The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF KENNETH L. EDWARDS, PETITIONER

Petitioner was definitely suspended from the practice of law for eighteen (18) months. In the Matter of Edwards, 371 S.C. 266, 639 S.E.2d 47 (2006). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina

May 22, 2012

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF IVAN JAMES TONEY, PETITIONER

Petitioner was definitely suspended from the practice of law for nine (9) months. In the Matter of Toney, 396 S.C.303, 721 S.E.2d 437 (2012). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina

May 25, 2012

The Supreme Court of South Carolina

In the Matter of Richard J. Breibart, Respondent.

Appellate Case No. 2012-212123

ORDER

By order dated June 1, 2012, the Court placed respondent on interim suspension.

Pursuant to Rule 31, RLDE, Rule 413, SCACR, the Court hereby appoints Mark Steven Barrow, Esquire, to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Barrow shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Barrow may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Mark Steven Barrow, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Mark Steven Barrow, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Barrow's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

June 4, 2012

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
June 6, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Florence County Democratic Party; Sheila C. Gallagher, as Chairwoman of and as a Representative of the Florence County Democratic Party, and in her Individual Capacity as a Registered Voter of Florence County, Plaintiffs,

v.

Florence County Republican Party, William "Bill" Pickle, as Chairman of the Florence County Republican Party and as a Representative of the Florence County Republican Party; Florence County Election Commission, David Alford, as Director of the Florence County Election Commission; South Carolina State Election Commission, Marci Andino, as Executive Director of the South Carolina State Election Commission and as a Representative of the South Carolina Election Commission, Defendants.

Appellate Case No. 2012-211937

Opinion No. 27128
Heard June 4, 2012 – Filed June 5, 2012

JUDGMENT FOR PLAINTIFFS

Melvin Wayne Cockrell, III, and Jason B. Turnblad, of Cockrell Law Firm, P.C., of Chesterfield, for Plaintiffs.

Kevin A. Hall, Karl Smith Bowers, Jr., and M. Todd Carroll, all of Womble Carlyle Sandridge & Rice, LLP,

of Columbia, for Defendants Florence County Republican Party and William "Bill" Pickle; D. Malloy McEachin, Jr., of McEachin & McEachin, P.A., of Florence, for Defendants Florence County Election Commission and David Alford; Mary Elizabeth Crum, Ariail Burnside Kirk, and Amber B. Martella, all of McNair Law Firm, PA, of Columbia, for Defendants South Carolina State Election Commission and Marci Andino.

Robert E. Tyson, Jr., of Sowell Gray Stepp & Lafitte, LLC, of Columbia, for *Amicus Curiae* Frank Waggoner, Scott Estep, Jeff Harris, and Leigh Evans.

William B. von Herrman, of Conway, *pro se*, as *Amicus Curiae.*

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for *Amicus Curiae* Blake A. Hewitt.

PER CURIAM: This is a matter in the Court's original jurisdiction seeking declaratory relief in connection with the alleged improper certification of certain candidates by the Florence County Republican Party (County Republicans) for the June 12, 2012, party primary. Plaintiffs and defendants Florence County Election Commission, David Alford, South Carolina State Election Commission, and Marci Andino contend these candidates were improperly certified because they failed to comply with the requirements for filing a Statement of Economic Interests (SEI) contained in S.C. Code Ann. § 8-13-1356 (Supp. 2011), as interpreted by this Court in *Anderson v. S.C. Election Comm'n*, Op. No. 27120 (S.C. Sup. Ct. filed May 2, 2012). The County Republicans argue the candidates are exempt under § 8-13-1356(A) from the filing requirements of § 8-13-1356(B). We grant declaratory relief to plaintiffs and declare the County Republicans improperly construed the relevant statutory provisions to determine certain candidates were exempt from the requirements of § 8-13-1356(B).

In *Anderson*, this Court held § 8-13-1356 requires non-exempt candidates to file an SEI along with a Statement of Intention of Candidacy (SIC). In response to a request for rehearing and clarification, the Court clarified that filing a paper copy of an SEI simultaneously with the filing of an SIC is the **only** method by which a non-exempt individual can comply with § 8-13-1356.

The County Republicans admit that they certified individuals as candidates who did not comply with the filing requirements of § 8-13-1356(B), as construed by this Court in *Anderson*. However, they contend that, because the term "candidate" is included in the definition of "public official," the candidates who filed their SEIs online prior to filing an SIC with the County Republicans had SEIs on file and were public officials who were exempt under § 8-13-1356(A) from filing paper copies of their SEIs with the political parties as required by § 8-13-1356(B). They argue the reasoning behind the definition of candidate in § 8-13-1300(4), which includes a person exploring whether or not to seek election, is to ban an individual from raising funds during an exploratory period without any of the statutory caps on campaign contributions or disclosure requirements. They contend the candidates they claim are exempt under § 8-13-1356(A) were public officials when they filed their SICs because they were exploring whether to seek office, and they had current SEIs on file at the time they filed their SICs. According to the County Republicans, since *Anderson* only requires paper copies of an SEI to be filed by "non-exempt" individuals, and the individuals who failed to file SEIs along with their SICs were "exempt," *Anderson* does not apply to them.

Section 8-13-1356(A) exempts from its provisions requiring an SEI to be filed simultaneously with an SIC "***a public official*** who has a current disclosure statement on file ***with the appropriate supervisory office*** pursuant to Sections 8-13-1110 or 8-13-1140." (emphasis added). "Public officials" are required, under S.C. Code Ann. §§ 8-13-1110(B) and -1140 (Supp. 2011), to file an SEI with the appropriate supervisory office and update it annually no later than April 15th. Section 8-13-1300(28) defines a public official as "an elected or appointed official of the State, a county, a municipality or a political subdivision thereof, ***including candidates for the office***." (emphasis added). Candidate is defined in § 8-13-1300(4) as "(a) a person who seeks appointment, nomination for election, or election to a statewide or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or

election; (b) a person who is exploring whether or not to seek election at the state or local level; or (c) a person on whose behalf write-in votes are solicited if the person has knowledge of such solicitation."

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). The statutory language must be construed in light of the intended purpose of the statute. *Id*. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something); *Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs*., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

To construe the statutes in the manner suggested by the County Republicans would render § 8-13-1356 meaningless. The section sets forth specific provisions for candidates to file an SEI and is separate and distinct from the general statutory provisions for filing an SEI. *See Spectre, LLC v. S.C. Dep't of Health and Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010) (where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect). Indeed, the provisions of § 8-13-1110 requiring public officials to file an SEI with the appropriate supervisory authority are limited by the phrase "unless otherwise provided." Section 8-13-1356 provides otherwise. As decided by this Court in *Anderson*, § 8-13-1356 requires that a candidate must simultaneously file a copy of an SEI with an SIC unless the candidate already holds the office and has an SEI on file with the appropriate supervisory office. This Court's decision in *Anderson* is clear.

We note the argument that candidates are public officials who are exempt from the filing requirements of 8-13-1356 was not raised in *Anderson*, in the petition for

rehearing in *Anderson*, or in the initial pleadings in this matter. Although the County Republicans were not parties in *Anderson*, they knew that, like all of the political parties in this State, they were bound by the decision in the case, yet they deliberately chose to disregard the Court's clear dictates. In their return to the petition for original jurisdiction, the County Republicans indicated they "carefully followed [the Court's] ruling" in *Anderson*. However, in response to a request by the Court to unequivocally assure the Court the candidates they certified all filed a paper copy of an SEI along with an SIC, the County Republicans admitted they certified candidates who did not do so. The voters in this State rely on the political parties to ensure that only those individuals who are qualified candidates appear on the party primary ballots. We are disappointed in the County Republicans for failing to diligently perform this duty and for presenting an inaccurate statement to this Court concerning their actions in certifying candidates for the party primary.

We reject the interpretation of the statutes urged by the County Republicans and hold those candidates who failed to file a paper copy of an SEI along with an SIC were improperly certified as candidates. We direct the County Republicans to file with this Court, the Florence County Election Commission, and the South Carolina State Election Commission, by 10:00 a.m. on June 6, 2012, a list of only those non-exempt candidates who simultaneously filed an SEI and an SIC with the County Republicans and a sworn statement that all of those candidates were properly certified as defined by the Court in *Anderson* and in this case. If the Florence County Election Commission is able to correct the ballots to remove all improperly certified candidates prior to the party primaries scheduled for June 12, 2012, it shall do so. If this task is not possible, signs shall be prepared and placed in all affected polling places setting forth the names of all improperly certified candidates who appear on the ballots and advising voters that a vote cast for any of the candidates will not be counted. All costs and expenses associated with amendments to the ballots or, if required, preparation and posting of signs shall be borne by the County Republicans. The Florence County Election Commission is directed not to count any votes cast for an improperly certified candidate. In the event an improperly certified candidate is inadvertently left on the ballot after the required revisions, the political parties shall comply with § 8-13-1356(E) and shall not certify the candidate for the general election.

The Florence County Republican Party Primary is the only matter before this Court. Accordingly, we deny the requests by the *Amicus Curiae* to order relief in any other election. However, just as the Florence County political parties were

bound by the decision in *Anderson*, this decision applies to the political party primaries throughout the State. To the extent other county political parties have improperly certified candidates, those parties ignore the decisions of this Court at their own peril.

Finally, while a petition for rehearing is normally due within fifteen days after the filing of an opinion under Rule 221(a), SCACR, because of the urgency of this matter, any petition for rehearing must be received by this Court by 9:00 a.m. on June 6, 2012.

JUDGMENT FOR PLAINTIFF.

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

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, Petitioner,

v.

Jarod Wayne Tapp, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 27129
Heard November 29, 2011 – Filed June 6, 2012

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter III, all of Columbia, and Scarlett Anne Wilson, of Charleston, for Petitioner.

Timothy C. Kulp, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: We granted the State's request for certiorari to review the court of appeals' decision in *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010), which reversed and remanded Respondent's convictions and sentences for a new trial. The court of appeals found that the record in this case was insufficient for determining whether the circuit judge properly considered the reliability of Special Agent Prodan's testimony prior to introducing that testimony to the jury, as required by *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). We agree that our decision in *White*, decided while Respondent's appeal was pending, governs this case, but take this opportunity to clarify *White* in light of the court of appeals' misreading of *White* in the opinion below. Our reading of the record convinces us the circuit judge stopped short of determining the reliability of Prodan's testimony prior to admitting it into evidence, and therefore the trial court erred. However, we find that the error in admitting the testimony at issue was harmless. Accordingly, we reverse the court of appeals and reinstate Respondent's convictions.

FACTS

Jarod Wayne Tapp (Respondent) was convicted of murdering and sexually assaulting his upstairs neighbor, Julie Jett (victim), and of burglarizing her apartment. Respondent received a life sentence for murder and two thirty-year sentences for the first degree criminal sexual conduct and burglary charges.

Victim was a resident of the apartment located above the apartment Respondent shared with his grandmother. Victim was in the process of packing her apartment on the Thursday evening when she was last seen alive. She planned to move in with a friend in Mount Pleasant the following Saturday. Victim and that friend moved several of her belongings to the Mount Pleasant apartment on Thursday evening, and the victim left the friend's apartment shortly after 10:00 p.m. with plans to return to her own apartment.[1] When the victim did not show up for work the next morning, her

[1] A detective testified the drive from the friend's apartment to the victim's apartment, located west of the Ashley River in Charleston, took

coworkers became concerned. They were unable to reach her, and eventually they contacted her father, who convinced the apartment manager to check the victim's apartment. At approximately 5 p.m. on Friday, May 16, 2003, an apartment employee knocked on the victim's door several times, and after hearing no response, used the office's copy of the key to open the door to the victim's apartment.[2] Upon cracking the door open, the employee observed a large amount of blood on the carpet in the living room area. She immediately closed the door and called the police.

The police arrived at approximately 5:30 p.m. and noticed a copious amount of blood on the carpet in the living room area near the television and several areas of blood splatter in the vicinity. Lying on the blood-stained carpet was a broken piece of black plastic that investigators later determined was a broken part of a knife handle. This plastic was an exact match to the knife set the victim owned that was sitting on her kitchen counter.[3] Investigators discovered the victim's nude body in the apartment's hall bathroom, her knees on the floor and her body draped face-first over the edge of the tub, with her buttocks in the air. There was no blood on the carpet of the hallway that led to the bathroom where she was found, although there were several swipes of blood on the hallway walls. Investigators lifted several latent prints from the apartment that matched the victim, but were unable to retrieve any prints from the bathroom. An examination of the doors and windows in the apartment showed no indication of forced entry.

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approximately seventeen minutes, presumably placing the victim back at her apartment at approximately 10:30 p.m.

