STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2013-002179

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

FRANKLIN E. DENNISON,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted in Georgetown County for possession with intent to distribute cocaine base, second offense, and attempted taking of a firearm or other weapon from a law enforcement officer. On September 30 through October 3, 2013, Appellant proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Appellant guilty of the cocaine offense and not guilty of the attempted taking offense. Judge Cottingham sentenced Appellant to twenty years. A timely notice of appeal was served and filed.

ARGUMENT

I. The judge acted within his broad discretion in conducting Appellant's trial and his actions did not violate Appellant's right to a fair and impartial trial.

It is well established that the conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a clear prejudicial abuse of discretion. See e.g., State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). A trial judge is vested with broad discretion regarding the scope and propriety of opening statements and closing arguments. See State v. Harris, 275 S.C. 463, 465, 272 S.E.2d 636, 638 (1980) (stating that the scope of opening statements is left to the sound discretion of the trial judge whose decision will stand absent a showing of an abuse of discretion and prejudice to the complaining party); State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed."). Further, a trial court has the duty to exercise reasonable control over the mode and order of the questioning of the witnesses and the presentation of evidence "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Rule 611 (A), SCRE. A trial judge also has "the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court be preserved." State v. DeBerry, 250 S.C. 314, 322, 157 S.E.2d 637, 641 (1967).

Of course, a trial judge must act with absolute impartiality in the performance of his judicial duties. State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (citing Canon 3, CJC, Rule 501, SCACR). Judges are presumed to be unbiased, and that presumption is "more than a pious hope." State v. Langford, 400 S.C. 421, 438, 735 S.E.2d 471, 480 (2012). Simply ruling against a party on evidentiary matters does not constitute prejudicial error. See Liteky v. United States, 510 U.S. 540, 555 (1994) (judicial rulings alone almost never constitute a valid basis for a bias or partiality motion); see also State v. Cooper, 334 S.C. 540, 546-47, 514 S.E.2d 584, 587 (1999). Indeed, "[t]he contention that a judge was biased solely because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it." Langford at 438, 735 S.E.2d at 480.

Appellant argues that the trial judge's conduct during trial violated his right to a fair and impartial trial. Appellant complains about the trial judge's *sua sponte* interruption of defense counsel during opening statement, the trial judge's ruling regarding that the chain of custody documents were business records, and the trial judge's *sua sponte* ruling regarding hearsay during Appellant's testimony, and argues that these comments by the trial judge served to prejudice and influence the jury against Appellant since "the jury may become less than impartial in its efforts to decide a case upon the merits." (Brief of Appellant, p. 2-4). Appellant also complains that the trial court distracted and influenced the jury by repeatedly interrupting defense counsel, exhibiting various mannerisms and expressions to indicate disapproval, treating defense counsel with hostility during a hearing outside the jury's presence, and speaking too loudly with his law clerk during cross-examination. (Brief of Appellant, p. 4-5). Appellant argues "it

may be impossible to un-ring the bell once partiality has been demonstrated." (Brief of Appellant, p. 6). Finally, Appellant contends that the trial court overly restricted defense counsel, thereby prejudicially inhibiting Appellant's defense, by interrupting, responding in an exasperated manner, labeling counsel's motion "absurd and ridiculous," and accusing counsel of attempting to "mistry" the case from the day it started. (Brief of Appellant, p. 6-8).

Appellant's arguments are without merit. In State v. Cooper, 334 S.C. 540, 545-47, 514 S.E.2d 584, 587-88 (1999), the defendant argued that his conviction should be reversed because the trial judge made prejudicial comments toward defense counsel which influenced the verdict reached by the jury. The defendant pointed to approximately twenty instances in the record where the trial judge made prejudicial comments and argued that even comments made outside the presence of the jury had the effect of prohibiting defense counsel from presenting an adequate defense. Id. at 545-46, 514 S.E.2d at 587. In affirming the trial court, the Supreme Court stated as follows:

> We have examined each of the instances about which appellant complains. Each involves a situation in which the trial judge and defense counsel are interacting with regard to evidentiary or testimonial rulings. On each complained of instance, the trial judge has either ruled against counsel, asked counsel to avoid repetitive questions, asked counsel for clarification, or declined a request by defense counsel.
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> It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties. State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994); Canon 3 of Rule 501, SCACR. In Pace, this Court granted a new trial where the trial court commented on defense counsel's age and gender. The Court found that the remarks of the trial court tended to impugn the credibility of trial counsel and to diminish her in the eyes of the jury. Further, in State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976), this Court found reversible error where the trial judge threatened defense counsel with a jail sentence, immediately after which counsel proceeded no further with the arguments. The Court concluded that the remarks tended to impugn the credibility of defense counsel.

