upon" BNP's failure to receive, *inter alia*, a loan assumption agreement from Lincoln. In the event that BNP exercised this provision, the contract would become "null and void;" the purchase agreement, however, between Southport and the Partnership would remain "in full force and effect."

Scott Wilkerson, BNP's president, explained that BNP would not have been interested in the property without the Lincoln loan because it had such a low interest rate. Therefore, the loan assumption was a crucial part of the transaction. Wilkerson testified that he was told specifically not to contact Lincoln but to go through Mundy. Parker likewise testified that Mundy "had become the mouthpiece of Lincoln." As a result, BNP and Southport were relying on Mundy to give Lincoln the information necessary to get Lincoln's approval of the loan assumption.

Thus, all the information required by Lincoln regarding the loan assumption flowed from the buyer (which initially was Southport and then was BNP), to Mundy, then to Fleet Funding (Lincoln's local servicing agent), and, finally, to Lincoln. Parker testified that after Southport assigned its rights to BNP, Mundy inquired about the "secret profit" Southport was going to make. When Parker refused to tell him, Mundy's behavior became "fishy" according to Parker. Nonetheless, with the September 30 deadline

[3] Southport was going to profit $288,000 from the assignment of the purchase agreement to BNP. BNP also agreed to pay Southport $100,000 because Southport had already paid that amount as earnest money to the Partnership.

approaching, the parties continued to work on obtaining Lincoln's consent to BNP's assumption of the loan.

Although the loan was generally a non-recourse loan, there were certain exceptions or "carve-outs" which were personally guaranteed. For example, Lincoln required individuals to guarantee the loan for environmental liability. Mundy told BNP that Lincoln would not agree to an assumption of the loan without personal guarantors for the environmental carve-outs. However, because BNP is a publicly traded corporation, Wilkerson told Mundy a personal guaranty was not possible. BNP offered to have the company sign for the carve-outs or to provide Lincoln with a copy of its bond in lieu of individual guarantors. Wilkerson related this information to Mundy and was told that Lincoln was being contacted daily. According to Mundy, however, Lincoln insisted on individual signers for the carve-outs.

The deadline of September 30 came and, because Mundy said Lincoln would not approve the loan assumption, BNP reluctantly exercised its option under the contract to cancel. Wilkerson explained he did not want to put $200,000 of his company's money at risk without Lincoln's assurance it would consent to the loan assumption.

Nevertheless, negotiations regarding the sale of the property continued. Wilkerson could not understand why Lincoln was reluctant to approve assumption of the loan since it had closed many other insurance company loans with only the company as a guarantor. After hearing that the Partnership had a meeting on October 5 and had discussed finding another buyer at a higher price, Wilkerson decided to contact Lincoln directly. On October 6, he spoke with Calvin King of Lincoln and told him that the company would sign for the carve-outs. According to Wilkerson, King acted like he had never heard this information before. The very next day, Lincoln approved BNP's assumption of the loan without any individual guarantors.

On October 24, the Partnership's attorney wrote BNP and Southport a letter stating that BNP had terminated the contract and because Southport did not close by September 30, pursuant to the original purchase agreement, the Partnership was entitled to keep Southport's $100,000

deposit. Negotiations apparently continued for a few more months, but neither BNP nor Southport ever purchased 42 Magnolia.

The jury found in favor of BNP on the breach of contract claim and awarded $100,000 in damages. In its JNOV motion, the Partnership argued that because the contract was rescinded, damages could not be recovered for any breach. The trial court denied the motion, and the Court of Appeals affirmed. Boddie-Noell, supra.

ISSUE

> Where BNP exercised its option to cancel under the contract, can BNP recover breach of contract damages?

DISCUSSION

The Partnership argues that because BNP "rescinded" the contract, the contract was rendered "null and void;" therefore, BNP is barred from recovering damages for breach. BNP responds that the contract was not "rescinded," but instead was "canceled" pursuant to the contract terms.

Addressing the Partnership's argument that BNP had rescinded the contract, the Court of Appeals analyzed the issue as one of rescission and stated, in part, as follows:

> Rescission is an abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed. …
>
> When a party elects and is granted rescission as a remedy, he is entitled to be returned to status quo ante. Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract. …

Boddie-Noell, 344 S.C. at 482-83, 544 S.E.2d at 283-84 (internal quotes and citations omitted).

The Court of Appeals recognized, however, that in the instant case, "no issue is presented in regard to rescission being granted by the court **as a remedy**. Rather, this record encapsulates a factual scenario involving **rescission exercised by a party** when faced with a mandatory deadline. The breach of contract and resulting damages occurred **before** the rescission by BNP." Id. at 483, 544 S.E.2d at 284 (emphasis added). Therefore, the Court of Appeals looked to 17A Am.Jur.2d *Contracts* § 603 (1991), which states that:

> [W]hen a contract contains a provision or option giving the right … of cancellation and the contract is canceled in pursuance of the right … given, such cancellation does not extinguish liabilities that have already accrued under the contract, and this is so regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made.

(Footnotes omitted). Accordingly, the Court of Appeals held "BNP's **rescission** did not bar BNP from seeking damages for breach of contract." Boddie-Noell, 344 S.C. at 483-84, 544 S.E.2d at 284 (emphasis added). Furthermore, in the opinion's conclusion section, the Court of Appeals stated: "We find a voluntary **cancellation** of a contract under a **rescission** provision on account of a breach by the other party does not automatically release each party from all obligations under the contract." Id. at 486, 544 S.E.2d at 285.

The Partnership contends that because there was a rescission of the contract – pursuant to the contract's own terms – the contract has become null and void. This, according to the Partnership, precludes BNP from suing for damages. We disagree.

In our opinion, what happened in this case has been mistakenly characterized as a rescission of the contract.[4] As a result, confusion has ensued about whether BNP was entitled to sue for breach of contract damages. While the Court of Appeals discussed general law on "rescission," it nonetheless correctly recognized that the contract was "cancelled" by exercising a provision within the contract itself. Thus, the Court of Appeals' ultimate reliance on the general rule enunciated in 17A Am.Jur.2d *Contracts* § 603 was, in our opinion, appropriate. This particular section applies "when a contract contains a provision or option giving the right or privilege of cancellation" which is precisely the situation in this case.

Accordingly, we affirm the Court of Appeals' holding that BNP could recover for breach of contract despite the fact it exercised its option to cancel under the contract. See 17A Am.Jur.2d *Contracts* § 603 ("such cancellation **does not extinguish liabilities that have already accrued** under the contract, and this is so regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made") (emphasis added); see also 17B C.J.S. *Contracts* § 448 (1999) ("the exercise of a reserved power of termination will usually have prospective operation only, and it will discharge both parties from their contractual duty to perform promises that are still wholly executory, **but will not discharge the duty to make reparation for breaches that have already occurred**.") (emphasis added); 13 CORBIN ON CONTRACTS, § 1266 (Interim ed. 2002) (same). We note there is no unfairness in applying this general rule because it allows recovery for breach of contract after an option to cancel is exercised **irrespective** of who the breaching party is. Id.

Furthermore, to hold otherwise would actually reward the Partnership for Mundy's bad behavior, i.e. the breach itself. As found by the Court of Appeals, BNP presented "overwhelming evidence" that, by withholding information from Lincoln, Mundy breached the express provisions of the purchase agreement as well as the implied covenant of good

[4] Admittedly, "[t]here is a confusion of vocabulary in this area." 2 CORBIN ON CONTRACTS, § 6.10 (Rev. ed. 1995). "The power of 'termination' is often called the power of 'cancellation' or of 'rescission.'" Id.

faith and fair dealing. See Boddie-Noell, 344 S.C. at 484-85, 544 S.E.2d at 284-85. Indeed, we concur with BNP's argument that this case presents a somewhat unusual situation because BNP was essentially tricked into canceling the contract and that it exercised its right to cancel **before it had knowledge of any breach**. Under these peculiar circumstances, to deny BNP a remedy for the Partnership's breach clearly would be inequitable.

CONCLUSION

Because BNP cancelled the contract pursuant to an express right of cancellation within the contract, the Court of Appeals' focus on the law of rescission was misplaced. We affirm, however, the holding that BNP's cancellation did not bar it from recovering damages for the breach that had already occurred.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

David Scott Morgan,

Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3577
Heard November 5, 2002 – Filed December 9, 2002

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

ANDERSON, J.: David Scott Morgan was charged with criminal sexual conduct (CSC) with a minor, a violation of S.C. Code Ann. § 16-3-655(1) (1985). He was convicted and sentenced to fifteen years. Morgan's appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel attached a petition to be relieved from representation, asserting there are no directly appealable issues of arguable merit. Morgan did not file a pro se response. After a thorough review of the record, in accordance with Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), this Court ordered the parties to address whether the trial court erred in denying Morgan's motion for a directed verdict on the charge of CSC with a minor. We affirm.