[2] The employee made no attempt to open the door without the key and therefore could not determine whether the door was locked or unlocked when she arrived.

[3] One knife from the set was unaccounted for. Investigators never found the missing knife.

Victim had approximately 20 stab wounds about the face and neck and died from blood loss and blunt force trauma to the head.[4] She had deep carpet-burn type injuries on the knees and face. A rape kit examination revealed the presence of a protein indicating semen in the victim's vaginal vault and in her rectum. The sperm within the semen that could produce a DNA profile was either of very low quantity or quality. A DNA profile for the semen could not be recovered from the rectal swab, although the DNA expert who conducted the testing found the swab did show that a male protein was present in the rectum. Only a partial DNA profile could be developed from the vaginal swab. After sending the vaginal swab to another laboratory for more sensitive testing, the statistical probability of a randomly selected and unrelated individual not being excluded as the source was one in 17,800 white males. Respondent could not be excluded as the source.[5]

The investigation into Respondent's connection to the victim's murder began after he was identified as a neighbor whom the victim and her roommate found "creepy." The day after the victim's body was discovered, on Saturday, her current roommate called the lead investigator on the case and informed her of an interaction she and the victim had with Respondent that gave her pause.[6] After hearing this, on that same day, the investigator

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[4] Victim's nose and jaw were broken, she had a black eye, and bruising on both ears.

[5] Stated differently, if there was a group of 17,800 white males, 17,799 of them could be excluded as being the source of the DNA. Respondent could not be excluded.

[6] Victim's roommate recounted an occasion one evening when Respondent knocked on their door asking to use their phone because he was locked out of his grandmother's apartment. When the roommate turned to retrieve her phone, which was on a table just inside the doorway, Respondent walked in uninvited. The roommate stated he appeared to be high and smelled of alcohol. Victim was sitting on the couch at the time. Respondent made a quick phone call and left. According to the roommate, she and the victim thought the interaction was strange.

attempted to contact Respondent at his grandmother's apartment, but was informed he was now living with his mother on the Isle of Palms. The investigator was able to make contact with Respondent's mother and arranged for him to come to the station for questioning.[7]

During this initial interview, Respondent recounted the following facts. On the Thursday evening when the victim was last seen alive, Respondent's grandmother picked him up from a grocery store and they returned to their apartment between 8:30 and 9:00 p.m. Shortly after returning to the apartment, Respondent went to the apartment complex pool and, not finding anyone there, walked to a nearby convenience store to buy a thirty-two ounce bottle of malt liquor.[8] Respondent stated he returned to the pool, made several phone calls, and encountered two females who undressed and swam with two other males. He told the investigator that he consumed two 32 ounce malt liquor beverages that evening and did cocaine while at the pool. Respondent stated he stayed at the pool until around midnight when he called his grandmother to open the door for him. Respondent stated that he had only been to the victim's apartment on two occasions—once when prior residents lived there, and once a few months before the murder to use a phone and the bathroom.[9] Respondent gave fingerprint exemplars and DNA samples after making his written statement.

Cell phone records indicate phone calls being made from Respondent's phone every couple of minutes throughout the evening, but with no phone activity between 10:36 p.m. and 12:11 p.m., when a call was placed to his grandmother. A neighbor testified that while sitting on her porch that Thursday evening, she heard a loud thud coming from the vicinity of the victim's apartment between the hours of 9:30 and 11:00 p.m. that evening,

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[7] They originally scheduled a meeting on Monday, but Respondent failed to appear. Respondent came voluntarily to the station on Tuesday, however.

[8] Video footage obtained from the convenience store verifies Respondent purchased the malt liquor at 9:36 p.m.

[9] Victim's roommate testified that Respondent did not use the bathroom during their brief encounter. The bathroom Respondent claims he used was same bathroom where the victim was found dead.

and the light to the victim's apartment was on. The neighbor approached police at the crime scene the next day to inform police of what she heard.

Two witnesses who shared a prison cell with Respondent testified that Respondent claimed he and victim had prior sexual relations. The State presented several witnesses to refute this testimony, including the victim's roommate and her coworker. These witnesses testified that the victim found Respondent "creepy." The coworker recounted a conversation where she asked the victim why she was moving rather than re-signing the lease to her apartment. The coworker testified that the victim stated she would not mind moving to a different apartment within the complex, but that the guy who lived below her "creeped her out," and that "[h]e would say things to her and he bothered her." In that conversation, the coworker testified the victim elaborated on her feelings about Respondent, stating, "[H]e looks like he smells bad."

The prison cellmates of Respondent additionally alleged that Respondent confessed to the murder. The first cellmate stated Respondent told him that he and the victim had a sexual relationship and that Respondent used his key to enter her apartment after a man Respondent was doing cocaine with stated he also had sex with the victim. The witness testified that Respondent stated he "went in to confront the girl about it and he said before he knew it, he had stabbed her over and over and over and over again." After making the above statement, the witness testified Respondent dropped to the floor and begged the other prisoners to keep quiet because his "daddy done spent a lot of money on a lawyer." The second cellmate witness recounted a similar conversation.[10]

At trial, the State proffered Special Agent Prodan pretrial for a determination of whether he could be qualified as an expert in crime scene analysis and victimology, and whether his testimony would be admissible. Agent Prodan testified at this in camera hearing to his education, training, and experiences. Prodan explained his area of expertise:

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[10] Both cellmates wrote letters to the solicitor offering information about Respondent's confession in exchange for lesser prison sentences. Neither cellmate received a lesser sentence for testifying or giving this information, however.

> Crime scene analysis is a technique where a combination of forensics, behavior, victimology, crime scene assessment, crime scene reconstruction are put together to make an assessment of a violent crime to determine everything from victims' risks to becoming a victim of a violent crime, motive of the offender, possible characteristics and traits of the offender, interview and investigational strategies for . . . crime.

Over Respondent's objection, the circuit judge found Prodan was qualified as an expert. The circuit judge subsequently decided to admit Prodan's proffered testimony. The State offered Prodan as their final witness. Respondent did not call any witnesses.

On appeal to the court of appeals, Respondent argued, among other issues, that the circuit court erred in qualifying Prodan as an expert and in admitting his testimony. The court of appeals initially held that the circuit court did not err in finding Prodan was qualified as an expert, but that Prodan's testimony was irrelevant and unduly prejudicial. Therefore, the court reversed his convictions and remanded the case for retrial. The State filed a petition for rehearing, and while that petition was pending, this Court decided *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). In *White*, we held that, pursuant to Rule 702, SCRE, the reliability of non-scientific expert testimony is also part of the gatekeeping function of a trial court and should be determined prior to its admission into evidence. The court of appeals granted the State's petition for rehearing, and after oral arguments, substituted and refiled its opinion. In *State v. Tapp*, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010), the court again reversed Respondent's convictions and remanded after finding that the record in this case was insufficient for determining whether, prior to introducing Prodan's testimony to the jury, the circuit judge properly considered its reliability, as required by *White*. This issue being dispositive of the remaining issues, the court of appeals did not reach Respondent's remaining issues. This case is before this Court upon grant of the State's Petition for Writ of Certiorari.

ISSUES

I. Whether Respondent is procedurally barred from arguing the admission of Prodan's testimony did not comport with *White*

because Respondent did not specifically object to the circuit judge's failure to make a reliability finding prior to admitting Prodan's testimony.

II. Whether the court of appeals erred in finding the record was insufficient for determining whether the circuit court assessed the reliability of Prodan's testimony prior to its admission.

III. Whether any error resulting from the admission of Prodan's testimony was harmless beyond a reasonable doubt.

STANDARD OF REVIEW

The admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion. *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2009).

I. Preservation

The State argues that the court of appeals erroneously granted relief on an issue that was not preserved for appellate review because, although Respondent objected on the ground that Prodan failed to provide the data he relied on, Respondent did not specifically object to the circuit judge's failure to make findings in accord with *White* when it admitted Prodan's testimony. We disagree. While our preservation rules require that objections to the admissibility of evidence be specific, *see State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2010), they most certainly do not require clairvoyance. We find that Respondent's objections to Prodan's testimony were sufficiently timely and specific, and that the judge ruled on those objections accordingly.

After Prodan's voir dire as to his experience and training, Respondent objected to the qualification of Prodan as an expert, arguing:

> We think, Your Honor, that specifically that he is not qualified in this instant [sic] to render testimony as an expert witness that

> would be relevant in the sense that it would even fail under a test of being probative. In effect, and in short, it is simply another person's opinion as opposed to something that would qualify him to give the jury any more ability to render decision in this case as the finer of fact than a lay witness.

The State countered that Prodan was most certainly qualified as an expert in the field based on his in camera testimony and that Respondent's argument about relevance of the testimony went to the weight the jury should accord to Prodan's testimony, not to his qualification as an expert in the field of crime scene analysis or victimology. The circuit judge agreed and found Prodan was qualified as an expert.

Respondent then moved to exclude Prodan's testimony from trial for the following reasons:

> (1) Prodan could not comply with Rule 705, SCRE, in that he could not cite any data upon which he relied;
>
> (2) his testimony was marked by qualifiers such as "suggest, if, maybe, assume, could be, might, you would suspect, would not be unreasonable to suggest, it would appear," rendering his expert opinions "mere speculation [that] serves no purpose . . . [but is] highly prejudicial" and confusing, "injecting issues into this case for which there is no foundation;" and
>
> (3) the basis for Prodan's opinion was merely his opinion.

The State argued that once Prodan was qualified as an expert, the standards under Rules 702 and 703, SCRE, were "pretty low in the State of South Carolina." Finally, the State contended all of Respondent's arguments went to the weight that should be accorded the evidence, not to its admissibility. The court declined to rule at that juncture whether Prodan's testimony would be admitted.

As the trial progressed, the State asked the court to rule whether Prodan would be permitted to testify. Respondent renewed his objections, arguing the testimony was pure speculation, that it was prejudicial, and that it was

confusing. The State responded, again, "Your Honor, I think all of those arguments go to the weight of his testimony, not the admissibility." The circuit judge then responded, "I'm going to allow it." When the State called Prodan as a witness, Respondent renewed his objection, which the circuit judge stated was noted for the record. After qualifying Prodan before the jury, the judge again noted Respondent's previous objection for the record. Therefore, Respondent objected to Prodan's testimony at every available point during the trial and on every ground available to him at the time. After hearing the extensive arguments of Respondent, the circuit judge overruled these objections. Accordingly, we find the issue of the admissibility of Prodan's testimony is sufficiently preserved.

II. Circuit Judge's Admission of Prodan's Testimony

The court of appeals found that "without the guidance of the *White* decision, [Respondent] was not able to sufficiently develop and pursue theories upon which to challenge Prodan's qualifications; nor was the trial court given the opportunity to address the issue." *Tapp*, 387 S.C. at 168–69, 691 S.E.2d at 170. Therefore, the court reversed and remanded the case for a new trial so that the parties could fully develop the issue of reliability in light of *White*. *Id.* at 169, 691 S.E.2d at 170. The State concedes that this Court's ruling in *White* governs the admission of Prodan's testimony, but argues that the record sufficiently demonstrates that the circuit judge vetted Prodan's testimony for its reliability prior to admitting it to the jury. We believe the record supports that the circuit judge admitted Prodan's testimony based merely on a finding he was qualified as an expert, and left the reliability determination for the jury. Therefore, the admission of Prodan's testimony was error.[11]

White involved the admissibility of dog tracking evidence. The court of appeals had decided several cases in which it opined that nonscientific expert testimony, such as that of a dog tracker, was not subject to a reliability determination of the trial judge under Rule 702, SCRE. Rather, any reliability questions of such a nonscientific expert went to the weight a jury should accord the testimony, not to its admissibility. *State v. White*, 372 S.C.

[11] We make no conclusions about the reliability of Prodan's testimony.

364, 642 S.E.2d 607 (Ct. App. 2007); *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). This is the authority the circuit court relied upon to admit Prodan's testimony based merely upon a finding that he was qualified as an expert.

In *White*, this Court clarified that all expert testimony, not just scientific expert testimony, must be vetted for its reliability prior to its admission at trial. The Court concluded:

> The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial judge has vetted the matters of qualification and reliability and admitted the evidence.

White, at 274, 676 S.E.2d at 689.

For the most part, the court of appeals' rendering of *White* was correct. However, the court misstated that *White* created the requirement that "the foundational reliability of nonscientific testimony must be tested *prior* to the qualification of an expert." *Tapp*, 387 S.C. at 166, 691 S.E.2d at 169 (emphasis added). The court additionally stated, "this court is left with no guidance on what test or elements must be satisfied to establish the foundational reliability *necessary to qualify an expert* in the fields of crime scene analysis and victimology." *Id.* at 166–67, 691 S.E.2d at 169. To be clear, the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert.[12] The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony.