> In other instances, this Court has found the trial court's comments to defense counsel to be harmless. See, e.g., State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967) (holding that trial judge's admonition to defense counsel to be brief and stop wasting court's time was not abuse of discretion nor prejudicial to the rights of defendant). Moreover, there is generally no prejudice when the trial court's hostile comments are made outside the jury's presence. See Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992).
>
> In the instant case, the trial judge's comments and rulings were routine. None of the exchanges involved any improper, personal comment about defense counsel, nor did the comments tend to impugn counsel's credibility or diminish him in the eyes of the jury. Many of the comments were innocuous or merely explanatory of the trial court's ruling and were therefore permissible. See State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941) (holding that remarks made by the judge in the course of a trial need not be confined in such narrow limits as to prevent him from stating his reasons for his rulings). Some of the comments were made outside the presence of the jury, and therefore, could not affect the verdict. See Graves, supra. Further, the contention that these comments nonetheless inhibited defense counsel is not supported by the record. In sum, these were instances in which the trial judge made routine rulings against defense counsel over the course of a four-day murder trial. There was no resulting prejudice to Defendant.
>
> We therefore affirm the trial court on this issue. See State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982) (holding that, in general, the conduct of a criminal trial is left largely to the sound discretion of the presiding judge, and the appellate court will not interfere unless it clearly appears that rights of the complaining party were abused or prejudiced in some way).

Id. at 546, 514 S.E.2d at 587-88.

The reasoning of Cooper applies squarely in Appellant's case. As in Cooper, the trial judge's statements and rulings – each viewed in context – were not improper and none of the trial judge's remarks were so prejudicial as to infringe upon Appellant's right to a fair and impartial trial. See also State v. Mitchell, 261 S.C. 452, 460, 200 S.E.2d 448, 452 (1973) ("Appellant argues further that not only were each of the foregoing comments and acts of the trial judge prejudicial, when considered separately, but, when

viewed together, their cumulative effect was to show an antagonistic attitude on the part of the trial judge, rendering it impossible for appellant to receive a fair trial. We have examined each of the cited instances with care and have reached the conclusion that, while some of the statements and questions by the trial judge were unnecessary and should have been omitted, they did not, under this record, result in legal prejudice to appellant."); State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012) ("[A] defendant is entitled to a fair trial, not a perfect one."). In that vein, none of the judge's comments inhibited defense counsel in any way (nor did defense counsel argue this below) and in fact, at the end of trial, the judge commended defense counsel's performance and stated that both of Appellant's "distinguished lawyers" provided him with "an excellent defense." (R. p. 226, lines 1-3; p. 182, line 21; see also p. 181, line 25 – p. 182, line 1). Note also that the judge charged the jury on two occasions that he, as trial judge, was not entitled to any opinion on the facts and that the jury should not regard any judicial rulings or any mannerisms exhibited by the judge as an opinion on the facts. (R. p. 125, lines 7-25; p. 184, lines 8-20). In sum, Appellant's arguments on this issue are without merit and he is not entitled to a new trial on this ground.

Harmless Error

In any event, even assuming the judge erred in some respect, Appellant did not suffer prejudice warranting a new trial. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The materiality and prejudicial character of an error must be determined from its

relationship to the entire case. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In Appellant's case, any error with respect to the judge's comments to defense counsel was harmless beyond a reasonable doubt. Initially, the jury was obviously not irreparably prejudiced against Appellant inasmuch as it found Appellant not guilty of one of the charges. (See R. p. 213, lines 12-17). Moreover – as the trial judge pointed out after trial on at least four different occasions – there was overwhelming evidence of guilt such that any possible prejudice from any of the judge's remarks was inconsequential. (See R. p. 219, lines 7-8; p. 224, lines 9-10; p. 225, lines 5-6; p. 282, lines 8-9). Appellant was caught literally red-handed with a pill bottle containing multiple, individually-wrapped pieces of crack cocaine. (See State's Exhibit # 1, Video; R. p. 85-89). Appellant had a large amount of cash, mostly in ten-dollar bills, on his person and there was no paraphernalia for personal use of crack cocaine in Appellant's car. (R. p. 90, lines 2-6; p. 93, lines 2-12). The total amount of crack cocaine found was approximately 2.7 grams, an amount well over the "permissive inference" amount of one gram. (R. p. 140, line 16 – p. 141, line 8). See S.C. Code § 44-53-375(B) ("Possession of one or more grams of methamphetamine or cocaine base is prima facie evidence of a violation of this subsection."). Although Appellant testified in his defense, his assertion that "there weren't no bottle in my hand" (R. p. 165, lines 15-16) was patently

unbelievable in light of the video evidence. (See State's Exhibit # 1 & #6, Videos; see also R. p. 206-10).