FACTS/PROCEDURAL BACKGROUND

Detective Stephen Thompson of the Rock Hill Police Department took Morgan's six-year-old daughter (the victim) into emergency protective custody on August 30, 1999. On September 10, 1999, Department of Social Services investigators Tammy Boheler and a Ms. Kline[1] drove the victim to an appointment with a psychologist. While en route, Kline asked the victim a series of questions about "good touching" and "bad touching." During the course of this conversation, the victim denied having ever been touched in her private areas. However, in a subsequent interview with Boheler, the victim complained of sexual assault by Morgan. As a result of the victim's allegations, Boheler contacted Detective Thompson, who met with the victim four days later. At that meeting, the victim again stated Morgan had sexually abused her. The next day, Morgan was arrested.

The York County Grand Jury indicted Morgan for criminal sexual conduct with a minor. The indictment alleged Morgan "perform[ed] cunnilingus upon his daughter" and "rubb[ed] his penis into her vaginal area."

[1] Ms. Kline's first name is not identified within the record.

Morgan exercised his right to a jury trial. The victim testified during the State's case-in-chief. She averred Morgan had "licked" her vagina with his tongue. The victim further related that Morgan had touched her vagina with his hand and his penis, but that Morgan did not "go inside" her with his penis. Nevertheless, the victim declared it had "hurt" when Morgan touched her with his penis. The victim stated Morgan referred to his "private part" as "his dick" and that it hurt when he touched her "private part" with "his dick." A physical examination of the victim revealed no genital abnormalities.

At the conclusion of the State's case, Morgan moved for a directed verdict, contending conviction for CSC with a minor required evidence of intrusion or penetration and that no such evidence existed. The judge denied the motion. After testifying in his own defense, Morgan renewed his directed verdict motion, which the judge denied as to the cunnilingus allegation. However, the judge ruled he would not instruct the jury on the sexual intercourse charge because the State had not demonstrated there had been an "intrusion" by Morgan into the victim's vagina. Thus, the only issue for jury consideration was whether Morgan had committed sexual battery on the victim by performing cunnilingus on her.

The jury found Morgan guilty. The circuit judge sentenced Morgan to fifteen years.

ISSUE

Is the act of cunnilingus statutorily encapsulated as a separate and distinct act constituting sexual battery under S.C. Code Ann. § 16-3-651(h) (1985)?

STANDARD OF REVIEW

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). On appeal from the denial of a

directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, Op. No. 25535 (S.C. Sup. Ct. filed Oct. 14, 2002)(Shearouse Adv. Sh. No. 34 at 32); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

LAW/ANALYSIS

Appellate counsel asserts Morgan was entitled to a directed verdict. We disagree.

I. "CUNNILINGUS" AS A SEPARATE AND DISTINCT ACT OF "SEXUAL BATTERY"

Citing § 16-3-651(h), Morgan's trial counsel argued, at the directed verdict stage, the State was required to prove an "intrusion" into the victim's vagina before obtaining a conviction against Morgan. According to counsel, "[w]hile the statute says that cunnilingus may be a sexual battery, that still does not obviate the need for intrusion." Counsel claimed no such "intrusion" occurred as a result of the cunnilingus being performed upon the victim. We disagree with Morgan's interpretation of § 16-3-651(h).

A. Statutory Authority: Sections 16-3-655(1) & 16-3-651(h)

Section 16-3-655(1) provides "[a] person is guilty of criminal sexual conduct in the first degree if the actor engages in **sexual battery** with [a] victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(1) (1985) (emphasis added). "Sexual battery" is statutorily defined as "sexual intercourse, **cunnilingus**, fellatio, anal intercourse, **or any intrusion, however slight**, of any part of a person's body or of any object **into the genital or anal openings of another person's body**, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (1985) (emphasis added).

B. Statutory Construction

Penal statutes are strictly construed against the State and in favor of the defendant. State v. Fowler, 322 S.C. 157, 470 S.E.2d 393 (Ct. App. 1996). The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000); City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). 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. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The determination of legislative intent is a matter of law. City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

The legislature's intent should be ascertained primarily from the plain language of the statute. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996); City of Sumter Police Dep't, 330 S.C. at 375, 498 S.E.2d at 896. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Hudson, 336 S.C. at 246, 519 S.E.2d at 581.

The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991). Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997); see also Stephen, 324 S.C. at 340, 478 S.E.2d at 77 (statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act). In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d

843 (1992); Hudson, 336 S.C. at 246, 519 S.E.2d at 582. Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). However, 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. Hudson, 336 S.C. at 247, 519 S.E.2d at 582. The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Brassell, 326 S.C. at 561, 486 S.E.2d at 495. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. City of Sumter Police Dep't, 330 S.C. at 376, 498 S.E.2d at 896.

C. Cunnilingus/Sexual Battery

The act of cunnilingus is statutorily enumerated as "sexual battery." The etymological construction of the statute reveals legislative intent to separate acts and conduct. The phrase "or any intrusion" is grammatically located after seriatim presentation of sexual intercourse, cunnilingus, fellatio, and anal intercourse. There is no modifying efficacy of the phrase "or any intrusion" as juxtaposed to "cunnilingus." The word "or" is "**a coordinating conjunction introducing an alternative**." Webster's New Twentieth Century Dictionary 1257 (2d ed. 1983) (emphasis added).

II. INTRUSION OR PENETRATION

Morgan's trial counsel maintained the phrase "or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body," found in § 16-3-651(h), required the State to demonstrate that there was an "intrusion" by Morgan when he performed cunnilingus on the victim. We disagree.

Morgan's counsel cited State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), for the proposition that the State must prove "intrusion" to obtain a conviction for criminal sexual conduct. In Johnson, the Court considered a defendant's touching of two female victims' genital areas with his hand. One victim testified the defendant touched her and it "hurt." There was evidence on physical examination of a vaginal injury. The Court concluded this was sufficient evidence of digital penetration to create a jury question as to whether there was any intrusion. As to a second victim, she declared the defendant touched her and it "made [her] feel bad." There was no evidence of sexual battery upon physical examination. In that case, the Court found the evidence was insufficient to create a jury issue on penetration. The Johnson Court stated: "[a] sexual battery is defined as an 'intrusion, however slight, . . . into the genital or anal openings of another person's body.'" Id. at 84, 512 S.E.2d at 798 (quoting S.C. Code Ann. § 16-3-651(h) (1985)) (ellipsis in original).

In Johnson, the circumstances involved manual genital touching. Johnson is factually and legally distinguishable.

III. OTHER JURISDICTIONS

In State v. Beaulieu, 674 A.2d 377 (R.I. 1996), the Supreme Court of Rhode Island reviewed a statute very similar to our section 16-3-651(h), in which the South Carolina General Assembly defined "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body . . . ." The court, in a superb analysis, explained that "G.L. 1956 § 11-37-1(8) does not require **actual penetration, only sexual penetration**." Id. at 378 (emphasis added).

Explicating the word "cunnilingus" in a medical/legal application, the Beaulieu court continued:

> The young victim in this case testified that the defendant had "licked her vagina." If that act occurred, that was cunnilingus, which does not require penetration. Cunnilingus is medically defined as "sexual stimulation by licking or kissing the vulva or clitoris; a type of oral genital sexual activity." Stedman's Medical Dictionary 345 (5th Unabridged Lawyers' Ed. 1982). The "vulva" is defined as the covering "of the external genitalia of the female." Id. at 1571. All that is required to establish the first-degree sexual offense of cunnilingus is that the cunnilinguist lick or kiss the female genitalia, and penetration of the vagina is not necessary. State v. Cassey, 543 A.2d 670, 679 (R.I. 1988).
>
> From both the statutory and the medical anatomy viewpoint, the act of cunnilingus, which requires the male tongue to reach the female vagina, assumes the necessary penetration or intrusion into the female genitalia. State v. Cassey, 543 A.2d 670 (R.I. 1988). Cunnilingus does not require actual vaginal penetration.

Id. at 378.

The case of Stephan v. State, 810 P.2d 564 (Alaska Ct. App. 1991), elucidated with clarity the sexual act of "cunnilingus" as juxtaposed to "sexual penetration." Stephan instructed:

> The evidence at trial in support of Count VII of the indictment proved that the defendant made oral contact with the victim's vaginal area, but that neither the defendant's mouth nor tongue intruded into the genital opening. The trial court found that such contact, even without actual penetration of the genitals, was sufficient to prove "sexual penetration" through the act of "cunnilingus."

> The defendant now argues that in the absence of actual penetration of the opening, "sexual penetration" is not proven under the statute. . . . .
>
> . . . The trial court instruction stated that **"cunnilingus" and "fellatio" do not require penetration of or by any organ, but that mere contact with the mouth and the genitals was sufficient** (citation omitted).
>
> This court applied the dictionary definition and determined that **the meaning[] of "cunnilingus" . . . do[es] not require penetration by the mouth or tongue, but that contact between the mouth or tongue and the genitals was sufficient.**

Id. at 568 (emphasis added); see also Murray v. State, 770 P.2d 1131 (Alaska 1989) (cunnilingus does not require intrusion into genital area).