In this case, after qualifying Prodan as an expert, but before admitting his testimony to the jury, Respondent argued that the substance of Prodan's testimony was "entirely personal" and that Prodan should have produced a written report of his findings and the data upon which he relied so that Respondent could verify Prodan's conclusions with other experts in the field.

[12] The dog tracker's qualifications under Rule 702, SCRE, were conceded in *White*.

After making this argument, the State countered, "Your Honor, I think all of those arguments go to the weight of his testimony, not the admissibility." The circuit judge then stated, "I'm going to allow it." Under *White*, after qualifying Prodan as an expert, the circuit judge should have then evaluated the substance of Prodan's testimony to determine if it was reliable, as required by Rule 702, SCRE. However, the law at the time of this trial instructed that the reliability of nonscientific expert testimony was a determination to be made by the jury. Accordingly, it appears from the record that the circuit judge admitted Prodan's testimony after making the initial determination of his expertise. Although admitting Prodan's testimony before vetting it for its reliability was error, we find that error to be harmless.

III. Harmless Error

The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967), *overruled on other grounds by Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001)). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Id.* (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict. *See State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained). In finding Respondent guilty, the jury made a number of factual determinations, including the probability that the DNA found inside the victim belonged to Respondent, the plausibility that the DNA was there by innocent means, and the credibility of the cellmate witness's testimony. Therefore, our analysis focuses on whether

Prodan's testimony lent more credence to the DNA results, its manner of deposit, or the validity of the cellmate witness's testimony.

In relevant part, Prodan testified that because there was no sign of struggle at the doorway, there was no sign of forced entry, and the victim habitually locked her door, the assailant may have entered the apartment either because the victim recognized him or because the assailant created a ruse that caused the victim to invite him in. Prodan recognized the possibility that the victim unintentionally left the door unlocked, allowing the assailant to walk in. Additionally, because of the victim's relatively low risk for encountering a violent crime, he believed she was likely targeted for sexual assault. Prodan stated his belief that this was a sexually motivated crime because the victim was found nude with multiple stab wounds and blunt force trauma, and semen was found inside the victim. He opined that because it appears the victim was stabbed with a knife that belonged to her and was sitting on her kitchen counter, the assailant most likely did not come to the apartment for the purpose of killing the victim, although he may have had the intention to sexually assault her. Finally, Prodan noted that the lack of blood in the hallway leading to the bathroom where the victim was found indicated the victim was carried from the struggle scene in the living room to the bathroom, and then intentionally "posed" in a sexually suggestive manner. He opined that the assailant may have posed her this way to demonstrate a feeling of contempt or to degrade the victim.

Beyond a reasonable doubt, we believe that Prodan's testimony could not have contributed to the verdict obtained. Prodan provided lengthy testimony about the opinions he formed after a review of crime scene and autopsy photographs, crime scene reports, several witness statements, and crime rate statistics for the apartment complex. However, Prodan did not review any information about Respondent's background, nor did he review the statements Respondent made to the police. Prodan did not promote the validity of the DNA results or boost the credibility of the inmates' testimony about Respondent's confession. For these reasons we believe that the error of admitting Prodan's testimony before a determination of its reliability was harmless beyond a reasonable doubt.

CONCLUSION

We find that the issue of whether Prodan's testimony was properly admitted is preserved for appellate review. On the merits, we find that Prodan's nonscientific testimony was not properly vetted for its reliability before its admission into evidence, as required by our holding in *White*. However, we find the error in admitting Prodan's testimony could not have contributed to Respondent's convictions. As to the remaining issues Respondent raised to the court of appeals, we have reviewed the briefing of those issues and find them to be without merit. Therefore, we reverse the court of appeals and reinstate Respondent's sentences.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that the issue of the admissibility of Agent Prodan's testimony was preserved for appellate review, and that the trial judge erred in admitting Prodan's testimony without determining that the evidence was reliable. I disagree, however, that the admission of that testimony was harmless error.

As I read **t**he majority opinion, it does not view Prodan's testimony in light of the properly admitted evidence in the record to determine whether this erroneously admitted evidence could have contributed to the jury's verdict. Chapman v. California, 386 U.S. 18 (1967). Instead, the majority posits that the jury made three critical factual determinations:

> (1) that the DNA evidence established respondent was the source of the protein found in the victim's vaginal vault;
>
> (2) that the DNA was not present as a result of consensual sexual activity between the victim and respondent; and
>
> (3) that the inmates' testimony of respondent's purported confession was credible.

The majority then determines that Prodan's testimony could not have contributed to the verdict obtained. I disagree.

The majority states Prodan's testimony did not "promote the validity of the DNA results or boost the credibility of the inmates' testimony about Respondent's confession." Admittedly Prodan provides no direct evidence regarding the DNA evidence, but as explained below his erroneously admitted "expert" testimony bolstered both the probability that respondent was the source of the DNA as well as the inmates' testimony relating respondent's "confession." In my view, the critical harmless error question is whether Prodan's erroneously admitted testimony bolstered the State's contention that respondent was the victim's rapist and killer.

Prodan's testimony that the victim probably knew her attacker bolstered the inmates' testimony that respondent had confessed to an ongoing relationship with the victim. Further, Prodan's theory that the victim and her assailant were acquainted served to identify respondent as a likely perpetrator in light of his statement to police that he had been in the apartment, as well as the testimony of the victim's roommate and another witness that the victim

was familiar with respondent. Accordingly, Prodan's testimony cannot be said to be harmless, especially given the relative statistical weakness of the DNA evidence.

In respondent's "confession," he did not acknowledge any sexual contact on the night of the killing, but rather told the inmates that he went to the victim's apartment in a jealous frame of mind, having learned his "girlfriend" was sexually involved with a mutual friend. According to the inmates' testimony, respondent confessed his jealous frame of mind escalated to rage as he questioned the woman about the relationship, and resulted in the victim's stabbing. Prodan's testimony that "the assailant most likely did not come to the apartment for the purpose of killing the victim" bolsters this part of respondent's confession. Prodan's theory that the perpetrator intended to sexually humiliate the victim by posing her body is consistent with respondent's confession that he went to the apartment after learning of the victim's sexual infidelity, and that her responses to his questions about this infidelity led to her assault. Prodan's improperly admitted evidence goes directly to the only issue the jury had to decide: not whether crimes had occurred, but was respondent the perpetrator.

Unlike the majority, I believe that Prodan's improperly admitted "expert" testimony cannot be deemed harmless error. Improper "expert" evidence which goes to the heart of the case is not harmless. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001); see also State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting). I would therefore reverse and remand the case for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Chris Anthony Liverman, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 27130
Heard February 23, 2012 – Filed June 6, 2012

AFFIRMED IN RESULT

A. Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Daniel E. Johnson, of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). We affirm in result.

Petitioner Chris Anthony Liverman was convicted of two counts of murder and sentenced to life imprisonment. The court of appeals affirmed. Petitioner sought certiorari with respect to the claim that the trial court refused to conduct a "full" *in camera* hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972).[1] Petitioner contended the eyewitness's identification of him as the shooter at a police-orchestrated show-up was unduly suggestive and therefore tainted the in-court identification. The trial court, relying on McLeod v. State, 260 S.C. 445, 196 S.E.2d 645 (1973), did conduct an *in camera* hearing and found the pretrial identification was reliable, based primarily on the witness's previous knowledge of Petitioner.

Following the court of appeals' decision, the United States Supreme Court issued its opinion in Perry v. New Hampshire, 565 U.S. ___ (2012), in which the Supreme Court made clear that due process requires a trial court to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances arranged by law enforcement. The case before us involves the intersection of a suggestive police show-up identification procedure and an eyewitness who knows the accused. In McLeod, we held that the procedural safeguard of a pretrial hearing to determine the reliability and ultimate admissibility of eyewitness identification testimony was not necessary where the eyewitness knows the accused. McLeod cannot stand in light of Perry, and we overrule McLeod insofar as it creates a bright-line rule excusing a Neil v. Biggers hearing where the eyewitness knows the accused. We nevertheless affirm Petitioner's

[1] At the court of appeals, Petitioner also challenged the admission of testimony regarding the meaning of certain tattoos on Petitioner's body. The court of appeals rejected Petitioner's argument that the testimony was unduly prejudicial. Petitioner did not seek certiorari concerning the court of appeals' ruling regarding the tattoos.

convictions and sentence because any error in failing to conduct a Neil v. Biggers hearing was harmless.

I.

BACKGROUND

A.

On the evening of August 26, 2004, two minor victims were shot and killed outside of one of the victim's homes on T.S. Martin Drive in Columbia, South Carolina. The shooting was gang-related.[2] Officers from the Columbia Police Department responded to the scene. A witness, Tyrone Smith, identified the shooter to Investigator Joe Gray. Tyrone recognized the shooter as "Baby Jesus," the nickname of Petitioner. He further described the type of gun Petitioner used, and described Petitioner as wearing a white shirt, shorts, reflective sneakers, and a camouflage bandana on his head.

Shortly after the shooting, Petitioner was apprehended by officers in the nearby woods. Upon hearing officers had seized a possible suspect, Investigator Gray drove Tyrone to the woods, parked his vehicle approximately twenty feet from the car in which Petitioner was detained, and turned on the high beam lights. Petitioner was removed from the police vehicle and stood in front of Investigator Gray's car. There, from the back seat of Investigator Gray's vehicle, Tyrone confirmed Petitioner was the person he saw fire the shots that killed the two victims.

B.

Defense counsel moved for a Neil v. Biggers hearing regarding Tyrone's identification. The State, however, opposed a Neil v. Biggers

[2] The evidence indicates that Petitioner and several other witnesses were members of the Dead Folk Nation gang and that the incidents leading up to and through the shooting were related to an altercation with members of a rival gang, the Bloods. The facts surrounding the murders are set forth fully in the court of appeals' opinion.

hearing. Relying on McLeod, the State contended that the constitutional safeguards applicable to Neil v. Biggers are not necessary when the witness knows the accused. The able trial judge proceeded cautiously and required the State to proffer Tyrone's testimony. Tyrone, age 19, testified he knew Petitioner by the name "Baby Jesus" and that he had known Petitioner as an acquaintance since elementary school. Petitioner once lived at the Saxon Homes Apartment Complex, where Tyrone's aunt lived. When Tyrone was about 12 years of age, he and Petitioner "hung out" at the apartment complex with a mutual friend, "Goo." Tyrone had seen Petitioner at McDonald's (where Petitioner worked) on two occasions. On the day of the murders, Tyrone saw Petitioner at the nearby Bayberry Apartments. At this point in Tyrone's testimony, the State rested its presentation, but Petitioner objected. The trial court agreed with the State's position but required an additional showing concerning "what was going on at the time the identification was made."[3]

Tyrone then testified as to where he watched the shooting occur, as well as his ability to identify Petitioner. According to Tyrone, he observed the shooting while looking out of a second story window in his house across the street on T.S. Martin. Tyrone stated he could see a group of men, including Petitioner, standing a short distance from a street light on the corner. After the murders, Tyrone promptly identified Petitioner as the shooter and provided police with a description of Petitioner's clothing. Petitioner was apprehended nearby, and Tyrone described the show-up arranged by police through which Tyrone confirmed his prior identification of Petitioner.

Initially, the trial court ruled the identification testimony was admissible pursuant to McLeod: "Based on what has been presented here I think the relationship or at least a knowledge existed and I think whether it was sufficient knowledge it would be [sic], go more toward the weight of the

[3] The trial court stated: "Before I can examine the totality of the circumstances I think I still have to hear exactly what was going on at the time the identification was made. For that reason I will let the State continue examination as to the actual identification."

testimony rather than the admissibility of it." The trial court provided a secondary basis for admitting the evidence:

> But in addition to that I find that sufficient evidence has been shown by the State under the totality of the circumstances to make it an identification. It is permissible. And I know the argument would be made that at a showup identification where the defendant was the only one there might be overly suggestive but at the same time the witness who testified that he knew the defendant, he knew him from elementary school, from seeing him at McDonald's, from seeing him on Bay Berry [sic] on the date of the shooting. He knew him by his nickname, he identified the shooter by nickname to the officer prior to him being taken to the second location. Based on that I will permit the identification testimony and you can still argue about its weight.

C.