For the reasons discussed above, the State submits that any error with regard to the judge's comments or remarks was harmless beyond a reasonable doubt. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

II. The trial judge properly admitted chain of custody documents and the drugs where the chain of custody logs were admissible as business records through the testimony of the current evidence custodian.

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." U.S. v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don Frank.' "). Notably, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." Hatcher, 392 S.C. at 94, 708 S.E.2d at 754.

On one hand, "the establishment of a strict chain of custody is not required" when a party seeks the admission of non-fungible evidence during trial. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); see State v. Glenn, 328 S.C. 300, 305,

492 S.E.2d 393, 395 (Ct. App. 1997) ("While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is, evidence that is unique and identifiable – the establishment of a strict chain of custody is not required[.]"). Non-fungible evidence is "evidence that is unique and identifiable[.]" Freiburger, 366 S.C. at 134, 620 S.E.2d at 741. "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." Id. at 134, 620 S.E.2d at 741-742.

On the other hand, a complete chain of custody must be established as far as practicable when a party seeks the admission of fungible evidence like drugs or a blood sample during trial. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable."). However, the proof of the chain of custody need not exclude every possibility of tampering. State v. Smith, 326 S.C. 39, 41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."). Instead, in order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between

its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). "[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007). Furthermore, "where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

Appellant argues that the State failed to present a proper foundation for admission of the drugs in this case because the chain of custody forms presented by the State constituted inadmissible hearsay and were not admissible under the business records exception. Consequently, Appellant contends, the chain of custody for the drugs was "incomplete" and the drugs and the analysis of the drugs should not have been admitted. Appellant's arguments are wholly without merit under recent case law from the South Carolina Supreme Court and from this Court.[1]

Here, the chain of custody forms about which Appellant complains – specifically, State's Exhibits 3, 4, and 5 – did not constitute hearsay because the forms were admissible under the business records exception contained in Rule 803(6), SCRE.[2] Rule 803(6) provides:

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[1] Appellant's argument on this issue is arguably abandoned inasmuch as his Brief cites no case law whosoever in support of his position. (See Brief of Appellant, p. 8-10). See, e.g., State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); Mulherin-Howell v. Cobb, 362 S.C. 588, 600-601, 608 S.E.2d 587, 594 (Ct. App. 2005) (where a party fails to cite any supporting authority for its position and all arguments are merely conclusory statements, the issue is deemed abandoned on appeal).

[2] Rule 803(6) was patterned after S.C. Code § 19-5-510, "Uniform Business Records as Evidence Act," which states in pertinent part as follows: "A record of an act, condition or event shall, insofar as relevant,

> **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (emphasis in original).

In State v. Brockmeyer, 406 S.C. 324, 352, 751 S.E.2d 645, 660 (2013), the South Carolina Supreme Court held that chain of custody logs were kept as business records for the purpose of identifying and storing evidentiary items; that the trial judge properly determined that the chain of custody reports fell within the hearsay exception in Rule 803(6), SCRE; and that the evidence custodians' testimony about the chains of custody was admissible. In State v. Taylor, 360 S.C. 18, 21-28, 598 S.E.2d 735, 736-39 (Ct. App. 2004), this Court held that despite the fact that the previous evidence custodian was no longer employed by the Department of Public Safety and did not testify, the evidence established the identity of all the people who handled the evidence and reasonably demonstrated the manner in which it was handled; therefore, the drugs were properly admitted.

In Appellant's case, the chain of custody forms were clearly admissible as business records pursuant to Brockmeyer. Furthermore, Sergeant Walton was the

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be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." See State v. Rice, 375 S.C. 302, 330-31, 652 S.E.2d 409, 423 (Ct. App. 2007), *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011).

custodian of the chain of custody logs and of the drug evidence at the time of trial. He explained how and why the logs were kept and testified they were kept in the normal course of business. (See R. p. 118-27). Under the Taylor case – and under the plain language of Rule 803(6) – the fact that Sergeant Walton did not hold the title of "evidence custodian" at the time the evidence was initially submitted is totally irrelevant. See also Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999) (rejecting a party's argument that records should not have been admitted under the business records exception because the witness who testified about the records was not the custodian "at or near the time" the records were made where the witness testified the records were part of her file that she maintained in the regular course of business and the records conveyed information from persons "with knowledge" at the time the records were created). Therefore, contrary to Appellant's claims, the chain of custody regarding the drugs was not "incomplete" and the drugs were properly admitted. Appellant is not entitled to reversal on this ground.