Finally, our sister state of North Carolina, in the case of State v. Ludlum, 281 S.E.2d 159 (N.C. 1981), determined:

> Whether penetration is required before cunnilingus, as the word is used in the statute, may occur is a question really of legislative intent. What did the Legislature mean by its use of the term?
>
> In arriving at this intent, we look first to the ordinary meaning of the word. Unless statutory words have acquired some technical meaning they are construed in accordance with their ordinary meaning unless some different meaning is definitely indicated by the context. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970). Courts may and often do consult dictionaries for such meanings. Id.; State v. Martin, 7 N.C. App. 532, 173 S.E.2d 47 (1970).
>
> Cunnilingus is defined by Webster's Third New International Dictionary (Unabridged) (hereinafter Webster's) as "stimulation of the vulva or clitoris with the lips or tongue." The

word is defined by the Oxford English Dictionary to mean, "(o)ral stimulation of the vulva or clitoris." (Supplement, Vol. I, 1972). According to Gray's Anatomy, (28th Edition, 1966) at pp. 1328-1329, the external genital organs of the female consist, in pertinent part, of the mons pubis, labia majora, labia minora, and the clitoris. The outermost of these are the labia majora. Next come the labia minora. The innermost of these anatomical structures is the clitoris. Gray's Anatomy also teaches that the term "vulva, as generally applied, includes all these parts" (in addition to the vestibule of the vagina, the bulb of the vestibule, and the greater vestibule glands). According to Webster's, the term "vulva" means: "1 a: the external parts of the female genital organs, b: the opening between the projecting parts of the external organs."

If the term "vulva" means all of the external female genitals, as the cited authorities say, and the clitoris lies beneath both the outer and inner labia, then in order for the vulva in its entirety or the clitoris to be stimulated, there must be some penetration of at least the outer labia. On the other hand, one may reasonably argue that stimulation of the vulva means stimulation of any part of the vulva, for example, the labia majora, or the mons pubis.

We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties. We conclude, therefore, that the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of any part of a woman's genitalia.

> Our view of the legislative intent is borne out by the context in which the word is used in G.S. 14-27.1(4) and the overall statutory scheme, Article 7A, Chapter 14, by which this kind of act is made punishable. The statute, G.S. 14-27.1(4) defines "sexual act" as "cunnilingus, fellatio, analingus, or anal intercourse . . . (or) the penetration, however slight, by any object into the genital or anal opening of another person's body (except for) accepted medical purposes." If the Legislature intended cunnilingus to require penetration by the lips or tongue, then its inclusion in the statute as a form of sexual act would have been superfluous because, the lips or tongue being themselves objects, the act would have been prohibited under the clause dealing specifically with penetrations.

Id. at 162-63.

Courts from other jurisdictions have rejected arguments concerning the necessity of vaginal penetration in the act of cunnilingus. See Roundtree v. United States, 581 A.2d 315 (D.C. 1990) (to prove cunnilingus has occurred, it is not necessary to establish that either the victim's genitalia penetrated mouth of defendant or that defendant's tongue penetrated victim's genitalia); Partain v. State, 492 A.2d 669 (Md. Ct. Spec. App. 1985) (cunnilingus does not require penetration of the genitals); Commonwealth v. Benoit, 531 N.E.2d 262 (Mass. App. Ct. 1988) (cunnilingus does not require proof of some penetration of the female's genital opening); People v. Lemons, 562 N.W.2d 447 (Mich. 1997) (cunnilingus does not require penetration for the sexual act to be performed); People v. Legg, 494 N.W.2d 797 (Mich. Ct. App. 1992) (act of cunnilingus, by definition, involves act of sexual penetration; defendant's touching with his mouth of the urethral opening, vaginal opening, or labia establish cunnilingus; the labia are included in the "genital openings" of the female); State v. Blom, 358 N.W.2d 63 (Minn. 1984) (penetration of the vagina is not required for the act of cunnilingus to constitute sexual penetration under statute); Johnson v. State, 626 So. 2d 631 (Miss. 1993) (skin to skin contact between person's mouth, lips, or tongue and woman's genital opening, whether by kissing, licking, or sucking, is "sexual penetration" through act of cunnilingus within meaning of sexual battery statute); State v. Brown, 405 N.W.2d 600, 607 (Neb. 1987) (stating

"[w]e need not indulge in an extensive anatomy lesson concerning the clitoris, an organ which realistically defies 'sexual penetration' as envisioned in § 28-318(6). . . . Therefore, once the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia."); State v. Ramirez, 648 N.E.2d 845 (Ohio Ct. App. 1994) (penetration of vagina is not required to complete act of cunnilingus).

The victim testified Morgan "licked" her vagina. This testimony constituted evidence of cunnilingus, a separate and distinct act of sexual battery. Therefore, the trial judge properly permitted the case to go to the jury regarding whether Morgan committed the offense of criminal sexual conduct with a minor.

CONCLUSION

The act of cunnilingus is statutorily enumerated as "sexual battery." The etymological construction of the statute reveals legislative intent to separate acts and conduct. The phrase "or any intrusion" is grammatically located after seriatim presentation of sexual intercourse, cunnilingus, fellatio, and anal intercourse. There is no modifying efficacy of the phrase "or any intrusion" as juxtaposed to "cunnilingus." The word "or" is a coordinating conjunction introducing an alternative.

We hold section 16-3-651 is clear and unambiguous. The term "cunnilingus" identifies a separate and distinct act constituting "sexual battery." "Cunnilingus," in its plain and ordinary meaning, is defined as oral stimulation of the vulva or clitoris with the lips or tongue. "Cunnilingus" is medically and legally accomplished by licking or kissing the vulva or clitoris. It is a type of oral genital sexual activity.

We rule the sexual offense of "cunnilingus" is complete when the cunnilinguist licks or kisses the female genitalia. Penetration of the vagina is **NOT** necessary or required.

Assuming the statute could be construed as requiring "sexual penetration," this Court concludes the very act of "cunnilingus" involves sexual penetration.

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Domitilo H. Lopez,

Appellant.

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

Opinion No. 3578
Heard November 7, 2002 – Filed December 9, 2002

AFFIRMED

Gordon A. Senerius, of Anderson, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Druanne D. White, of Anderson, for Respondent.

ANDERSON, J.: Domitilo H. Lopez appeals a Circuit Court order denying his motion to withdraw his guilty plea on a charge of trafficking cocaine. Lopez argues the Circuit Court erred in finding (1) he entered his guilty plea freely and voluntarily; and (2) the State's admitted violation of his rights under the Vienna Convention on Consular Relations (Treaty) provides no basis for withdrawing his guilty plea. We affirm.

FACTS/PROCEDURAL BACKGROUND

Lopez was a Mexican national residing legally in the United States as a resident alien. In June 1998, law enforcement found approximately 500 grams of cocaine in Lopez's car during a consensual search after he was stopped for speeding. Lopez was indicted for trafficking in cocaine in excess of 500 grams.

With the advice of an assistant public defender, Lopez agreed to plead guilty to the charge in exchange for the State's recommendation that he only receive fourteen years out of a possible twenty-five years. At the guilty plea hearing in January 1999, the judge twice asked Lopez whether he needed an interpreter's assistance in the hearing. Lopez twice responded that he did not need the assistance of an interpreter. The Circuit Court informed Lopez: "If you do not understand during this hearing, if you will stop me and tell me you need an interpreter, we'll be glad to get an interpreter for you." Lopez responded: "All right."

Lopez's counsel informed the Circuit Court that he had "no great trouble" communicating with Lopez over the period of months during which he counseled Lopez. During a litany of questions from the Circuit Court, Lopez's counsel acknowledged that he reviewed the charge of trafficking cocaine and its possible sentences with Lopez, that Lopez understood the charge and possible sentence, and that Lopez wished to plead guilty to the charge of his own free will. The attorney professed his negotiation with the State resulted in a recommendation that Lopez receive a fourteen year sentence in exchange for his plea.

The Circuit Court questioned Lopez regarding his understanding of the charges against him, as well as his constitutional rights, and the plea agreement negotiated between his attorney and the State. Lopez indicated that he was aware of the charges, his rights, and that his guilty plea would result in the loss of his constitutional rights. He agreed his decision to enter the plea agreement did not result from promises or threats, but from his own free will. After entering his guilty plea, Lopez declared he was not under the influence of drugs or alcohol. The Circuit Court asked Lopez: "Do you have any questions about what is going on right now?" Lopez answered: "No."

The State briefly summarized the case's factual background, after which the Circuit Court accepted Lopez's guilty plea. The court found Lopez made the plea "freely and voluntarily with the advice and assistance of his attorney" and that Lopez was "fully aware and cognizant of what has gone on and that he has completely understood [the Circuit Court's] questions of him." Pursuant to the recommendation negotiated between the State and Lopez, the Circuit Court sentenced him to fourteen years in prison, with credit for time served, and imposed a statutorily mandated $100,000 fine.