At trial, Tyrone testified extensively regarding his previous knowledge of Petitioner and what he witnessed the night of the shooting. Both Tyrone and Investigator Gray testified as to Tyrone's out-of-court identification. In addition to Tyrone's testimony, the State offered the testimony of other witnesses who presented further incriminating evidence against Petitioner. Two witnesses testified Petitioner was armed with a gun the day of the shooting and indicated he planned to go to T.S. Martin that night. Diego Thompson placed himself at the scene of the murders with Petitioner and testified that Petitioner and another male began shooting, while the others in the group ran towards the woods. Finally, the State presented the testimony of Petitioner's fellow gang member, Shante, who testified that shortly after the shooting, she overheard Petitioner discussing the shooting where they were "spraying" gunfire and two children were shot.

The defense thoroughly challenged the State's case. Defense counsel argued to the jury that the State's witnesses, especially Thompson, fabricated Petitioner's involvement to deflect from their own guilt. Defense counsel

also attacked Tyrone's testimony. Specifically, counsel maintained that Tyrone was mistaken about his identification of Petitioner as the shooter because he did not know Petitioner with any familiarity and he misidentified Petitioner in an incident earlier in the day. Ultimately, the jury found Petitioner guilty of both murders.

D.

On appeal, Petitioner repeated his challenge to the trial court's failure to conduct a "full" Neil v. Biggers hearing. The trial court erred, Petitioner contended, in refusing to conduct a more extensive hearing when Petitioner alleged the out-of-court identification was procured by law enforcement through unduly suggestive procedures. Petitioner argued that the State failed to show Tyrone had sufficient prior knowledge of Petitioner to overcome the unduly suggestive nature of the out-of-court identification. The court of appeals rejected Petitioner's argument and affirmed his conviction.

II.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Id.

III.

ANALYSIS

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (citing Biggers, 409 U.S. at 199-200).

Our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation); State v. Simmons, 308 S.C.

80, 417 S.E.2d 92 (1992) (same); see also Rule 104(c), SCRE (providing that "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

A year after Neil v. Biggers, this Court decided McLeod, in which we held that a pretrial hearing is not necessary where a witness knows the accused. In McLeod, during a physical struggle with her attacker, the victim exclaimed "oh, you Hattie's boy," causing her attacker to flee. 260 S.C. at 447, 196 S.E.2d at 645. Following the attack, the victim went to a friend's house and stated only the phrase "Hattie's boy." Thereafter, the defendant was arrested and taken to the victim's home, where she identified him as her attacker, although she did not know his actual name. Id.

Regarding the fairness of the pretrial identification procedure used by law enforcement, this Court found it was "apparent from the record that [the victim] knew the defendant. She had seen him many times at a neighborhood store near their home; she knew the defendant's mother and knew him to be her son." Id. at 448, 196 S.E.2d at 645. The Court reasoned that previous United States Supreme Court cases[4] mandating pretrial procedural safeguards represented an "attempt to avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards." Id. at 448, 196 S.E.2d at 646. However, the Court found those rules were never intended to apply where the victim knew the accused. Id.; see also In re Robert D, 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) (finding Neil v. Biggers was not applicable because the identification was arranged by school officials, not police officers, and finding, based upon McLeod, that a pretrial hearing was not necessary where the victim knew the defendant by his first

[4] Notably, McLeod (1973) does not reference Neil v. Biggers (1972), but does cite to three of its predecessors, including United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967).

name, recognized him as a friend of her classmates, and remembered he watched movies with her class).

In Perry v. New Hampshire, the Supreme Court refused to extend the reach of identification due process protections into areas where an identification is not procured by state action.[5] 565 U.S. ___ at *18-19. While acknowledging that eyewitness evidence is inherently imperfect, the Court stated: "The fallibility of eyewitness evidence does not, *without the taint of improper state conduct*, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Id. at *15 (emphasis added). However, in refusing to expand judicial screening to *all* eyewitness identifications, the Supreme Court reemphasized the necessity of pretrial judicial review when an identification is infected by improper police influence, as expounded by Neil v. Biggers and its progeny. Thus, Perry mandates that preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused. Therefore, we overrule McLeod to the extent it permits circumvention of a Neil v. Biggers hearing.

Here, the trial court went beyond the scope of a McLeod hearing and required testimony related to Tyrone's ability to identify Petitioner as the shooter, as well as the circumstances surrounding the show-up procedure arranged by the police. Petitioner maintains that he was denied a "full" Neil v. Biggers hearing. The State, having adamantly objected to a Neil v. Biggers hearing at trial, now suggests we treat the trial court's handling of the matter as the functional equivalent of a Neil v. Biggers hearing. While the

[5] The identification of the defendant in Perry was not procured by state action. When an officer responding to the police call asked the eyewitness to describe the man breaking into cars, the witness pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. The trial court denied the defendant's motion to suppress the witness's identification. On appeal, the defendant argued that it was error to require an initial showing that police arranged a suggestive identification procedure. Perry, 565 U.S. ___ *3-4. However, the Supreme Court refused to extend pretrial protections for eyewitness identifications that are not the result of police-arranged tactics. Id. at *18.

trial court required the State to submit evidence that has many of the traditional features of a Neil v. Biggers hearing (and the trial court made concomitant Neil v. Biggers findings), we decline to hold that the pretrial hearing fully comported with due process requirements. Even assuming error, however, we are firmly persuaded that such error was harmless.

"A harmless error analysis is contextual and specific to the circumstances of the case." State v. Byers, 392 S.C. 438, 448-49, 710 S.E.2d 55, 60 (2011). No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). In considering whether error is harmless, a case's particular facts must be considered along with various factors including: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

Although McLeod cannot survive Perry as a standalone basis for circumventing a Neil v. Biggers hearing, the fact that an identification witness knows the accused remains a significant factor in determining reliability. The suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused. We concur with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory. See State v. Taylor, 594 N.W.2d 158 (Minn. 1999) (holding that the show-up procedure was not suggestive but merely confirmatory where witness previously singled out assailant by nickname and had seen him around her apartment building at least ten times before the show-up took place); People v. Rodriguez, 593 N.E.2d 268, 272 (N.Y. 1992) ("A court's invocation of the 'confirmatory identification' exception is thus tantamount to a conclusion that, as a matter of law, the

witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification.").

After conducting a pretrial hearing, the trial court was satisfied that Tyrone knew Petitioner before the shooting and Tyrone's identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up. Further, a review of Tyrone's trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from Tyrone's prior association with Petitioner and his observation of Petitioner at the time of the shooting. Thus, despite the lack of a full Neil v. Biggers hearing, Tyrone's in-court identification was nonetheless properly admitted as it had an independent origin. See Ramsey, 345 S.C. at 613, 550 S.E.2d at 297 ("The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification."); State v. Byrd, 252 S.E.2d 279 (N.C. App. 1979) (finding no prejudicial error in failing to hold a voir dire hearing where evidence indicated eyewitness had known defendant for five or six years, recognized him at the scene, and gave his description to an officer before a show-up, the eyewitness's in-court identification originated from his observation of defendant at the scene of the crime).

Our decision to uphold Petitioner's convictions is reinforced by the protections available to an accused at trial. We must "take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." Perry, 565 U.S. ___ *15. In Perry, the Supreme Court articulated safeguards available to parties in light of its recognition that the jury, not the judge, traditionally determines the reliability of evidence:

> These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the

> jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

565 U.S. ___ *15-16 (internal citations omitted).

Many of the safeguards noted by the Supreme Court in Perry were at work in Petitioner's trial. The reliability of the Tyrone's testimony was vetted, albeit perhaps in limited form, at the pretrial hearing. Without question, however, the reliability of Tyrone's testimony was fully vetted at trial. During opening statements, Petitioner's counsel cautioned the jury about the fallibility of Tyrone's identification.[6] While cross-examining Tyrone, Petitioner's counsel repeatedly discussed the weaknesses of Tyrone's identification, including: his inability to remember details of his prior encounters with Petitioner; the distance between Tyrone's window and the shooting two houses away; his alleged mistaken identification of Petitioner as the man who earlier in the day pointed a gun at him; inconsistencies in Tyrone's statements concerning whether Petitioner was wearing a bandana on his face; the lateness of the hour and lack of sufficient lighting; Tyrone's inaccurate statement that the shooter was wearing New Balance sneakers; and Petitioner's position next to a police car at the moment Tyrone made an identification.

During her closing argument, Petitioner's counsel reminded the jury of such weaknesses. Moreover, the trial court instructed the jury thoroughly on identification testimony[7] and the factors that should be considered when

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[6] Defense counsel stated "I submit to you ladies and gentlemen that from the very beginning, from that first night, the police were put on notice that the basis of their arrest, that identification, was a bad one, that it was a mistake."

[7] Beyond the traditional charge concerning the jury's determination of the credibility of witnesses, the trial court gave the following instruction regarding identification testimony:

evaluating it. The trial court also instructed the jury that the defendant's guilt must be proved beyond a reasonable doubt and specifically advised that the State must prove "beyond a reasonable doubt the identity of the defendant as the perpetrator of the offenses with which he stands charged."

Having thoroughly reviewed the record, we can say with assurance that "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (quoting Arnold v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992).

V.

For the foregoing reasons, the decision of the court of appeals is affirmed in result.

AFFIRMED IN RESULT.

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

I would further charge you, Mr. Foreman and ladies and gentlemen, that in appraising identification testimony of a witness, you should consider the following: are you convinced that the witness had the capacity and an adequate opportunity to observe the offender; whether the witness or a witness had an opportunity to observe an offender at the time of the offense will be affected by such matters as how long or short a time was available; the circumstances under which an accused is presented for identification, how far or how close the witness was; how good the lighting conditions were; whether the witness had [] occasion to see or know the person in the past.

Again, I will charge you that the burden of proof on the prosecution extends to every element of the offense charged, and this includes the burden of proof and beyond a reasonable doubt the identity of the defendant as the perpetrator of the offenses with which he stands charged.

If examining this testimony you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

The Supreme Court of South Carolina

In the Matter of Richard J. Breibart, Respondent.

Appellate Case No. 2012-212123

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court. Pending further order of this Court, respondent is prohibited from accessing any trust account(s), escrow account(s), operating account(s), and other law office accounts respondent may maintain.

The appointment of an attorney to protect the interests of respondent's clients shall be made in a separate order.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
June 1, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Troy Taylor, Appellant.

Appeal from Williamsburg County
Judge George C. James, Circuit Court Judge

Opinion No. 4920
Heard March 10, 2011 – Filed December 21, 2011
Withdrawn, Substituted and Refiled June 6, 2012

AFFIRMED

Jeremy Adam Thompson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Ernest Finney, III, of Sumter, for Respondent.

LOCKEMY, J.: Robert Troy Taylor appeals his convictions and sentence of life without parole for criminal sexual conduct with a minor in the second degree and kidnapping. Taylor argues the trial court erred in (1) granting the State's Batson motion, (2) admitting evidence of Taylor's prior conviction for criminal sexual conduct with a minor, (3) denying his motion for a directed verdict, and (4) sentencing him to life without parole. We affirm.

FACTS

Taylor was the pastor of the church Victim attended in Murrells Inlet, South Carolina. In November 1998, when Victim was 11, Taylor organized a camping trip with Victim and a group of six or seven boys from the church. Taylor took the boys to an area "just outside [the city of] Andrews" on Highway 521 and the group hiked about a mile into the woods to a campsite "right next to the Black River." Taylor and the boys set up a tent and a large tarp, made a fire, and cooked food. At approximately 11 p.m., the boys retired to their sleeping bags under the tarp. Later that night, Taylor woke Victim, placed his hand over Victim's mouth, and carried him to the tent. Once inside the tent, Taylor removed Victim's clothes and forced Victim to touch his penis and anus. Taylor also touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to reveal the rape to anyone and returned Victim to his sleeping bag. Taylor slept next to Victim and held him throughout the course of the night.

In August 1999, Taylor and a few other adults from the church organized a trip to the beach. After leaving the beach, the group returned to the church to use the showers. Once all the showers were occupied, Taylor asked Victim and another boy if they would like to use the showers at his house. Victim and the other boy accompanied Taylor to his home near the church. While Victim was showering, Taylor entered the bathroom, removed his clothes, and entered the shower. Taylor forced Victim to touch his penis and Taylor touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to divulge the rape to anyone. Taylor drove Victim and the other boy back to the church.