III. The trial judge correctly denied Appellant's motion to suppress because the traffic stop was proper where Appellant was stopped for speeding and for a seatbelt violation.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's

ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009), *overruled in part on other grounds by* State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. That guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996). The test regarding whether reasonable suspicion exists is an objective assessment of the circumstances, and the

officer's subjective motivations are irrelevant. State v. Provet, 405 S.C. at 108, 747 S.E.2d at 457 (citations omitted). **Critically, however, the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred.** State v. Provet, 391 S.C. 494, 499, 706 S.E.2d 513, 516 (Ct. App. 2011) (stating a police officer's decision to conduct a traffic stop is reasonable under the Fourth Amendment when the officer has probable cause to believe a traffic violation has occurred), *aff'd* 405 S.C. 101, 747 S.E.2d 453 (2013); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (citing Whren v. U.S., 517 U.S. 806, 809–10 (1996)) (same); see also S.C. Code § 56-5-1520 (stating that a person who violates the speed limit is guilty of a misdemeanor and setting forth the penalties); S.C. Code § 56–5–6520 (2006) (providing an occupant of a vehicle travelling on a public street must wear a seatbelt); S.C. Code § 56–5–6540(E) (providing a police officer may stop a vehicle when he has probable cause to believe a seatbelt violation has occurred based on a clear and unobstructed view of someone in the vehicle not wearing a seatbelt).

Appellant argues that there was no reasonable suspicion justifying the traffic stop, contending that the officer's observation of what appeared to be a drug transaction in the middle of the roadway was insufficient. (Brief of Appellant, p. 10-11). However, regardless of the officer's observations regarding a possible drug transaction, it is undisputed that the officer observed two traffic violations – speeding and a seatbelt violation – prior to initiating the stop and he stopped Appellant based upon these violations. (R. p. 10, lines 2-22; p. 83-84; see also State's Exhibit # 1, Video). Whether or not these "minor infractions" generally "give rise to a traffic stop in the ordinary lives of most drivers within this State" (Brief of Appellant, p. 11) is wholly immaterial. See,

e.g., Whren, 517 U.S. at 809-10 (the stop of an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred). The traffic stop in this case was perfectly valid and Appellant is not entitled to reversal on this ground.

IV. Appellant's issue regarding an illegal search and seizure is not preserved for appellate review where the argument below was limited to whether or not there was reasonable suspicion for the traffic stop. Regardless, the subsequent seizure was not illegal where the officer's actions were justified and objectively reasonable under the rapidly-evolving circumstances.

Issue Preservation

Appellant argues that the admission of the drugs was error because the drugs were obtained pursuant to an illegal search and seizure. Specifically, Appellant contends that Officer Tempalsky exceeded the bounds of the traffic stop when he removed the keys from the ignition of Appellant's vehicle and deployed his taser into Appellant "despite never having seen a weapon in the vehicle or being presented with a credible threat from Appellant." (Brief of Appellant, p. 12). Appellant further asserts that such an "extended and violent detention by law enforcement officers constitutes an unreasonable detention for purposes of a roadside traffic stop" and that any evidence gathered as a result should have been suppressed. (Brief of Appellant, p. 12-13). However, below, defense counsel's sole argument was that there was a "lack of reasonable articulable suspicion" for the traffic stop. (R. p. 7, lines 1-3; see also p. 27, line 7 – p. 30, line 9; p. 143, lines 6-13). The trial judge never ruled on the issue of an illegal search and seizure based upon the officer's subsequent actions. (See R. p. 29-30; p. 143). Accordingly, Appellant's current argument regarding an illegal search and seizure, made for the first time on appeal, is clearly unpreserved for review. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State

v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (a party cannot argue one ground for an objection at trial and an alternative ground on appeal); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (a losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred; imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). This issue must be dismissed on error preservation grounds.

Discussion Regarding the Merits

Even assuming the issue was somehow preserved for review, Appellant's arguments are without merit. A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing U.S. v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). "Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333. "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts

to a second detention." Pichardo, 367 S.C. at 98, 623 S.E.2d at 848. However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. "The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure." Provet, 405 S.C. at 109, 747 S.E.2d at 457 (citation omitted).