Lopez subsequently moved to withdraw his guilty plea. In December 1999, the Circuit Court conducted a hearing regarding his motion at which Lopez appeared with private counsel. Lopez conceded the Circuit Court "took all the necessary steps that it could" to ensure he entered his guilty plea willfully and voluntarily. Instead, he argued the State failed to comply with the Treaty's requirement that the State inform Lopez of his right to contact the Mexican Consulate for assistance following his arrest. Lopez claimed that, had he known of his rights, he could have obtained the services of a translator from the Mexican Consulate to help him better understand the "ramifications and consequences" of his decision to enter a guilty plea. Additionally, Lopez stated that the "United States has a woeful record of compliance with [the Treaty]" and that he found no cases in which the United States complied with the Treaty.

The State asserted that it unintentionally failed to advise Lopez of his rights under the Treaty. The Circuit Court denied Lopez's motion.

ISSUES

I. Did the Circuit Court err in denying Lopez's motion to withdraw his guilty plea based on the finding that Lopez freely and voluntarily entered the plea?

II. Did the Circuit Court err in denying Lopez's motion to withdraw his guilty plea based on the State's admitted failure to comply with the Treaty?

STANDARD OF REVIEW

Once a defendant enters a plea of guilty, the decision whether to allow withdrawal of the plea is left to the trial court's sound discretion. State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001).

LAW/ANALYSIS

I. Free and Voluntary Nature of Guilty Plea

Lopez contends his guilty plea was not made freely and voluntarily because language and cultural barriers precluded him from understanding his rights under the American legal system in contrast with his rights under the legal system of his native country, Mexico. We disagree.

As an initial matter, we note this issue is not preserved for appellate review since the alleged error was not raised below. State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (defendant must object at first opportunity to preserve issue for appellate review; alleged error must be raised to and ruled on by trial judge); see also State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982) (absent timely objection at plea proceeding, unknowing

and involuntary nature of guilty plea can be attacked only through the more appropriate channel of post-conviction relief).

A guilty plea must be an informed and intelligent decision. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea is valid if it represents a voluntary and intelligent choice among alternatives available to a defendant. Id. Before accepting a guilty plea, the trial court must give the defendant an adequate warning of the consequences of his plea, which should include an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975). The trial court need not direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each right if the record reveals an affirmative awareness of the consequences of the guilty plea. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976).

Here, the trial court asked Lopez and his first attorney numerous questions to determine whether Lopez freely and voluntarily decided to plead guilty. In fact, Lopez concedes the trial court "took all the necessary steps that it could." We cannot say as a matter of law that the court erred in accepting Lopez's guilty plea.

Moreover, any error committed by the Circuit Court in refusing to allow Lopez to withdraw his guilty plea is harmless. Lopez maintains his guilty plea did not result from an informed and intelligent decision because "cultural, legal, and language barriers" prevented him from understanding his rights and the ramifications of his guilty plea. According to Lopez, these barriers hampered his counsel's efforts to "effectively explain the difference in the rights a criminal defendant enjoys in the United States compared with the rights of the criminal defendant in Mexico." However, the record contains substantial evidence that Lopez consistently rejected the Circuit Court's offers to provide the services of a translator. We conclude that any prejudice Lopez suffered from language impediments resulted from his own willful refusal to avail himself of the services of a translator as repeatedly offered by the Circuit Court. Furthermore, Lopez fails to explain how a comparative knowledge of the legal rights available to him under the legal

systems of the United States and Mexico would have affected his decision to plead guilty. Thus, we find no prejudice to Lopez resulting from any error made by the Circuit Court in accepting his guilty plea.

II. Vienna Convention

Lopez argues the trial court abused its discretion in denying his motion to withdraw his guilty plea where the State admitted its violation of the Treaty. We disagree.

The Vienna Convention is a seventy-nine article, multilateral treaty that governs the establishment of consular relations between nations and defines the functions of a consulate. United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001). Article 36 of the Treaty, entitled "Communication and contact with nationals of the sending State," requires that a foreign national who has been arrested, imprisoned, or taken into custody be notified by the arresting government of his right to contact the local consulate of his nation of which he is a citizen. Id. Article 36 provides, in pertinent part, that if such a foreign national so requests:

> [T]he competent authorities of the receiving State[1] shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the [foreign national] arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of [these] rights.

Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 36(1)(b) (Dec. 24, 1969) 21 U.S.T. 77. Regarding consulates, article 36 states:

[1] In this case, the "receiving State" is the United States and the "sending State" is Mexico.

> [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Id. at art. 36(1)(c). The Supremacy Clause of the United States Constitution provides that treaties into which the United States enters take precedence over any state law, and must be honored by the individual states as required by the treaty. U.S. Const. art. IV.

The State admits it failed to make Lopez aware of his rights under the Treaty. Lopez alleges the State's failure to comply with the notification requirements of the Treaty created a basis for withdrawing his guilty plea. We disagree.

We note this is a question of first impression in South Carolina. In the absence of South Carolina authority on point, we look to other jurisdictions for guidance.

Rights created by international treaties do not create rights equivalent to constitutional rights. See Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (habeas corpus proceeding). Thus, Lopez must establish prejudice to prevail. See United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122 (C.D. Ill. 1999), aff'd, 226 F.3d 616 (7th Cir. 2000); United States v. Hongla-Yamche, 55 F. Supp. 2d 74 (D. Mass. 1999); United States v. Miranda, 65 F. Supp. 2d 1002 (D. Minn. 1999); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250 (D. Utah 1999); cf. Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (habeas corpus proceeding where Court examined whether violation had an effect on the trial); United States v. Ademaj, 170 F.3d 58 (1st Cir. 1999) (direct criminal appeal in which court noted that defendant did not indicate how the consulate could have assisted in his defense or that any rights were infringed by failure to notify the consulate);

Waldron v. INS, 17 F.3d 511 (2d Cir. 1993) (deportation proceeding in which court noted that defendant did not claim or demonstrate prejudice from INS's failure to inform of privilege to communicate with the consulate.)

The only specific prejudice Lopez claims to have suffered is that his consulate might have provided a fluent Spanish interpreter to assist him during the guilty plea hearing. However, Lopez rejected the Circuit Court's offers to provide him with the assistance of a translator and never requested the assistance of a translator.

The record indicates Lopez understood English and was able to communicate with his attorney and the Circuit Court. He answered the Circuit Court's questions, at one point stating, "Yes, I understand." Moreover, Lopez's first attorney indicated he was able to communicate with Lopez during the period of months before his guilty plea hearing.

The record contains ample evidence that if Lopez suffered any prejudice from his failure to have a translator's assistance during his guilty plea hearing, the prejudice resulted from his own actions.

CONCLUSION

We rule that rights created by international treaties do not create rights equivalent to constitutional rights. We hold a violation of rights under the Vienna Convention on Consular Relations (Treaty) provides no basis for withdrawing a free and voluntary plea of guilty. In addition, we find Lopez failed to demonstrate that he suffered any prejudice as the result of the State's failure to make him aware of his rights under the Treaty. Accordingly, the Circuit Court's decision is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Dana Dudley, **Appellant.**

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

Opinion No. 3579
Heard October 9, 2002 – Filed December 9, 2002

AFFIRMED IN PART; REVERSED IN PART

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Druanne D. White, of Anderson, for Respondent.

ANDERSON, J.: Dana Dudley was convicted of trafficking cocaine and conspiracy to traffic cocaine. She was sentenced to concurrent terms of twenty-five years for each charge and fined $12,000. Dudley, a Georgia resident, argues on appeal that (1) South Carolina lacked jurisdiction to prosecute her; and (2) the Circuit Court erred in failing to grant her motion for a directed verdict on the conspiracy charge. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

On September 10, 1997, Officer Matthew Durham of the Anderson County Sheriff's Department noticed a vehicle weaving along Interstate 85 and making an improper lane change. Durham stopped the car and asked driver Earl Hale to exit the vehicle. Hale told Officer Durham that he was returning from a party in Atlanta. Passenger Donald Stokes told Durham that the two were returning from a funeral in Atlanta. After talking with Hale and giving him a warning, Durham asked Hale if he could search the vehicle. During his conversation with Hale, Durham allowed Stokes to exit the car. Hale gave Durham permission to search the vehicle. Deputy James Littleton spoke with Hale and Stokes while Durham proceeded with the search. Durham found in the trunk of the vehicle a paper bag containing a ziplock bag wrapped in a clear plastic bag. The ziplock bag contained cocaine. Hale and Stokes attempted to escape, but they were apprehended by the officers.

Hale and Stokes, who were both from Virginia, gave voluntary statements to the police. In Stokes' statement, he indicated he was acquainted with Dudley, who lived in Atlanta, and that Dudley knew where to obtain large amounts of cocaine. According to the statements of both men, Hale and Stokes traveled to Atlanta, partied at a gentlemen's club, and then contacted Dudley the next morning. Dudley met with the two men, who gave her a total of $5,000 to take to her supplier. Thereafter, Dudley returned to Hale and Stokes' hotel to deliver the cocaine. Hale and Stokes were planning to sell the drugs in their home state of Virginia, but they were stopped in Anderson County, South Carolina, before they could make it home.