Approximately five years after the 1999 rape, Victim, then 17, told his parents about the two rapes. Taylor was indicted for second degree criminal sexual conduct with a minor in Georgetown County for the 1999 rape. Taylor pled guilty and was sentenced to eight years' imprisonment suspended upon the service of five years and three years' probation. In May 2006, Taylor was indicted for second degree criminal sexual conduct with a minor and kidnapping for the 1998 rape. The State served Taylor with notice of its intent to seek a sentence of life without parole pursuant to section 17-25-45 of the South Carolina Code (2003). Taylor was convicted on both counts and the trial court sentenced him to life without parole. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. Batson

Taylor argues the trial court's finding that his strike of Juror 146 was racially motivated is clearly erroneous. We disagree.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from striking a venire[]person on the basis of race." State v. Hicks, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998) (citing Batson v. Kentucky, 476 U.S. 79 (1986)). The trial court must hold a Batson hearing when members of a cognizable racial group are struck and the opposing party requests a hearing. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). First, the proponent of the strike must present a race or gender neutral explanation for the challenged strike. Id. In response the opponent of the strike must show the race or gender neutral explanation given by the proponent was mere pretext. Id. at 629, 515 S.E.2d at 91. Pretext is generally established by showing similarly situated members of another race or gender who were seated on the jury. Id.

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Id. at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)). This court will give the trial court's finding great deference on appeal and review the trial court's ruling with a clearly erroneous standard. Edwards, 384 S.C. at 509, 682 S.E.2d at 822.

Here, the State moved to quash the jury after Taylor used ten strikes to strike white jurors. In regard to Juror 146, Taylor noted Juror 146 was an administrative assistant and offered the following explanation:

> I have found over the years that the more education jurors have the less likely they are to adopt argument—they usually come with their own idea or agenda. Over the years, I [have] learned to shy away from jurors with higher education. And, in addition to that, I also know her husband personally and we just do [not] get along.[1]

In response, the State pointed to Juror 138, an accountant, as a similarly situated African-American juror with equal or more education than Juror 146. The trial court inquired regarding Taylor's reasoning for concluding Juror 146 had a high level of education. Taylor responded: "Well, she [is] an [a]dministrative [a]ssistant. Inasmuch as she would be in management that she would have got there by promotion or her qualification[s]. Certainly she

[1] Taylor has not argued on appeal that defense counsel's poor personal relationship with Juror 146's husband was a proper race neutral explanation for the strike. Accordingly, we are precluded from addressing the issue. See State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant).

would have met the qualification to be in management. But she is in management."

Before ruling on the State's Batson motion, the trial court allowed Taylor to revisit his explanation for striking Juror 146. Taylor explained that in striking Juror 146 based upon her education level, in essence, he was striking her based upon her position in management. According to Taylor, jurors with management level employment "come with an agenda" and are "constantly manifesting their discretion as it relates to how you handle people." Ultimately, the trial court found Taylor offered a race neutral explanation for the other nine strikes he used. However, the trial court found Taylor's strike of Juror 146 violated Batson because he accepted Juror 138 with more formal education and a higher level employment position. A jury was re-struck and Juror 146 was seated on the jury.

Based on our standard of review, we are unable to find anything clearly erroneous in the trial court's determination Taylor failed to offer a race neutral explanation for striking Juror 146. Taylor explained he struck Juror 146 based on her education and/or employment level. However, Taylor seated Juror 138, an African-American, with a similar education and/or employment level. Although employment is a race neutral reason for striking a juror, the State demonstrated Taylor's explanation was mere pretext by pointing to a similarly situated African-American juror whom Taylor seated. See State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (noting "it is legitimate to strike potential jurors because of their employment"). Considering the record as a whole, we see nothing clearly erroneous in the trial court's determination and defer to the trial court's finding of purposeful discrimination.

II. Rules 403 and 404(b), SCRE

Taylor contends the trial court erred in allowing the admission of Victim's testimony regarding the 1999 rape as evidence of a common scheme or plan because they are not sufficiently similar. Assuming the 1999 rape is evidence of a common scheme or plan, Taylor maintains its probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

South Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, evidence of other crimes, wrongs or acts may be "admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Evidence of other crimes, wrongs, or acts is admissible to show a common scheme or plan when a "close degree of similarity [exists] between the crime charged and the prior bad act." State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008). Thus, the trial court must examine "the similarities and dissimilarities between the crime charged and the bad act evidence"; if the "similarities outweigh the dissimilarities, the bad act evidence is admissible" as evidence of a common scheme or plan. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." Id. at 434, 683 S.E.2d at 278. In sexual abuse cases, the trial court should consider all relevant factors in determining the degree of similarity, including "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." Id. at 433-34, 683 S.E.2d at 278.

Here, the trial court weighed the similarities between the two crimes and determined they fell within the common scheme or plan exception under Rule 404(b), SCRE. In making this determination, the trial court relied on State v. Edwards for the proposition that "[t]he common scheme or plan exception is commonly applied in cases of sexual assault where conduct both before and after the acts charged is held admissible to show 'continued illicit intercourse between the same parties.'" 373 S.C. 230, 235, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004)). In our view, the concept of continued illicit

intercourse between the same parties in sexual abuse cases is another way of stating the common scheme or plan exception to Rule 404(b). See State v. Clasby, 385 S.C. 148, 159, 682 S.E.2d 892, 898 (2009) (concluding evidence of the defendant's continued illicit sexual abuse "prior to the indicted offenses constitutes the archetypal 'common scheme or plan' evidence"); State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003) ("Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well."). Therefore, we proceed with the analysis used in Wallace.

Turning to the Wallace factors, the 1998 and 1999 rapes occurred nine months apart when Victim was 11 to 12 years old. Taylor was the Victim's pastor. While the physical locations where the rapes occurred are not identical, both rapes occurred in connection with church organized outings. After both rapes Taylor threatened Victim to prevent him from revealing the rapes. Finally, the type of sexual battery in 1998 is identical to the sexual battery in 1999. In sum, with the exception of the physical location of the rapes, all the Wallace factors are highly similar. The similarities between the 1998 rape and the 1999 rape outweigh the dissimilarities, and we conclude a very close degree of similarity exists between the rapes. Accordingly, Taylor's argument is without merit.

Even if evidence of "other crimes, wrongs, or acts" is admissible as evidence of a common scheme or plan, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Clasby, 385 S.C. at 155-56, 682 S.E.2d at 896; Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). We are cognizant of the prejudicial effect of admitting evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime. See Wallace, 384 S.C. at 436, 683 S.E.2d at 279 (noting "the mere presence of similarity only serves to enhance the potential for prejudice") (Pleicones, J. dissenting). However,

here, both rapes were committed in an identical manner under almost identical circumstances on the same victim. Therefore, we conclude the trial court properly found the probative value of the 1999 rape substantially outweighed the danger of unfair prejudice to Taylor. See State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879-80 (Ct. App. 2004) (finding the probative value of evidence of earlier assaults on the victim substantially outweighed the danger of unfair prejudice where all the earlier assaults were attempted in the same manner and under similar circumstances).

III. Venue

Taylor argues the trial court erred in denying his motion for a directed verdict because the State failed to prove the 1998 rape occurred in Williamsburg County. We disagree.

Generally, a criminal defendant "has a right to be tried in the county in which the offense is alleged to have been committed." State v. Brisbon, 323 S.C. 324, 327, 474 S.E.2d 433, 435 (1996). Thus, a defendant "is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment." State v. Williams, 321 S.C. 327, 333, 468 S.E.2d 626, 630 (1996). However, this is a low evidentiary threshold. Brisbon, 323 S.C. at 328, 474 S.E.2d at 436. The State is not required to affirmatively prove venue, it is sufficient if evidence exists from which venue can be inferred. Id. at 327, 474 S.E.2d at 435. In the absence of conflicting evidence, even slight evidence of venue is sufficient. Id.

Here, Victim testified the campsite was "just outside of Andrews" on Highway 521, about a "mile in the woods," "right next to the Black River." Victim's mother also testified she was told the campsite was on the "other side of Andrews." Victim explained he first reported the rape to the Georgetown County authorities who were uncertain whether the campsite was in Georgetown County or Williamsburg County. The Georgetown County authorities referred Victim to Sergeant Laura Rogers, a victims advocate for the Williamsburg County Sheriff's Office. Rogers reviewed the statement Victim gave to the Georgetown County authorities and took additional oral and written statements from Victim. Rogers explained

Victim's statements contained landmarks which she used to personally locate the campsite in Williamsburg County. We find the State presented sufficient evidence to establish the 1998 rape occurred in Williamsburg County. Thus, the trial court properly denied Taylor's motion for a directed verdict.

IV. Life Without Parole

Taylor contends the trial court erred in sentencing him to life without parole (LWOP). Taylor argues the 1999 rape is inextricably connected to the 1998 rape because it was admitted as evidence of a common scheme or plan. Therefore, Taylor maintains the 1998 rape and the 1999 rape should be considered one offense pursuant to section 17-25-50 of the South Carolina Code (2003). However, we believe this issue is not preserved for our review.

At trial, Taylor moved to quash the State's notice of its intent to seek a sentence of life without parole. Taylor argued his conviction for the 1998 rape did not support a sentence of life without parole because it occurred prior to his predicate most serious offense, the 1999 rape.[2] The trial court denied Taylor's motion. After trial, Taylor filed a motion to reconsider. At the hearing on his motion to reconsider, one of Taylor's contentions was the 1998 and 1999 rapes were so closely connected in time that they should be treated as one offense pursuant to section 17-25-50 of the South Carolina

[2] In 1982, the Legislature passed section 17-25-45 of the South Carolina Code (1982), adding a provision that stated "a conviction shall be considered a second conviction only if the date of the commission of the second crime occurred subsequent to the imposition of the sentence for the first offense." Bryant v. State, 384 S.C. 525, 530, 683 S.E.2d 280, 282-83 (2009). In 1995, the Legislature amended section 17-25-45 to abandon the requirement that a second offense occur after the imposition of a sentence for the prior offense. Id. at 530-31, 683 S.E.2d at 283. In 2006, the Legislature again amended section 17-25-45(F) to clarify that the sentence for the predicate most serious offense does not have to be served before a sentence of life without parole can be imposed for a subsequent offense. Id. at 531, 683 S.E.2d at 283. Here, Taylor makes his argument under the 1982 statute. Since the incident here occurred in 1998, the 1982 statute is not relevant, and the 1995 amended statute is applicable.

Code (2003). In response, the State submitted the 1998 and 1999 rapes were not committed as part of a continuous course of conduct or crime spree. The trial court inquired whether its ruling admitting evidence of the 1999 rape as evidence of a common scheme or plan required it to also find the 1998 and 1999 rapes were one continuous event pursuant to section 17-25-50. The State maintained the rapes were not so closely connected in time that they should be considered one offense. Taylor then reiterated his argument a LWOP sentence was improper in his case because the predicate most serious offense occurred after the 1998 rape. The trial court denied Taylor's motion to reconsider. In its order the trial court noted Taylor argued his LWOP sentence was improper because evidence of the 1999 rape was admitted as evidence of a common scheme or plan.[3] The trial court found no authority existed supporting the proposition and denied the motion.

We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must be "raised to and ruled upon by the trial judge to be preserved for appellate review") (emphasis added); State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant). Taylor appears to approach the issue at the post-trial motion hearing.[4] Even so, this is insufficient to preserve the issue for our review because it was not raised at trial. See Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); see also Wilder, 330 S.C. at 77, 497 S.E.2d at 734 (holding post-trial motions are not necessary to preserve issues that have already been

[3] After a review of the record, it appears only the trial court raised the issue of whether a finding of a common scheme or plan under Lyle would require a finding that the 1998 and 1999 rapes were one continuous event for purposes of sentencing.

[4] Taylor contends the definition of "inextricably connected" and "continuous course of conduct," as applied to these facts, entitles him to lenity or other relief in the application of section 17-25-50. He did not raise this issue at trial; thus, we are bound by the laws of preservation.

ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it). The balance of the argument on the issue at the post-trial motion hearing was raised by the trial court, which is also insufficient to preserve the issue for our review. Duncan v. Hampton Cnty School Dist. No. 2, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999) (finding issue unpreserved where it was raised sua sponte by the trial court and not by the respondent). Furthermore, on appeal, Taylor argues "[t]he [trial court] improperly sentenced [Taylor] to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." However, at trial and during argument on his motion to reconsider, Taylor repeatedly maintained the trial court erred in sentencing him to life without parole because the predicate most serious offense, the 1999 rape, occurred after the 1998 rape. Taylor cannot argue one ground for error at trial and a different ground for error on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). Accordingly, this issue is not preserved for our review.

CONCLUSION

For the foregoing reasons, Taylor's convictions and sentence of life without parole are

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sean Patrick Tillman, Respondent,

v.

Margaret Jane Oakes, Appellant.

Appellate Case No. 2010-164666

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 4978
Heard April 24, 2012 – Filed May 30, 2012

REVERSED AND REMANDED

David Alan Wilson, Horton, Drawdy, Ward, Mullinax, & Farry, P.A., of Greenville, for Appellant.