In this case, Appellant's argument is misplaced where there was no "extension" of the traffic stop beyond its original purpose. The traffic stop had commenced less than two minutes before the situation escalated due to Appellant's repeated non-compliance with the officer's commands to keep his hands in view. The officer barely had a chance to introduce himself and explain the reasons for the stop; obviously, the purpose of the stop had not yet been accomplished. However, because of Appellant's erratic behavior which caused the officer to fear that Appellant had a weapon and was a threat, the officer determined it was necessary to use additional measures to maintain the status quo of the traffic stop. Whether or not the additional measures, including use of the taser, were justified based upon the officer's concern for his safety is an entirely separate matter from an extension of a traffic stop beyond its original purpose. Cf. Provet, 405 S.C. at 111-12, 747 S.E.2d at 459 (case involving whether or not the observation of various factors supported reasonable suspicion of drug trafficking activity so as to render a second detention reasonable).

Regardless, Officer Tempalsky's actions to maintain the status quo during the traffic stop were entirely justified under the circumstances that confronted him, and his actions were objectively reasonable. "The test of reasonableness under the Fourth

Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Heyward v. Christmas, 357 S.C. 202, 208, 593 S.E.2d 141, 144 (2004) (citations omitted).

It is well-established that "[i]nvestigating officers may take such steps as are reasonably necessary to maintain the status quo and to protect their safety during an investigative stop." See, e.g., U.S. v. Taylor, 857 F.2d 210, 213 (4th Cir. 1988) (citation omitted); see also U.S. v. Hensley, 469 U.S. 221, 235 (1985) ("When the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop."). A law enforcement officer is "authorized to use such reasonable force as may be necessary to accomplish the purpose of the limited stop." U.S. v. Haye, 825 F.2d 32, 35 (4th Cir. 1987). "[T]he risk of harm to officers and occupants is minimized 'if the officers routinely exercise unquestioned command of the situation.'" Muehler v. Mena, 544 U.S. 93, 99 (2005) (quoting Michigan v. Summers, 452 U.S. 692, 703 (1981).

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." Terry v. Ohio, 392 U.S. 1, 24 (1968). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Id.

Here, Officer Tempalsky, who had thirty years of experience in law enforcement and significant experience in drug-related crimes, explained that he stopped Appellant for traffic violations after he observed Appellant engaged in what – in his extensive experience – appeared to be a drug transaction in a high-crime area. (R. p. 8-9). When he attempted to pull Appellant's vehicle over using his blue lights, the vehicle did not immediately stop but instead momentarily slowed, then sped up again, then made a right turn and still did not stop. (R. p. 10). The vehicle finally "jerked to a stop" once Officer Tempalsky hit his "air horn." (R. p. 10, lines 19-22). After approaching the driver's side door and making contact with Appellant, Officer Tempalsky discovered that Appellant was the driver and that there were two other individuals in the vehicle. (R. p. 11, lines 2-6). Officer Tempalsky was in the process of explaining the reasons for the stop and asking for Appellant's driver's license when Appellant, who seemed distracted and

extremely nervous, kept "moving about the vehicle." (R. p. 11, lines 7-11; see State's Exhibit # 1, Video). Officer Tempalsky noticed that Appellant had a ten-dollar bill in his lap and a white pill bottle in his right hand. (R. p. 11, lines 11-17). Appellant then suddenly moved his entire body to the right and put his hands down where the officer could not see them. (R. p, 11, lines 17-19). Concerned for his safety because he did not know if Appellant might be reaching for a weapon, Officer Tempalsky repeatedly instructed Appellant to stop moving around the car and to keep his hands in view. (R. p. 11, lines 19-21). Appellant would comply for a moment and then resume his unusual movements. (R. p. 11, lines 21-23). Appellant's movements were becoming "more and more erratic" and "more intent on the area to his right where the vehicle console was."[3] (R. p. 12, lines 6-9). Based upon his observations, Officer Tempalsky became fearful that Appellant was going to draw a weapon on him. (R. p. 12, lines 5-6; p. 85, lines 8-14). He also suspected Appellant might be trying to discard some type of contraband in his hand, since Appellant lied and said he had no pill bottle in his hand despite the fact that the officer had plainly seen it. (R. p. 85, lines 8-19).