Hale and Stokes agreed to assist police officers in prosecuting narcotics cases in South Carolina and Virginia. They began working with the Drug Enforcement Agency. While agents were monitoring and recording the conversations, Stokes made several telephone calls to Dudley to set up another cocaine purchase. Stokes asked Dudley to meet him in South Carolina, but she refused. Dudley finally agreed to meet Stokes in Atlanta. She was arrested in Atlanta and charged for her actions in providing to Stokes and Hale the cocaine, which was confiscated in Anderson County.

Hale and Stokes both testified against Dudley at her trial. Hale stated that Dudley supplied the cocaine to him and he intended to resell it. Stokes declared that Dudley brought them nine ounces of cocaine to their hotel.

After the State presented its case, Dudley moved for a directed verdict. Dudley claimed there was no evidence to establish guilt beyond a reasonable doubt on either indictment. The Circuit Court found there was sufficient evidence of guilt and denied the motion.

LAW/ANALYSIS

I. JURISDICTION

Dudley contends the Circuit Court lacked jurisdiction to prosecute her in South Carolina because she never entered the state. We disagree.

A. Subject Matter Jurisdiction

Dudley never entered South Carolina during her transaction with Hale and Stokes. The indictment charging Dudley with trafficking stated that Dudley "did in Anderson County, South Carolina on or about September 10, 1997 traffic in cocaine by aiding and abetting the bringing into the State of South Carolina 200 or more grams of cocaine." The indictment charging Dudley with conspiracy to traffic cocaine provided that Dudley "did in Anderson County, South Carolina on or about September 10, 1997 to September 15, 1997 conspire with another to knowingly traffic in excess of 200 grams of cocaine."

Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). A Circuit Court acquires subject matter jurisdiction over a criminal matter if: (1) there has been an indictment which sufficiently states the offense; (2) the defendant has waived presentment of the indictment; or (3) the offense is a lesser included offense of the crime charged in the indictment. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Timmons, 349 S.C. 389, 563 S.E.2d 657 (2002); State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).

Questions regarding 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. State v. Brown, Op. No. 3549 (S.C. Ct. App. filed Sept. 9, 2002)(Shearouse Adv. Sh. No. 32 at 52); see also State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time). Furthermore, lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

An indictment is sufficient to confer jurisdiction if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer. Lynch, 344 S.C. at 639, 545 S.E.2d at 513; Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). In South Carolina, an indictment "shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20 (1985). An indictment must: (1) enumerate all the elements of the charged offense, regardless of whether it is a statutory or common law offense; and (2) recite the factual circumstances under which the offense occurred. Id.; State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996). Thus, an indictment passes legal muster if it charges the crime substantially

in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. State v. Reddick, 348 S.C. 631, 560 S.E.2d 441 (Ct. App. 2002).

To convey jurisdiction, an indictment must apprise the defendant of the elements of the offense intended to be charged and inform the defendant of the circumstances he must be prepared to defend. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); see also Browning, 320 S.C. at 368, 465 S.E.2d at 359 (true test of sufficiency of indictment is not whether it could be made more definite and certain, but whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must be prepared to meet). An indictment phrased substantially in the language of the statute which creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981). South Carolina courts have held that the sufficiency of an indictment must be viewed with a practical eye. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Dudley was charged in 1997 with trafficking cocaine pursuant to S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996). This section provides:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> . . . .
>
> ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:

. . . .

> two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars.

(Emphasis added). Dudley was also charged with conspiracy to traffic under section 44-53-370(e)(2)(d).

Dudley does not complain that her indictments were invalid. Here, the indictments gave the time, place, and manner of the events in which Dudley was accused of having participated. The indictments "charge[d] the crime[s] substantially in the language of the . . . statute prohibiting the crime[s]." S.C. Code Ann. § 17-19-20 (1985). The statute is broad and plenary. Additionally, the statute is imbued with specificity in regard to acts and conduct consisting of "otherwise aids, abets, attempts" and "bring into this State." Id.

Moreover, both indictments apprised Dudley of the charges against her and the circumstances she must be prepared to defend. Furthermore, the indictments contained the necessary elements of the offenses charged and informed the Circuit Court of the sentence to pronounce. Subject matter jurisdiction over these crimes attached when valid indictments were issued by the grand jury. Concomitantly, we find the indictments in the present case conferred subject matter jurisdiction on the Circuit Court to try Dudley.

B. Personal Jurisdiction

Although Dudley couched her issue on appeal as a question of subject matter jurisdiction, she actually complains that the Circuit Court lacked personal jurisdiction over her.

Generally, jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction. State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case. See State v. Bethea, 88 S.C. 515, 70 S.E. 11 (1911); see also State v. Castleman, 219 S.C. 136, 138-39, 64 S.E.2d 250, 251 (1951) ("A defendant may, of course, waive his objection to the jurisdiction of the Court over his person . . ."); Town of Ridgeland v. Gens, 83 S.C. 562, 65 S.E. 828 (1909) (the court found no personal jurisdiction problem where the defendant appeared for his trial, was represented by an attorney, and defended his case on the merits).

In the instant case, Dudley appeared at trial and defended her case on the merits. She did not object to personal jurisdiction before the Circuit Court. As she consented to the Circuit Court's exercise of personal jurisdiction over her and did not raise any objection, Dudley failed to preserve this issue for review. See State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002) (issue must be raised to and ruled upon by trial judge to be preserved for appellate review). Because this issue was not preserved, it is improper for this Court to consider it on appeal.

C. Exercise of Extraterritorial Jurisdiction by South Carolina

Facially and legally, this Court has subject matter jurisdiction by virtue of a valid indictment under South Carolina precedent. That conclusion does not end the inquiry. We are required to analyze the exercise of extraterritorial jurisdiction over acts committed outside the state by Dudley.

The general rule is that a state may not prosecute an individual for a crime committed outside its boundaries. In re Vasquez, 705 N.E.2d 606 (Mass. 1999); see also People v. Blume, 505 N.W.2d 843 (Mich. 1993) (general rule is that jurisdiction is proper only over offenses as may be committed within the prosecuting state's jurisdiction). Yet, "blind adherence to a purely territorial concept of jurisdiction inadequately addresses the state's interest in protecting its citizens from the results of criminal activity." Blume, 505 N.W.2d at 845 n.6.

Despite the general rule, a state is not deprived of jurisdiction over every criminal case in which the defendant was not physically present within the state's borders when the crime was committed. Vasquez, 705 N.E.2d at 610. The authority to exercise jurisdiction over acts that occur outside the state's physical borders developed as an exception to the rule against extraterritorial jurisdiction. Blume, 505 N.W.2d at 845. That exception, however, is limited to those acts that are intended to have, and that actually do have, a detrimental effect within the state. Strassheim v. Daily, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735 (1911); Blume, 505 N.W.2d at 845. In defining extraterritorial jurisdiction, the United States Supreme Court held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the defendant] had been present at the effect, if the state should succeed in getting him within its power." Strassheim, 221 U.S. at 285, 31 S.Ct. at 560, 55 L.Ed. at 738; see also State v. Winckler, 260 N.W.2d 356 (S.D. 1977) (state jurisdiction properly lies when acts done outside its jurisdiction are intended to produce and do produce a detrimental effect within that jurisdiction).

The exception to the rule against extraterritorial jurisdiction requires a finding that the defendant intended a detrimental effect to occur in this state. Blume, 505 N.W.2d at 846. The two key elements of the requirement for exercising extraterritorial jurisdiction are specific intent to act and the intent that the harm occur in South Carolina. See Blume, 505 N.W.2d at 846. Some states refer to this exception as the "effects doctrine," which provides that acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect. See Vasquez, 705 N.E.2d at 610. "Although some courts consider the effects doctrine to be an exception to the general rule against extraterritorial jurisdiction, others point out that it is not an exception at all, but a logical application of the general rule in that the crime occurs where the effect is felt, not where the offender is located." Id. at 611 n.4.

The proper analysis to determine whether extraterritorial jurisdiction can be exercised over trafficking in cocaine occurring in another state is to

consider whether the trafficking charge could be established by the evidence. Blume, 505 N.W.2d at 846. Then, the Court must determine whether the trafficking was intended to occur in South Carolina. Id.

A crime is committed where the criminal act takes effect. Simpson v. State, 17 S.E. 984 (Ga. 1893). This is true even though the accused is never actually present within the state's jurisdiction. Winckler, 260 N.W.2d at 360. One who puts in force an agency for the commission of a crime is deemed to have accompanied the agency to the point where it takes effect. Id. The state is then justified in punishing the cause of the harm as if he were in fact present at the effect should the state ever succeed in getting him within its power. Id.

This Court should not approve the exercise of jurisdiction over Dudley unless the State can prove that Dudley intended the crime to occur in South Carolina.