John Michael Turner, Sr., Turner & Burney, P.C., of Laurens, for Respondent.

FEW, C.J.: This is an appeal from an order of the family court to change custody of a child. We find the order does not adequately set forth the basis on which it awarded the change and does not demonstrate a substantial change in circumstances affecting the welfare of the child. We reverse and remand for a new trial.

I. Facts and Procedural History

Margaret Oakes and Sean Tillman married and had two sons: Jack, born in 1993, and Peter, born in 1999. The couple divorced in 2003. The divorce decree incorporated a custody agreement which stated the parents would share joint legal custody of the children with primary placement to Oakes and liberal visitation to Tillman. Almost five years later, in March 2008, Tillman filed this action seeking full custody of the children.[1] In his complaint, Tillman alleged the substantial change in circumstances warranting a custody change was "substantial problems in scheduling visitation and in communication between the parties" and unnamed "other issues." By the time of trial in October 2009, Tillman also asserted a change in circumstances due to two instances of Oakes physically punishing Peter, her alleged lack of cooperation in dealing with "some serious issues" related to Jack, and her alleged attempt to turn the boys against him.

Tillman spent the vast majority of his trial testimony discussing issues regarding Jack's behavior. He explained that these issues relate to Peter, the younger son, because his "biggest concern is that if the situation stays the same that it is today that Peter will end up with some of these same issues that Jack is struggling with." However, except to say Oakes "has refused to cooperate with the father or discuss with him significant issues of concern pertaining to the children," the family court did not address those issues in its order.

The guardian ad litem testified both parents "present great opportunities for these children" and "are good parents." In his written report, the guardian stated, "I believe . . . both parents are very capable of providing for their children and, no matter where custody is placed, can meet the needs of the children." He went on to explain the problem with maintaining the original custody arrangement is the parents' communication problems, and the issue "is how to spell out the time specifically in such a manner that there is no doubt about when the children are to be with each parent."

On December 30, 2009, the family court issued an order granting Tillman's request for a change in custody of Peter "commencing with the 2010-2011 school year."

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[1] Tillman's complaint states he "believes it is in the best interest of the minor children that he should be awarded full" custody. However, the complaint also states he recognizes that Jack, the older son, is mature and Tillman will respect his parental custodian choice. The family court maintained custody of Jack with Oakes, and his custody is not at issue on appeal.

The order left custody of Jack with Oakes and provided she would have visitation with Peter every other weekend. While this appeal was pending, Tillman filed a petition in the family court and later this court asking the court to suspend Oakes' visitation with Peter.

II. Review of the Family Court's Custody Determination

We review decisions of the family court de novo, as the supreme court recently explained in *Lewis v. Lewis*, 392 S.C. 381, 386-89, 709 S.E.2d 650, 652-54 (2011). In *Latimer v. Farmer*, 360 S.C. 375, 602 S.E.2d 32 (2004), the supreme court summarized the legal principles courts apply to a request for a change of custody:

> As in all matters of child custody, a change in custody analysis inevitably asks whether the transfer in custody is in the child's best interests. In order for a court to grant a change in custody, there must be a showing of changed circumstances[,] . . . mean[ing] that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change. The change of circumstances relied on for a change of custody must be such as would substantially affect the interest and welfare of the child. Because the best interest of the child is the overriding concern in all child custody matters, when a non-custodial parent seeks a change in custody, the non-custodial parent must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child.

360 S.C. at 381, 602 S.E.2d at 35 (internal citations and quotation marks omitted). *See also Housand v. Housand*, 333 S.C. 397, 405-06 n.5, 509 S.E.2d 827, 832 n.5 (Ct. App. 1998) ("When determining whether a change of circumstance has been established in a custody case, the issue is whether the evidence, *viewed as a whole*, establishes that the circumstances of the parties have changed enough that the best interests of the children will be served by changing custody."); *Shirley v. Shirley*, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000) ("[T]he change of circumstance relied on for a change of custody must be such as would substantially affect the interest and the welfare of the child, not merely the parties, their wishes or convenience." (internal quotation marks omitted)); *Hollar v. Hollar*, 342 S.C.

463, 476, 536 S.E.2d 883, 890 (Ct. App. 2000) ("While Mother clearly suffered a lapse in judgment in allowing [a man] into her bed while the child was in the home, the record is devoid of evidence of any impact on the child whatsoever. . . . [W]e are not persuaded this isolated incident is sufficient to warrant a change in custody."); *Routh v. Routh*, 328 S.C. 512, 520, 492 S.E.2d 415, 419 (Ct. App. 1997) ("[R]emarriage is normally relevant to show improved circumstances on the part of a remarried parent seeking to obtain custody, not to show the deterioration of the circumstances of the custodial parent.").

The family court's order is unclear as to the factual findings which support its conclusion that Tillman proved a substantial change in circumstances that affected Peter's welfare. *See* Rule 26(a), SCFCR ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."). From our review of the order, we discern the following factual findings to support the court's decision:

1. Communications between the parents "diminished to the point that there is no personal mutual acknowledgement or mutual respect between the parents and stepparent to the extent that proper parenting under the joint custody Order is no longer effective."
2. Tillman "remarried and relocated and has a suitable and proper home."
3. Jack is a full-time resident at Governor's School.
4. "[T]he children are now older."
5. "There has been at least one incident of excessive corporal punishment" of Peter by Oakes.
6. "There have been incidents of physical altercations between" Oakes and Peter.
7. The parents "disparaged each other to the children and have improperly exposed the children to their parental difficulties and conflicts."
8. Oakes "refused to cooperate with" Tillman "or discuss with him significant issues of concern pertaining to the children."
9. Oakes and Jack "both have interests in drama and theatre. Peter on the other hand is more into math and science . . . ."
10. "Peter has mainly expressed an interest in being with his father."

These findings, viewed as a whole, do not amount to "a substantial change in circumstances affecting the welfare of the child" or a showing that the "change in custody is in the overall best interests of the child." *Latimer*, 360 S.C. at 381, 602 S.E.2d at 35.

Several of the findings warrant individual discussion. First, the family court relied on the parents' communication problems. However, the court found the parents mutually responsible for those problems. The court gave no explanation as to how the communication problems affect Peter's welfare and made no finding that a change of custody would improve the problems.

Second, the family court characterized two incidents as "excessive corporal punishment," and found "incidents of physical altercations between" Oakes and Peter. Our review of the testimony reveals that in one incident, Oakes bruised Peter's arm while trying to put a sweatshirt on him before school. Peter had dressed himself in short sleeves when the temperature was thirty degrees outside. When Oakes pressed him to wear the sweatshirt, he "pretty much threw a fit" and refused to wear it, saying to his mother, "No, you can't make me. I'm not gonna wear it." When she attempted to force him to put it on, he started hitting her. In her attempts to restrain him, she bruised his arm. Oakes testified the second incident occurred in the morning after Peter had been particularly defiant since the night before. She described his demeanor as "hateful," "yelling at me," and "objecting when I asked him to do anything at all." She testified he told her "I won't do that," "you can't make me," and "you're mean." At one point he walked away from her when she was trying to talk to him. She testified candidly, "I spun him around by the shoulder and I slapped him." As to the "physical altercations," Oakes testified that they occurred in 2008 when Peter "would get upset" and swing his arms, but he does not do that any longer.

Occasional misbehavior of this type is normal for a child of Peter's age. Though we do not condone Oakes' responses, no parent can be held to the unattainable standard of making a perfect response to the misbehavior of a child every time. Our review of Oakes' testimony convinces us she understands her responses in these situations were unacceptable and is working to ensure she does not respond in that manner in the future. Moreover, the record clearly indicates these were isolated incidents. There is no evidence that any corporal punishment or physical altercations continued to affect Oakes' relationship with Peter, or Peter's welfare, as of the time of trial. *See Hollar*, 342 S.C. at 476, 536 S.E.2d at 890 (refusing to change custody based on an "isolated incident").

Third, the family court placed some emphasis on Peter's supposed preference to live with Tillman. We find the preference of a ten-year-old on the important issue of a change in custody to be of little value, if any. *See Bolding v. Bolding*, 278 S.C. 129, 130, 293 S.E.2d 699, 700 (1982) (stating "[t]he significance to be attached to the wishes of the child in a custody dispute depends upon the age of the child and the attendant circumstances," and discounting the importance of the preference expressed by an eleven-year-old); *Brown v. Brown*, 362 S.C. 85, 93, 95, 606 S.E.2d 785, 789, 790 (Ct. App. 2004) (stating "[t]he court shall place weight upon the preference based upon the child's age, experience, maturity, [and] judgment," and discounting the importance of the preference expressed by a ten-year-old). Moreover, at other times Peter expressed a preference to live with his mother.

Finally, the order contains several vague references to such things as "some serious issues" and "significant issues of concern." There is no explanation of what those "issues" are, which parent is responsible for their development, or how they affect Peter's welfare. At oral argument, this court addressed its concern that some unwritten factor forms a substantial basis for the family court's decision. The responses from both counsel served only to increase our concern, and we believe the entire basis of the lower court's decision is not reflected in its order. The court's order begins its recitation of changes in circumstances by stating, "there have been a number of material changes in circumstances . . . [which] include but are not limited to . . . ." Rule 26(a) requires that the family court set forth all of the findings of fact that support its decision. By relying on unnamed "serious" issues "of concern" and by failing to set forth all "material" changes in circumstances, the order violates Rule 26(a).

III. Remand for a New Trial

After a thorough review of the entire record and consideration of all the evidence, we conclude the reasons stated by the family court, taken as a whole, do not qualify as a substantial change in circumstances that affect Peter's welfare. We remand for a de novo custody determination. *See Thomson v. Thomson*, 377 S.C. 613, 623, 661 S.E.2d 130, 135 (Ct. App. 2008) ("When an order from the family court fails to make specific findings of fact in support of the court's decision, the appellate court may remand the matter to the family court . . . ."). Two reasons support our decision to remand so that the family court can make the custody determination. First, we believe that some issues not addressed in the order formed a substantial basis for the family court's decision. We find ourselves unable to

fully assess the significance of these issues and what effect they might have on Peter's welfare by reviewing the record of the proceedings below.

Second, we are troubled by what is alleged to have happened since the family court's order. During the appeal, Tillman filed a petition with the family court, and later with this court, in which he made serious allegations against Oakes regarding her care for Peter during his visitation with her. The petition requests suspension of Oakes' visitation rights. We are unable to determine whether these accusations are true, or are simply the next incident in this father and mother's longstanding pattern of using accusations against each other to further their interests regarding the children and using the children to make their attacks against each other more effective. "In gauging between fit parents as to who would better serve the best interests and welfare of the child in a custodial setting, the family court judge is in a superior position to appellate judges who are left only to review the cold record." *Altman v. Griffith*, 372 S.C. 388, 393, 642 S.E.2d 619, 622 (Ct. App. 2007). Recognizing this, we find it necessary for these allegations to be presented to and considered by the family court. *See Dorn v. Criddle*, 306 S.C. 189, 192, 410 S.E.2d 590, 592 (Ct. App. 1991) (remanding for a "trial *de novo*" where "more than three years have elapsed since the trial court issued the appealed order"); *Cook v. Cook*, 280 S.C. 91, 93, 311 S.E.2d 90, 91 (Ct. App. 1984) (remanding for a "trial de novo" because the court could not determine the child's best interest "due to the considerable amount of time which has elapsed since custody was granted to the mother").

Accordingly, we reverse the family court's determination that Tillman met his burden to prove a substantial change in circumstances that affected Peter's welfare and remand for a new trial. On remand, the family court is to consider all facts and circumstances up to the time of the new trial.

IV. Matters Not Affected by the Appeal

Finally, we address the petition Tillman filed in the family court during the pendency of this appeal asking the court to suspend Oakes' visitation. The family court refused to rule on the petition, stating "this Court is of the opinion that it cannot proceed with this action which involves issues pending on appeal unless the automatic stay is lifted." Denying a subsequent "Motion to Lift Automatic Stay," the family court stated "[t]he better course would be for [the] Father to demonstrate

his need for the automatic stay to be lifted before the South Carolina Court of Appeals."[2]

The question of when a lower court may proceed with a case after one of its orders has been appealed can be a difficult one to answer. In this case, the family court erred in finding it could not rule on the petition. As an initial matter, the family court was mistaken in determining that an automatic stay existed as to the appealed order. Rule 241(a), SCACR, provides that "[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order . . . and . . . the relief ordered." However, Rule 241(b)(6) specifically excludes the order appealed in this case from the general rule, listing "[f]amily court orders regarding a child" as an exception to the automatic stay provision. Under Rule 241(b)(6), therefore, there is no automatic stay in this case. Both parties and the family court recognized this, as the order appealed from took effect according to its terms and custody was changed to Tillman despite the filing of the notice of appeal.