At that point, Officer Tempalsky felt that the situation was becoming dangerous and was concerned Appellant was preparing to flee. (R. p. 12, lines 1-2). Tempalsky called for backup at least once and was able to remove the car key from the ignition. (R. p. 11, line 25 – p. 12, line 5). After repeatedly advising Appellant that he needed to see his hands, and after Appellant's repeated non-compliance, Officer Tempalsky drew his taser and told Appellant that if he did not stop reaching down he would be tased. (R. p. 12, line 5 & lines 10-13). Nevertheless, Appellant continued to move around in the car, tried to move the gear shift lever, and then abruptly pushed the car door open into Officer

[3] Razor blades were later found in the center console. (R. p. 98, lines 6-7).

Tempalsky. (R. p. 12, lines 18-21; p. 86, lines 6-8). Officer Tempalsky believed Appellant was either about to attack him or about to flee, so he deployed the taser and it hit Appellant once in the abdomen. (R. p. 12, lines 21-23). Appellant appeared to be fighting the taser and he continued to move toward the center console area of the vehicle. (R. p. 12, line 24 – p. 13, line 2). The officer again told Appellant to stop moving and informed him that failure to comply would result in a second cycle of tasing. (R. p. 13, lines 2-5). Appellant then reached toward the officer in what the officer believed was an attempt to grab the taser, and at that point Officer Tempalsky tased Appellant a second time. (R. p. 13, lines 5-8).

Around this time the front seat passenger exited the vehicle and Appellant then moved over to the passenger side and rolled out of the car, breaking the taser leads. (R. p. 13, lines 11-15). The officer's backup arrived during this time. (R. p. 13, lines 10-11; see State's Exhibit #1 & # 6, Videos). Appellant immediately got up off of the ground and ran down the sidewalk away from the officers. (R. p. 13, lines 15-16). Sergeant Scogin, the first backup officer to arrive, caught up with Appellant and activated his taser, which caused Appellant to fall to the sidewalk. (R. p. 13, lines 16-17; see also p. 145-46). Officer Tempalsky was then able to get on top of Appellant and handcuff him. (R. p. 13, lines 17-18). At this point Tempalsky discovered that the pill bottle was still clenched tightly in Appellant's hand and that it contained several individually-wrapped pieces of crack cocaine. (R. p. 13, lines 19-24; p. 14, lines 7-11). The cap of the pill bottle had fallen to the sidewalk during Appellant's attempt to flee, and the officer discovered wrapped-up crack cocaine jammed into it. (R. p. 89, lines 10-13). After handcuffing Appellant, Officer Tempalsky performed a frisk and discovered a substance

that appeared to be marijuana in Appellant's pocket. (R. p. 89, lines 18-23). He also found a lump of ten-dollar bills totaling $164 in one pocket and a couple hundred dollars in another pocket. (R. p. 90, lines 2-6).

The facts described above – which are clearly shown in the patrol car videos – establish that the officer's actions under the rapidly-evolving circumstances were justifiable and objectively reasonable. The officer's primary concern was his safety and his goal was simply to maintain the status quo of the traffic stop. See Hensley, 469 U.S. at 235. Officer Tempalsky's actions were particularly reasonable in light of the fact that he had just observed Appellant engaged in what appeared to be drug transaction in a high-drug area and considering the "indisputable nexus between drugs and guns." State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006); see also State v. Butler, 353 S.C. 383, 391, 577 S.E.2d 498, 502 (Ct. App. 2003) (pointing out that in the Fourth Circuit, the indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger such that where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a pat-down or frisk of both the driver and the passengers) (citing U.S. v. Sakyi, 160 F.3d 164, 169-70 (4th Cir. 1998)). Because Officer Tempalsky's actions were objectively reasonable under the Fourth Amendment, there was no reason to suppress the drugs on this basis. Appellant's conviction should be affirmed.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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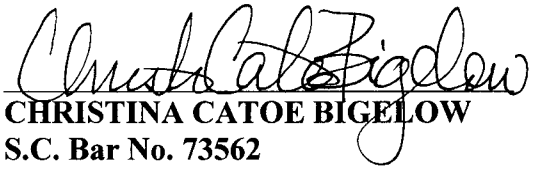

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February 2, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

The Honorable Edward B. Cottingham, Circuit Court Judge

Appellate Case No. 2013-002179

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

FRANKLIN E. DENNISON,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Zachary D. Ellis, Ellis Law, LLC, 111-A E. North Street, Greenville, South Carolina, 29601**, this **2nd** day of **February, 2015.**

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February 2, 2015

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
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RE: State of South Carolina v. Franklin E. Dennison
Appellate Case No. 2013-002179

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Proof of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

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