A thorough review of the testimony discloses that Dudley transferred over 200 grams of cocaine to Stokes and Hale that they intended to sell. Dudley played an integral part in providing the cocaine that was brought into South Carolina. Giving efficacy to the law of circumstantial evidence in this state, it is inferable that Stokes and Hale intended to possess or sell the cocaine somewhere. Dudley knew that Stokes and Hale were from Virginia and would most probably travel through South Carolina while in possession of the contraband.

At common law, criminal jurisdiction was based primarily on the territorial principle. Courts have created the doctrine of constructive presence in order to allow a state to punish an offender not located within the state when the offender set in motion the events which culminated in a harm in the prosecuting state. The doctrine is articulated in Simpson v. State, 17 S.E. 984 (Ga. 1893). In Simpson, the defendant, who had been standing in South Carolina at the time he shot at a person in Georgia, was convicted in Georgia. Simpson applied the doctrine of constructive presence by concluding that the act of the accused took effect in Georgia.

The exercise of legislative criminal jurisdiction is recognized by reference to statutory language identifying the proscribed conduct. This state in the statutory verbiage encapsulates an objective territorial effect and proscribes conduct that occurs outside of the state's physical borders.

Here, Dudley demonstrated specific intent to act and the intent that the harm occur in South Carolina.

II. DIRECTED VERDICT

Dudley maintains the Circuit Court erred in failing to grant her directed verdict motion as to the charge of conspiracy to traffic cocaine. She asserts there was no evidence that she conspired **in South Carolina** with Hale and Stokes to traffic cocaine. We agree.

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002); State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct. App. 1996). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). Conversely, a trial court should grant a motion for a directed verdict when the evidence merely raises a suspicion the accused is guilty. Id.; State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

Dudley was charged with conspiracy to traffic cocaine under section 44-53-370(e)(2)(d). That section provides, in pertinent part, that it is unlawful for a person to "conspire[] to sell, manufacture, cultivate, deliver, purchase, or bring into this State" two hundred grams or more of cocaine. Id. (emphasis added).

Conspiracy

The law of conspiracy was articulated in depth in State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). It is necessary and essential to analyze elementally the offense of conspiracy in regard to a decision in the instant case. Condrey elucidates:

> A "conspiracy" is statutorily defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (Supp. 2001). In State v. Fleming, 243 S.C. 265, 133 S.E.2d 800 (1963), the Supreme Court stated the law of conspiracy with exactitude:
>
> > The foregoing statute [the predecessor to § 16-17-410] is declaratory of the common law definition of conspiracy. State v. Jacobs, 238 S.C. 234, 119 S.E.2d 735 [1961], and authorities cited therein. It need not be shown that either the object or the means agreed upon is an indictable offense in order to establish a criminal conspiracy. It is sufficient if the one or the other is unlawful. State v. Davis, 88 S.C. 229, 70 S.E. 811 [1911]. Nor need a formal or express agreement be established. A tacit, mutual understanding, resulting in the willful and intentional adoption of a common design by two or more persons is sufficient, provided the common purpose is to do an unlawful act either as a means or an end. 15 C.J.S. Conspiracy § 40. Although the offense of conspiracy may be complete without proof of overt acts, such "acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that the conspiracy can be proved in no other way." State v. Hightower, 221 S.C. 91, 69 S.E.2d

> 363 [1952]. "To establish sufficiently the existence of the 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. The circumstantial evidence and the conduct of the parties may consist of concert of action." 15 C.J.S. Conspiracy § 93a.

Id. at 274, 133 S.E.2d at 805.

An excellent academic review of the law of conspiracy is articulated in State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993):

> Generally, the agreement, which is the essence of the conspiracy, is proven by various overt acts committed in furtherance of the conspiracy. Therefore, a single conspiracy may be established by completely different aggregations of proof so that there appears to be several conspiracies. United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988). Accordingly, a multi-pronged flexible "totality of the circumstances" test is applied to determine whether there were two conspiracies or merely one. Id. The factors considered are: (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated. Id. This test was adopted by this Court in [State v.] Dasher, [278 S.C. 454, 298 S.E.2d 215 (1982)].

Id. at 319-20, 428 S.E.2d at 873.

> It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). As State v. Miller, 223 S.C. 128, 74 S.E.2d 582 (1953), instructs: "Often proof of conspiracy is necessarily by circumstantial evidence alone." Id. at 133, 74 S.E.2d at 585 (citations omitted). Substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). Under South Carolina law, no overt acts need be shown to establish a conspiracy. The crime consists of the agreement or mutual understanding. Id.
>
> Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). Further, "the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all." Id. at 42, 282 S.E.2d at 842 (citation omitted).

Id. at 191-93, 562 S.E.2d at 323-24.

One of the elements of the conspiracy charge is that Dudley knowingly conspired to bring the cocaine into this state. Because we must strictly construe the statute in the defendant's favor, we must view this element as a necessary part of the crime charged. See Brown v. State, 343 S.C. 342, 348, 540 S.E.2d 846, 849 (2001) ("First and foremost, a penal statute must be construed strictly against the State and in favor of the defendant.").

It is the agreement itself, and not the acts undertaken in furtherance of the agreement, that is the violation of the law. It is not necessary that any

overt acts be committed for a conspiracy to exist. The only evidence in this record is that Dudley, Hale, and Stokes conspired in Georgia. Dudley is being prosecuted and will subsequently be punished for the substantive crime of trafficking in cocaine by aiding and abetting the bringing of the contraband into South Carolina. There is no evidence of any conspiracy occurring in South Carolina. The conspiracy itself is the crime, not the commission of the overt acts. Because the conspiracy was limited to Georgia, Dudley is entitled to a directed verdict on the conspiracy charge.

CONCLUSION

We rule the Circuit Court had subject matter and extraterritorial jurisdiction over Dudley. We affirm the conviction and sentence of Dudley for trafficking in cocaine. We reverse the Circuit Court's denial of Dudley's motion for a directed verdict as to the charge of conspiracy to traffic cocaine into South Carolina.

AFFIRMED IN PART and REVERSED IN PART.

STILWELL, J., concurs.

CONNOR, J., dissents in a separate opinion.

CONNOR, J. (dissenting): I respectfully dissent. Because I believe South Carolina lacked jurisdiction for both of Dudley's offenses, I would vacate her convictions.

I agree with the majority's conclusion that the circuit court had personal jurisdiction over Dudley and was vested with subject matter jurisdiction based on a valid indictment. However, I disagree with the majority's holding that South Carolina could exercise extraterritorial jurisdiction over acts committed by Dudley outside of this State.

Although the majority correctly and thoroughly outlines a discussion of extraterritorial jurisdiction, I believe it errs in its application of this principle to the instant case. In my opinion, there is no evidence that Dudley intended

either crime to take effect in South Carolina. Therefore, based on the following discussion, I would find South Carolina could not exercise jurisdiction over Dudley.[1]

To date, there appears to be only one South Carolina case that addresses the concept of extraterritorial jurisdiction, particularly the "effects doctrine." State v. Morrow, 40 S.C. 221, 18 S.E. 853 (1893). In Morrow, the defendant was indicted pursuant to a South Carolina statute for the offense of procuring medicine for a woman with intent to cause an abortion. The defendant, a resident of Washington, D.C., procured the medication and mailed it to the woman in South Carolina. The woman's use of the medication resulted in an abortion, and ultimately the woman's death. Because the defendant's overt acts took place in Washington, D.C., the Supreme Court considered the question of whether South Carolina had jurisdiction for the charged offense.[2] The Court implicitly recognized the "effects doctrine" stating South Carolina would have jurisdiction over Morrow's acts in the District of Columbia "if the acts there done were intended to take effect in this State, and did there actually take effect . . . ." Id. at 237, 18 S.E. at 859. Although the Court acknowledged that courts of one state could not take jurisdiction of offenses committed in another state, it considered the question of whether Morrow's offense "was, in the eye of the law, committed within the limits of this State." Id. at 241, 18 S.E. at 860. Applying this analysis, the Court concluded Morrow committed an offense within South Carolina, given Morrow's acts "provided the effect thereby intended reached the person for whom it was intended while in this State."

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[1] Given the same reasoning is applicable to both conspiracy to traffic cocaine and the substantive offense of trafficking in cocaine, I do not separately address each offense.

[2] Despite testimony that Morrow had acted and formulated his intent within South Carolina, which the Court believed was sufficient to establish jurisdiction in this State, the Court went on to consider Morrow's specific issue by assuming there were no overt acts in South Carolina. Thus, to the extent the Court's analysis could be construed as dicta, we reference Morrow for the sole purpose of establishing that our Supreme Court has recognized and applied the "effects doctrine."

Id. at 238, 18 S.E. at 859.