However, the absence of a stay does not mean the family court may proceed with the case while one of its orders is on appeal. When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. This is the purpose of a stay under Rule 241—to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending.

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . ." Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal,

[2] On April 23, 2012, Tillman filed a "Petition to Lift Stay" with this court.

but is specifically allowed to proceed with matters not affected by the appeal.[3] The rule states: "Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 205, SCACR; *see also* Rule 241(a), SCACR ("The lower court . . . retains jurisdiction over matters not affected by the appeal . . . ."). Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a "matter[] affected by the appeal" under Rules 205 and 241(a). *See Arnal v. Fraser*, 371 S.C. 512, 518-19, 641 S.E.2d 419, 422 (2007) (per curiam) (explaining that Rules 205 and 241(a) permit the family court's action on matters not affected by the appeal and prohibit action on matters that are affected by the appeal).[4]

In deciding whether it could hear Tillman's petition, the family court addressed the wrong question—whether the order was stayed during appeal. The question the court should have addressed is whether the issue raised in the petition was a matter affected by the appeal. We find that it was not, and that the family court should have ruled on the petition.

The order on appeal in this case changed custody from Oakes to Tillman and established Oakes' visitation rights. Tillman's petition relates to Oakes' visitation rights. It would appear at first, therefore, that the appeal affected Oakes' visitation rights, and the family court did not retain the power to proceed. However, answering the question of whether a matter is "affected by the appeal" requires a closer examination of the appeal. Oakes challenges only the custody portion of the order in her appeal. In fact, understanding she lost primary custody, Oakes is actually the beneficiary of the visitation provisions in the order. Tillman did not file an appeal. Thus, there is no action the appellate courts could take resolving this appeal that would affect the visitation established in the appealed order, except to reverse the custody determination, in which case Oakes would not need visitation.

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[3] The reference in Rules 205 and 241(a) to the "jurisdiction" of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or "matter," during the pendency of the appeal.

[4] *Arnal* was decided before Rule 241(a) was renumbered from the former 225(a). *See* Rule 241, SCACR, note.

Moreover, the petition did not seek relitigation of any factual findings in the order on appeal. The appealed order made a permanent change of custody and established permanent visitation rights based on changes in circumstances occurring before the order. Tillman's petition requested a temporary suspension of Oakes' visitation based exclusively on events occurring after the order.

Under these circumstances, Tillman's petition addressed a "matter[] not affected by the appeal." Therefore, the family court retained the power to rule on Tillman's petition.

V. Conclusion

We remand the custody issue to the family court for a new trial. We understand, however, that the family court cannot conduct the retrial until after this court has sent down the remittitur. In the meantime, the family court should promptly hear and decide Tillman's petition to suspend visitation. We request that the family court report its progress on both issues to the Clerk of this court within sixty days, and every thirty days thereafter until a final order is entered.

REVERSED AND REMANDED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alberta Major, Appellant,

v.

City of Hartsville, Respondent.

Appellate Case No. 2010-176986

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Published Opinion No. 4979
Heard March 12, 2012 – Filed June 6, 2012

AFFIRMED

Michael T. Miller, Wukela Law Firm, of Florence, for Appellant.

William Bailey Woods, Woods Law Firm, LLC, of Lexington, for Respondent.

FEW, C.J.: This appeal involves constructive notice under subsection 15-78-60(15) of the South Carolina Code (2005), a provision of the Tort Claims Act. The question before the court is "constructive notice of what?" More precisely stated, the issue we address is: What is the "defect or condition" of which a plaintiff must prove a governmental entity had constructive notice before the entity is subject to liability "for loss arising out of a defect or a condition in [or] on . . . a highway, road, street, . . . or other public way caused by a third party"? § 15-78-60(15). Alberta Major presented evidence the City of Hartsville had notice of circumstances it knew would eventually lead to a dangerous defect or condition,

but she presented no evidence the City had any notice of the defect or condition she alleged proximately caused her injury. We affirm the circuit court's decision to grant summary judgment to the City.

I. Facts and Procedural History

Major attended night classes at Coker College in Hartsville, South Carolina. On the afternoon of her injury, December 1, 2008, Major parked in a lot across the street from the Student Union Building, where she was going to check her mailbox before class. To reach the building, Major walked on a sidewalk that turned into a grassy area before she crossed the street at a corner. The City owns the sidewalk and grassy area. As Major walked over the grassy area to get to the street, her foot "slipped into a hole." She did not fall but "stumbled" and "hobbled on across the street." Five days later, Major went to the emergency room for ankle pain. She later saw an orthopedist and attended physical therapy for her ankle.

In July 2009, Major filed this action for damages against the City. The City filed a motion for summary judgment asserting it was not liable under the Tort Claims Act because it was not on notice of any hole. The circuit court conducted a hearing, agreed with the City's position, and granted the motion.

II. Summary Judgment Standard

Summary judgment is proper when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Robinson v. Estate of Harris*, 388 S.C. 630, 638, 698 S.E.2d 222, 226 (2010) (internal quotation marks omitted). "On appeal from the grant of a summary judgment motion, [we apply] the same standard as that required for the circuit court." 388 S.C. at 637, 698 S.E.2d at 226.

III. "Defect or Condition" Under the Tort Claims Act

Major argues the City is liable for her injuries under subsection 15-78-60(15) of the Tort Claims Act, which provides in part:

> Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other

> public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. § 15-78-60(15) (2005). The parties agree there is no evidence of actual notice. Major argues the City was on constructive notice of "the condition at issue," which she defines as "the unpaved corner of the intersection that was frequently subject to vehicles driving over it creating ruts." Her argument is based primarily on the testimony of the City Director of Parks and Leisure Services, Phillip Gardner. Gardner testified that "for years" he observed trucks cutting the corner where Major fell and that the truck tires crossing unpaved ground caused "depressions." Gardner stated when his crew noticed a depression, "they've gone back and they have put sand or clay back in the area." However, he called it "a fruitless effort because a few days later, it's . . . right back in the same condition." He testified that because of this, "they just kept an eye on that area to make sure that it did not create . . . some sort of a . . . problem at a later time."

Major also presented the testimony of Hartsville police officer Michael Sanchez,[1] who responded to the scene of Major's fall when she reported it to the City three days later. Officer Sanchez testified he observed "a little bit of a concave depression in the dirt" at the corner. When Major's counsel asked him what "thoughts" he had on "how the depression was created," Sanchez testified it could have been caused by "vehicles cross[ing] over sidewalks and corners." Sanchez explained he had seen vehicles do that at the intersection where Major fell, and "we find this happening throughout the City a lot where people cut corners and it could have been something generated from just constant wear and tear. I know I've observed many a vehicle travel through a corner like that and go over it."

The circuit court found that the allegation the City was on notice of an "unpaved corner of the intersection that was frequently subject to vehicles driving over it creating ruts" does not create a "genuine issue as to any material fact" under subsection 15-78-60(15). The court stated:

[1] Gardner and Sanchez are the only City employees whose testimony is in the record. We have not considered the testimony of any other witnesses because their knowledge cannot be imputed to the City.

> [T]he alleged defect in this case involved nothing more than the periodic placement and correction of tire tracks on grass at a City of Hartsville street corner. The Court disagrees with the Plaintiff's assertion that the Defendant's knowledge of the periodic cutting of street corners was a continuous condition and finds that this did not place the Defendant on constructive notice of the actual defect, rut or depression in which the Plaintiff injured herself.

We agree with the circuit court. To prove liability under subsection 15-78-60(15), a plaintiff must prove the governmental entity was on notice of that which she alleges was the proximate cause of her injury. Here, Major alleges the proximate cause was the depression, rut, or hole. However, viewing the evidence in the light most favorable to Major, she has shown only that the City was aware of the circumstances which were likely, even certain, to cause a hole. As we will discuss later, this argument misses the significance of what a plaintiff alleges was the proximate cause of her injury.

Major argues the repetitive nature of trucks driving off the roadway at the corner and causing depressions, ruts, or holes establishes a continual condition, and therefore the City was on constructive notice that the specific condition or defect that caused Major's fall would likely develop. In support of her argument, Major cites *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). *Fickling* is factually similar to Major's case because it involved a plaintiff who "stepped into a hole in a sidewalk and fell, sustaining injuries." 372 S.C. at 599, 643 S.E.2d at 112. However, *Fickling* does not support Major's argument because in that case we found evidence that the City of Charleston was on constructive notice of the specific "defect or condition" the plaintiff alleged caused her injuries—"a hole in a sidewalk." We stated: "In the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could have seen and reported the problem; [and] (2) the condition had existed for a while." 372 S.C. at 609-10, 643 S.E.2d at 117. Specifically, we cited evidence "the hole was partially covered by leaves," 372 S.C. at 601, 643 S.E.2d at 113, a photograph showing "[l]arge cracks radiated out from [the hole]," *id.*, and the testimony of Charleston's Public Service Director that the hole "had probably been that way for a while." 372 S.C. at 610 n.34, 643 S.E.2d at 117 n.34. *Fickling*, therefore, was decided on the basis of the existence of evidence that the "condition or defect" that caused the plaintiff's

injury—the hole in the sidewalk—had existed long enough that City of Charleston personnel should have seen it and fixed it.

In this case, on the other hand, Major offered no evidence the City was on notice of the particular depression, rut, or hole she alleges caused her injury. Gardner testified his crew typically inspected a particular intersection every three to five weeks. Gardner did not know if any of his staff was present at the corner in the week before Major fell. He testified the City's records indicated that because Major fell on the Monday after Thanksgiving, "the last time we would have or could have been there would be Wednesday before Thanksgiving." Major's counsel conceded at oral argument that "we don't know" how long "the particular depression that caused Mrs. Major's injuries" had been there, and that it could have been created that morning. Because there was no evidentiary basis on which the jury could determine how long a depression, rut, or hole had been there, a jury would have to speculate whether City personnel should have seen it. In this situation, there was no evidence of constructive notice and summary judgment was required. *See Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (stating "verdicts may not be permitted to rest upon surmise, conjecture or speculation").

Major's argument that *Fickling* is applicable to this case appears to be based on a reference this court made at the end of a footnote to the supreme court's discussion of two cases in *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). *See Fickling*, 372 S.C. at 610 n.37, 643 S.E.2d at 117 n.37. In *Wintersteen*, refuting an argument that our courts "have . . . required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises," the supreme court explained its holding in *Henderson v. St. Francis Community Hospital*, 303 S.C. 177, 399 S.E.2d 767 (1990) and this court's holding in *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). 344 S.C. at 36, 36 n.1, 542 S.E.2d at 730, 730 n.1. The court explained that "recurrence alone is insufficient to establish constructive notice." 344 S.C. at 37 n.1, 542 S.E.2d at 730 n.1. The court went on to explain that

> there may be certain factual patterns, as in *Henderson* and *Pinckney*, wherein the recurrence is of such a nature as to amount to a continual condition, and that factor, when coupled with other evidence, such as store employees' knowledge thereof, may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.

Id.

For several reasons, this case does not fit the "factual patterns" of *Henderson* and *Pinckney*. First, those cases did not arise as exceptions to sovereign immunity under the Tort Claims Act. Second, in both of those cases the defendant's negligence created the circumstance which led to the recurrence of a dangerous condition that "amount[ed] to a continual condition." In *Henderson*, St. Francis Hospital ignored the advice of an architectural firm it hired to design an addition to its parking lot that it should remove numerous mature sweetgum trees because the balls they drop on the parking lot "are dangerous to pedestrians." 303 S.C. at 180, 399 S.E.2d at 768-69. Despite this advice, St. Francis "built a stairway immediately adjacent to one of the trees" and "failed to use a regular maintenance program." 303 S.C. at 180, 399 S.E.2d at 769. In *Pinckney*, the store manager "created a dangerous situation" by putting a "poinsettia display . . . on a make-shift shelf adjacent to the aisles in the store." 311 S.C. at 4, 426 S.E.2d at 329. The plaintiff presented evidence that a poinsettia leaf "secretes a 'milky substance'" when it is removed from the plant, and that "the store manager observed the poinsettia leaves falling to the floor and . . . left [them] . . . until the next periodic sweeping." *Id.*

Finally, as the supreme court stated in *Wintersteen*, the "continual condition" must be "coupled with other evidence." 344 S.C. at 36 n.1, 542 S.E.2d at 730 n.1. We do not see any "other evidence" in this record which could create a jury question on the City's liability under subsection 15-78-60(15) even if this were a "factual pattern" like *Henderson* or *Pinckney*.