Turning to the instant case, the record reveals no evidence that would support South Carolina exercising jurisdiction over Dudley. Both Stokes and Hale were Virginia residents who telephoned Dudley in Georgia. The entire transaction took place in Georgia. In Hale's written statement, he noted he and Stokes left Georgia and "got on 85 north towards [Virginia]." In Stokes's statement, he admitted he normally purchased drugs from someone in Virginia, but contacted Dudley in Atlanta to make a "dope run" because of the "dry spells" in Virginia. Stokes also testified he and Hale left for Virginia the same day they purchased the cocaine in Georgia. Additionally, Hale specifically acknowledged he and Stokes intended to sell the cocaine in Virginia.

Although Dudley may have known that Stokes and Hale would most likely travel through South Carolina on their way back to Virginia, any inference is speculative given there is no evidence of Dudley's knowledge of her co-conspirators' exact route. Furthermore, this inference or Dudley's mere knowledge is not sufficient to establish extraterritorial jurisdiction in this State. The prosecutor must have presented evidence that Dudley entered into the conspiracy and engaged in the sale with the intent to have a detrimental effect within South Carolina. See People v. Blume, 505 N.W.2d 843, 844 (Mich. 1993) ("[K]nowledge alone is not enough to exercise extraterritorial jurisdiction. The prosecutor must present evidence that defendant intended to commit an act *with the intent to have a detrimental effect within this state*.").

The officers' traffic stop and ultimate search of Hale and Stokes's vehicle can only be construed as an intervening act, rather than an overt act necessary to establish extraterritorial jurisdiction. Taking the majority's conclusion to its logical extreme, any state along a co-conspirator's route, however circuitous, would potentially be vested with jurisdiction over acts committed outside its state limits. This analysis would essentially eviscerate the "effects doctrine."

Furthermore, the lack of evidence establishing Dudley's specific intent is also illustrated by the contradictory result reached by the majority. The

majority concludes this State had jurisdiction to prosecute Dudley for both offenses because she "demonstrated a specific intent to act and the intent that the harm occur in South Carolina." However, it reverses the trial judge's denial of Dudley's directed verdict motion as to the charge of conspiracy to traffic cocaine on the ground the conspiracy occurred in Georgia and not South Carolina. It is difficult to reconcile these decisions given both offenses under section 44-53-370(e)(2)(d) require a specific intent to bring cocaine "into this State." S.C. Code Ann. § 44-53-370(e)(2)(d) (Supp. 1996).

In my opinion, the same evidence used in the directed verdict analysis is equally applicable to the extraterritorial jurisdiction analysis. Thus, if the only evidence is that Dudley, Stokes, and Hale conspired in Georgia and there was no overt act in South Carolina pursuant to this conspiracy, then there is no evidence that Dudley intended for her acts to create a detrimental effect within South Carolina. See State v. McAdams, 167 S.C. 405, 166 S.E. 405 (1932) (holding in order for South Carolina to prosecute Georgia defendants for conspiracy entered into in Georgia, but completed in South Carolina, the State was required to prove that some overt act was committed in South Carolina by one of the conspirators pursuant to the conspiracy); cf. Blume, 505 N.W.2d at 848-52 (concluding Michigan did not have extraterritorial jurisdiction to prosecute Florida defendant for conspiracy to deliver or possession with intent to deliver more than 650 grams of cocaine, and aiding and abetting the manufacture or possession with intent to manufacture or deliver more than 650 grams of cocaine, where entire sale to Michigan resident took place in Florida and there was no evidence defendant acted with intent to have a detrimental effect in Michigan).

This conclusion is consistent with other jurisdictions. See, e.g., Commonwealth v. Fafone, 621 N.E.2d 1178 (Mass. 1993) (finding Massachusetts lacked territorial jurisdiction over crime of accessory before the fact of trafficking in cocaine where alleged criminal acts took place in Florida and there was no evidence Florida defendant knew cocaine would be distributed within Massachusetts); Moreno v. Baskerville, 452 S.E.2d 653 (Va. 1995) (concluding Virginia did not have jurisdiction to try defendant for drug trafficking committed in Arizona, even though drugs were eventually sold in Virginia, where sale of drugs in Virginia was not "immediate result" of distribution of drugs in Arizona); cf. State v. Chan, 935 P.2d 850 (Ariz. Ct.

App. 1996) (finding Arizona had jurisdiction to prosecute out-of-state defendants for conspiracy to commit theft and attempted trafficking where in-state co-conspirator's overt actions of driving into and participating in the actual "sale" within the State of Arizona could be imputed to the defendants); Black v. State, 819 So. 2d 208 (Fla. Dist. Ct. App. 2002) (holding Florida had subject matter jurisdiction to try out-of-state defendant for RICO offenses, communications fraud, and conspiracy to commit RICO offenses where out-of-state defendant made telephone sales calls and sent faxes to Florida county for purpose of defrauding county); People v. Govin, 572 N.E.2d 450 (Ill. App. Ct. 1991) (concluding charge of trafficking in cocaine properly brought in Illinois where Florida defendant acted with intent that cocaine be delivered in Illinois, and aided and abetted a transaction through an Illinois confidential informant by which cocaine was caused to be delivered in Illinois); State v. Campa, 2002 WL 471174 (Ohio Ct. App. 2002) (finding, in a drug-trafficking case, an offer to sell drugs over the telephone to a person in Ohio was sufficient to establish jurisdiction in Ohio even if the person offering to sell the drugs was outside the state).

Although I recognize this State's legitimate interest in protecting its citizens from the societal effects of drug trafficking, this alone is not sufficient to confer jurisdiction. I would note the absence of jurisdiction in South Carolina does not preclude the prosecution of Dudley's actions. Under the facts of this case, I believe either Georgia or Virginia would have jurisdiction. Cf. Marquez v. State, 12 P.3d 711 (Wyo. 2000) (holding Wyoming had jurisdiction to prosecute defendant for drug conspiracy where defendant entered into the conspiracy in New Mexico, was arrested pursuant to a traffic violation in Colorado, but intended for the conspiracy to have an effect within the State of Wyoming); see also S.C. Code Ann. § 44-53-410 (2002) ("If a violation of this article [Article 3, Narcotics and Controlled Substances] is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State.").

Based on the foregoing analysis, I would vacate both of Dudley's convictions. Accordingly, it is unnecessary to separately address the merits of Dudley's argument concerning the denial of her motion for a directed verdict.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

FOC Lawshe Limited Partnership, FOC Pee Dee Limited Partnership, and FOC Downtown Limited Partnership, by Fisher Opportunity Corporation, Its General Partner, Appellants/Respondents,

v.

International Paper Company, Respondent/Appellant.

Appeal From Georgetown County
Sidney T. Floyd, Circuit Court Judge

Opinion No. 3580
Heard October 10, 2002 – Filed December 16, 2002

AFFIRMED

E. LeRoy Nettles, Sr. and Marian D. Nettles, of Lake City; for Appellants-Respondents.

Robert L. Widener, of Columbia, and William W. Doar, Jr., of Georgetown; for Respondent-Appellant.

HEARN, C.J.: FOC Lawshe Limited Partnership, et al, (collectively FOC Lawshe), brought suit seeking injunctive relief and damages against International Paper Company. FOC Lawshe appeals the trial judge's denial of its motion for temporary injunctive relief. International Paper appeals the denial of its motion to dismiss pursuant to Rule 12(b)(6), SCRCP. We affirm the denial of both motions.

FACTS

FOC Lawshe is the owner of a plantation consisting of approximately 841 acres. The Black River bounds FOC Lawshe's land to the north. International Paper owns large tracts of land, which surround FOC Lawshe's land to the east, south, and west. FOC Lawshe purchased its land primarily for the purpose of hunting deer and quail. FOC Lawshe invested time and money to improve the land to be used for hunting and to stock the property with wildlife. International Paper primarily utilizes its land for growing timber for use in its paper products. However, International Paper leases its property to several hunt clubs to use for hunting deer. During hunting season, the hunt clubs commonly hunt deer on Wednesdays and Saturdays, the same days that FOC Lawshe hunts deer and quail on its plantation.

The hunt clubs that lease the land from International Paper utilize dogs while they are hunting. The dogs are released to chase deer in the direction of the waiting hunters. FOC Lawshe's hunters are "still" hunters, meaning they set out corn, climb deer stands, and wait for a passing deer. The dogs released by the hunt clubs frequently cross over from International Paper's lands onto FOC Lawshe's property and disrupt the hunting by FOC Lawshe's members and guests. Deer and other wildlife are chased off FOC Lawshe's property toward the hunt clubs on International Paper's land. The dogs have also raided quail pens on FOC Lawshe's property, destroying the pens and the animals.

FOC Lawshe attempted to settle the dispute with the hunt clubs without success. When members of FOC Lawshe contacted individuals at International Paper, they were told that buffer areas were established between the adjoining lands and that the problem would be corrected. However, the use of dogs continued, and the buffer zones proved ineffective. Ruskin Dowdy, an employee of International Paper, told the members of FOC Lawshe the trespassing dogs may be coming from other groups and not the hunt clubs. However, FOC Lawshe's members collected the collars of nine dogs they found on their property, and believe the collars were from dogs owned by members of the hunt clubs that lease International Paper's land.

FOC Lawshe brought suit against International Paper seeking a temporary restraining order and damages. FOC Lawshe based its claim on a theory of nuisance arising from the disruption caused by the trespassing dogs. Neither the hunt clubs nor their members were named as defendants in the action. FOC Lawshe moved for the temporary restraining order when it filed its complaint. International Paper moved to dismiss the action for failing to state a cause of action pursuant to Rule 12(b)(6), SCRCP, and for failing to join a necessary party under Rule 19, SCRCP.

The trial court found FOC Lawshe failed to establish the requirements necessary for issuing a temporary restraining order, and denied its motion. In a separate order, the trial court found the complaint stated a cause of action in nuisance against International Paper and that all necessary parties were joined in the action. Accordingly, the court denied International Paper's motions to dismiss the case.

STANDARD OF REVIEW

A. Motion to Dismiss

A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRCP. "The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint."

Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." Id. All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings. Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

B. Temporary Injunction

The decision to grant or deny temporary injunctive relief is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." Id.

LAW/ANALYSIS

A. Motion to Dismiss

International Paper contends the trial court erred in denying its motion to dismiss pursuant to Rule 12(b)(6), SCRCP.[1] We disagree.

"The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land." Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). Nuisance is a substantial and

[1] We note the denial of a motion to dismiss pursuant to Rule 12(b)(6) is generally not immediately appealable. However, an order that is not directly appealable can be considered if there is an appealable issue before the court. See Cox v. Woodman of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001).

unreasonable interference with the plaintiff's use and enjoyment of his land. Id. "Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" Clark v. Greenville County, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) (citations omitted). In South Carolina, a landlord cannot be held liable for a nuisance arising from the use of his land when the landlord has no control over the property at the time of the alleged nuisance. See id. at 210, 437 S.E.2d at 119. Conversely, if the landowner maintains complete control of the leased property, he may be liable for the nuisance created by the use of the land. See Peden v. Furman University, 155 S.C. 1, 19, 151 S.E. 907, 913 (1930).

In Peden, Furman University leased its baseball field to the Greenville Baseball Association. Frequently, baseballs were batted over the fence surrounding the ball field onto other landowners' property. When a neighboring landowner sued, the University claimed it had no control over the ball field and, therefore, could not be held liable for any nuisance caused by its use. Id. The supreme court found the University had "complete control" of the property under terms of the lease, and concluded the University could be held liable. Id. Furthermore, the court stated, "In order to charge the landlord, the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let . . . ." Id.

International Paper argues it cannot be liable for a nuisance arising from its tenants' use of the land in light of recent South Carolina decisions that hold landlords are not liable for the actions of dogs belonging to their tenants, even in cases where the landlord knew of the danger of a foreseeable harm. See Mitchell v. Bazzle, 304 S.C. 402, 404 S.E.2d 910 (Ct. App. 1991). In Mitchell, this court found that even though the landlord knew of the dog's viciousness, had adequate time to terminate the tenant's lease, and failed to terminate the tenant's lease, the landlord was not liable for the acts of the tenant's dog over, which the landlord had no control. Id., at 405, 404 S.E.2d at 911-12. Also, in Fair v. United States, 334 S.C. 321, 513 S.E.2d 616 (1999), the supreme court held a landlord was not liable to a tenant's invitee for harm caused by the tenant's dog. International Paper

argues that if a landowner cannot be held liable for damages based on the facts in these cases, it would be inappropriate to hold the landowner responsible for the actions of its tenants' dogs in the instant action.

Because Mitchell and Fair were actions in tort based on negligence and premises liability, we find these cases are inapplicable. FOC Lawshe's cause of action is based on nuisance. Negligence is not an element of nuisance, and an action for nuisance may lie even though there has been no negligence on the part of the landlord. See Peden, 155 S.C. at 17-18, 151 S.E. 912 (stating a landlord can be found liable for a nuisance even though he may have exercised reasonable care). Moreover, the mere fact that dogs are the relevant subjects of the alleged nuisance does not in itself place the action in any particular category of cases. We see no rationale for distinguishing a nuisance caused by dogs from a nuisance caused by baseballs where both enter upon a neighbor's land disrupting the use and enjoyment of the property. Accordingly, Peden is controlling. Under Peden, the appropriate analysis is whether International Paper had complete control over the land and whether the alleged nuisance necessarily results from the ordinary use of the lands by International Paper's tenants or for the purpose for which the lands were let. 155 S.C. at 19, 151 S.E. at 913. Applying Peden, we find FOC Lawshe alleged sufficient facts to state a cause of action against International Paper.

In its complaint, FOC Lawshe alleges that despite the leases to the hunt clubs, International Paper reserved the right to and does control the premises and the activities on the land. The complaint alleges that International Paper allows the use of its lands for the type of deer hunting which uses dogs to drive the deer. Moreover, the complaint alleges the dogs used by the hunt clubs will continue to trespass onto FOC Lawshe's lands. FOC Lawshe alleges this continuing trespass prevents it using its property for the purpose for which it was purchased.

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), we look only to the pleadings to determine whether sufficient facts are alleged to establish a cause of action. See Brown, 291 S.C. at 366, 353 S.E.2d at 698. In viewing the face of the complaint, we find the allegation that International

Paper retained control over the property and activities thereon sufficiently satisfies the control element of Peden. 155 S.C. at 19, 151 S.E. at 913. Moreover, the allegation that International Paper permits the use of its lands for the type of deer hunting utilizing dogs and that the dogs will continue to enter onto FOC Lawshe's land satisfies the requirement that the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let. Id. Accordingly, we find the trial judge was correct in denying International Paper's motion to dismiss pursuant to Rule 12(b)(6).

B. Temporary Injunction

FOC Lawshe asserts the trial court erred in denying its motion for a temporary injunction prohibiting International Paper from allowing the use of dogs for hunting on its land. We disagree.

A plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for an injunction while establishing that an injunction is reasonably necessary to protect the legal rights of the plaintiff during the litigation. Transcont'l Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 480-81, 167 S.E.2d 313, 315 (1969). Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. Roach v. Combined Util. Comm'n, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct. App. 1986).

While the harm caused by the dogs invading FOC Lawshe's property is likely to continue, we believe the trial judge did not abuse his discretion in refusing to grant the temporary injunction. A requisite level of control must be shown in order to find an owner liable for the actions of a lessee who causes a nuisance to an adjoining property owner. Peden, 155 S.C at 19, 151 S.E. at 912. In Peden, the lease provided that the landowner maintained control of the maintenance of the baseball park. Moreover, the court found the lease gave the landowner control over the height of the fence, and the landowner could have taken several steps to prevent baseballs from traveling into the neighboring property. Id.

Looking beyond the face of the complaint, we find conflicting evidence in the record concerning whether International Paper maintained complete control over the activities taking place on its lands. FOC Lawshe alleges that International Paper maintained control over its lands and the activities thereon. In support of this allegation, the record indicates that International Paper created buffer zones between its lands and FOC Lawshe's lands in an attempt to limit the trespassing by the dogs. However, FOC Lawshe's own affidavits, as well as one submitted by International Paper, suggest International Paper may not have control over its lessees' hunting activities. The affidavit by Steven Fisher, president of FOC Lawshe, states:

> I am informed and believe that [International Paper] has agreed with the Sand Hill Hunting Club and the Pine Island Hunting Club to allow each club to have the right to hunt deer on certain areas, assigned to each club, on the lands owned by it. Except for the permitted hunting thereon, I am informed and believe that [International Paper] retains the right to and does control the premises and activities thereon.

(emphasis added).

Peden requires a finding of complete control before the landlord may be held liable. At this point in the action, the issue of complete control remains unadjudicated. See County of Richland v. Simpkins, 348 S.C. 664, 670, 560 S.E.2d 902, 905 (Ct. App. 2002). Whether International Paper retained complete control over its lands is a question of fact, and it is for the finder of fact to weigh the conflicting evidence in the record. The fact finder must first decide whether International Paper retained complete control before the court can justify imposing an injunction prohibiting the use of hunting dogs on International Paper's property. Because the issue of control has not been adjudicated, no injunction is needed, at this time, to preserve the status quo. Id. at 671, 560 S.E.2d at 906 (finding the operation of an alleged sexually oriented business could not be enjoined without first adjudicating whether the business had actually violated an ordinance because to do so

would not preserve the parties' positions pending a decision on the merits). Because there is conflicting evidence in the record, the trial court did not abuse its discretion in denying FOC Lawshe's motion for a temporary injunction. Zabinski, 346 S.C. at 601, 553 S.E.2d at 121.

CONCLUSION

We find the trial judge correctly denied International Paper's motion to dismiss pursuant to Rule 12(b)(6), SCRCP. The complaint alleges facts sufficient to support a cause of action in nuisance. Additionally, we find the trial judge did not abuse his discretion in denying FOC Lawshe's motion for a temporary injunction. Accordingly, the decisions of the trial judge are

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.