Our holding is further supported by *Wintersteen*. In *Wintersteen*, the plaintiff "slipped and fell on a puddle of clear liquid" while walking near "a self-service soda fountain equipped with an ice dispenser" in a Food Lion store. 344 S.C. at 34, 542 S.E.2d at 729. Wintersteen admitted Food Lion had neither actual nor constructive notice of the liquid on the floor but instead argued "the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling" because it is foreseeable that the ice dispenser will cause liquid to fall to the floor. 344 S.C. at 35, 542 S.E.2d at 730. Affirming this court's decision that the trial court should have directed a verdict for Food Lion, the supreme court distinguished between liability for failure to correct an existing dangerous condition and liability for failure to prevent the dangerous condition from arising in the first place.

> Wintersteen does not dispute the trial court's ruling that Food Lion neither placed the substance on the floor nor had actual or constructive notice thereof. Rather, she contends that, if it is foreseeable an item will fall to the floor, then the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling. Although this approach has some appeal, we decline to depart from our traditional "foreign substance" analysis. We adhere to prior precedent that a storekeeper is liable only upon a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof.

344 S.C. at 35-36, 542 S.E.2d at 730.

A similar distinction exists for liability of governmental entities under the Tort Claims Act. When a plaintiff seeks to recover for the failure to correct some existing "defect or condition," the plaintiff must prove the governmental entity had actual or constructive notice of the defect or condition alleged to have proximately caused the plaintiff's injury. *See* S.C. Code Ann. § 15-78-60(10) (2005) (requiring proof of actual or constructive notice for "loss resulting from . . . natural conditions on unimproved property"); § 15-78-60(15) (requiring the same for "loss resulting from . . . a defect or condition . . . caused by a third party); § 15-78-60(16) (2005) (requiring the same for "loss resulting from . . . public property, intended or permitted to be used as a park, playground, or open area for recreational purposes").

However, the Tort Claims Act contains different standards for liability when a plaintiff seeks to recover for the governmental entity's failure to prevent a dangerous condition from arising. For example, the Act provides immunity from liability in design defect cases. *See* S.C. Code Ann. § 15-78-60(15) ("Governmental entities are not liable for the design of highways and other public ways."). Even though absolute design immunity is not available in all cases, the City's actions might have been subject to discretionary design immunity. *Compare Giannini v. S.C. Dep't of Transp.*, 378 S.C. 573, 580, 664 S.E.2d 450, 453 (2008) (holding absolute design immunity was not available when SCDOT was on notice of the need for median barriers) *and Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999) (holding absolute design immunity was not available when SCDOT was on notice an intersection was hazardous because existing traffic signals did not allow safe pedestrian crossing) *with Wooten*, 333

S.C. at 469, 511 S.E.2d at 358 (holding discretionary immunity was a jury issue on a claim that SCDOT failed to redesign an intersection with traffic signals that allowed safe pedestrian crossing "after notice the intersection was hazardous") *and Giannini*, 378 S.C. at 590, 664 S.E.2d at 459 (Pleicones, J., dissenting) (stating "[a]lthough an entity may lose design immunity, it may still be immune from liability if it exercises discretion when faced with actual or constructive knowledge of a hazardous condition").

The distinction in *Wintersteen* and the Tort Claims Act turns on the plaintiff's allegation of proximate cause. In *Wintersteen*, the plaintiff alleged the proximate cause of her injury was Food Lion's failure to "take measures to prevent the items from falling" to the floor. 344 S.C. at 35, 542 S.E.2d at 730. The supreme court "decline[d] to depart from our traditional 'foreign substance' analysis . . . [and] adhere[d] to prior precedent that a storekeeper is liable only upon a showing . . . that it had actual or constructive notice" of the "substance on the floor." 344 S.C. at 35-36, 542 S.E.2d at 730. It is not enough, therefore, to prove the storekeeper knew the substance would eventually be on the floor and failed to take steps to prevent it. Similarly, when a plaintiff alleges a governmental entity is "liable for loss arising out of a defect or a condition . . . caused by a third party" under subsection 15-78-60(15), she must offer evidence that the governmental entity had notice of the defect or condition she alleges was the proximate cause of her injury. Major's argument that the City was on notice of trucks cutting the corner to create holes misses the distinction. Just as in *Wintersteen*, it is not enough to allege the governmental entity knew the defect or condition would eventually develop and then cause injury. This would not be an allegation that the City should have fixed the hole, but a design defect allegation that the City should have taken steps to fix the intersection where trucks cause holes. However, her complaint contains no allegation the City failed to take any step to prevent a depression, rut, or hole from developing, and, at oral argument, her counsel conceded she did not raise a design defect claim.

The dissent argues that we have applied an actual notice standard when only constructive notice is required. Our focus, however, is not the difference between actual and constructive notice. The question we address is "constructive notice of what?" The answer is that the plaintiff must prove the governmental entity was on constructive notice of the defect or condition she alleges proximately caused her injury. Major alleges the proximate cause of her injury was a hole but presented no evidence the City was on constructive notice of a hole.

IV. Conclusion

We affirm the circuit court's decision to grant summary judgment in the City's favor because we find no evidence the City was on constructive notice of the defect or condition Major alleges proximately caused her injury.

CURETON, A.J., concurs.

HUFF, J., dissents.

HUFF, J.: Respectfully, I dissent. Alberta Major brought this tort action against the City of Hartsville (City), alleging she was injured when she fell in a "hole" on City's premises. The trial court granted City summary judgment, finding City was not on notice of any defect, rut, or depression at the location of the incident. In my opinion, the majority, as well as the trial court, has effectively applied an actual notice standard to this matter, where the issue is one of constructive notice. Viewing the evidence in a light most favorable to Major, I believe she has presented sufficient evidence City had constructive notice of a defect or condition, alleged to have caused her injury, such that the granting of summary judgment to City on the basis that City had no notice was improper.

The facts are as follows: On Monday, December 1, 2008, Major, a resident of Florence, traveled to Hartsville to attend class at Coker College. Major parked her car in a school parking lot, and then proceeded to a sidewalk, walking her usual route to class. This particular sidewalk was paved to a point, but as it reached a corner where two roads intersected, the sidewalk ran out, leaving a grassy area between the sidewalk and the road. Major, intending to cross the street, stopped beside the stop sign on this corner to check for traffic. According to Major, as she "took a step out," her foot slipped into a hole, her knee buckled to the right, and she stumbled, but regained her balance. When she returned for class the following Thursday, December 4, Major reported she had injured her foot in the incident to a Coker College employee at the Student Building. The employee instructed her to report the matter to Coker College security. Major located security officer Burke Hoffman and pointed out the place where she indicated she had stepped into a hole. Hoffman informed Major the property did not belong to Coker College, and told her she needed to contact City's police department. Major then called the police, and Officer Michael Sanchez responded to the incident location. Major informed Officer Sanchez she had hurt herself on December 1 when, as she was about to cross the street, she stepped into a deep hole in the grass at the corner of the intersection. Major returned to the location the next day to take photographs of the

area, and found an individual with a golf cart who was putting dirt in the area. Major stated she sought medical treatment at the emergency room on December 6, 2008, and was thereafter seen by an orthopedist and ultimately referred to physical therapy for injury to her right ankle.

The Coker College security officer described the grassy area incident site Major showed to him as being located between the sidewalk and the road and as being "like a rut," with leaves partially covering it. When asked if he had any idea what may have caused the rut or hole, Hoffman responded:

> I do know from observations from over the years, that cars, they come – and not only when I'm in the parking lot, but when I'm on campus looking back towards that way, that cars come and cut that corner. And cut it, you know, a lot of times it - - they just roll, and don't come to a complete stop. And then, you know, they go on.

Hoffman indicated the cars "cut real sharp" and drive on the grass. Hoffman also acknowledged he had seen large 18-wheeler trucks cut that corner because it is difficult for them to make a right turn there due to a median. The area of the incident has since been paved, and Hoffman indicated he had seen vehicles cutting that corner since then and noted tire tracks could be observed on the cement. Coker College employee Gokey described the area in question as an "impression" with grass growing over it, two to three inches on a slope, about two feet long and one foot wide.

Officer Sanchez described the corner incident area as being about a foot away from the sidewalk and appearing "to be some kind of a relief, a concave depression . . . in the dirt with grass growing in it and very sparse leaf coverage." He testified the depression was oval shaped, about eight to twelve inches long, six inches wide, and an inch to an inch and a half in depth. When asked if he had any thoughts on how the hole or depression was created, Officer Sanchez indicated it could have been caused by "constant wear and tear" from traffic, as he has observed vehicles cutting that corner as they turned, driving up on the grass.

Phillip Gardner, the Director of Parks and Leisure Services for City testified that Public Works was in charge of the sidewalk, but his department was in charge of the grassy strip between the sidewalk and road. Gardner was not informed of the incident until around the time Major filed her lawsuit in July, 2009. His department then went out to look at the area, and found that trucks and cars

appeared to be cutting the corner short, leaving tire marks. Gardner stated right rear wheels were going across the curb to try to make the turn because it is a tight turn. Sometime after his department observed the area, the Public Works Department continued the sidewalk down to the street, paving the corner of land. Gardner acknowledged they had "observed vehicles making that turn for years," that trucks in particular had difficulty with it and would often drive up on the grass, and it had caused depressions before. When asked how his department had addressed the issue in the past, Gardner stated:

> They've gone back and they have put sand or clay back in the area, but it was - - it was a fruitless effort because a few days later, it's, you know, right back in the same condition so after two or three attempts, they just keep an eye on that area to make sure that it did not create, you know, some sort of a, you know problem at a later time.

Gardner further noted that tire tracks were currently on the paved portion, and if trucks continued to drive over the area, the concrete would eventually crumble. According to Gardner, his department worked in this area once every three to five weeks, and if his "crew had noticed that a tractor-trailer had cut that corner and left a deep grove or rut there," they would have then "gone in and back-filled it and tamped it tight and observed the area to make sure that it was packed well and did not wash out or settle."

City moved for summary judgment, asserting there was no evidence it had actual or constructive notice of any rut, hole, or defect in the property, arguing there was no evidence anyone with City was on notice of any problem at the location in the days, weeks and months prior to the incident. The trial court granted City's motion, finding City was not on notice, constructive or otherwise, of any defect, rut or depression at the location of the alleged incident. In making its ruling, the court noted that deposition testimony showed neither City nor Coker College were aware of any prior falls or injuries at the location; Major herself was unable to cite any prior experience or observation of any defect, rut, or depression in the area despite her frequent use of that street corner; there was no testimony from anyone that showed any notice, constructive or otherwise, of any specific rut or depression at the location in the days, weeks, or months prior to Major's accident; and, based on the deposition testimony of Gardner, City had corrected depressions in the past by filling and tamping the area affected such that City actively maintained its streets and street corners. The court specifically disagreed with Major's assertion that City's knowledge of the periodic cutting of street corners was a continuous

condition, and found such did not place City on constructive notice of the alleged defect, rut, or depression.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP, when reviewing a grant of summary judgment. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* at 122, 708 S.E.2d at 769. When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). Additionally, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

Major contends the only issue on appeal is whether City had adequate notice of the condition that caused her injuries. She concedes City did not have actual notice of the depression at the time of the incident. However, she notes that both parties acknowledge a constructive notice standard applies in this situation, and asserts the trial court erred in holding City did not have constructive notice of the condition that caused her injuries. Major points to the deposition testimony showing, whether the area was described as a depression, rut, or impression, City had knowledge that the condition was likely created by vehicles driving over the grass at that corner. Major further notes that the deposition testimony of Gardner shows his department had an established procedure for dealing with ruts and depressions caused by vehicles driving on the grass while turning at that particular corner. She argues the deposition testimony, showing City's common knowledge of the practice of vehicles cutting the corner as well as the creation of the ruts or depressions, created a genuine issue of material fact as to whether City had constructive notice of the depression. Major thus maintains that at least a scintilla of evidence exists to support the position that City had constructive notice.

Major further argues the trial court largely based its ruling on a determination that City was not aware of the depression that caused her injuries, and despite several references to constructive notice, in fact applied an actual notice standard. She notes that the trial court's reliance on her own lack of knowledge of the depression at the location is misplaced, because the burden is on City, not her, to keep the premises in a reasonably safe condition, and the issue is whether City had constructive notice, not whether she did. Major takes issue with the trial court's finding that City showed through the testimony of Sanchez, Hoffman, and Gardner that neither City, nor Coker College security, were aware of any rut, depression or defect at the location. She argues (1) constructive knowledge does not require actual knowledge and (2) deposition testimony showed these individuals were aware that depressions had been created at this corner in the past, and City's knowledge of this recurrent condition, as evidenced by Garner's testimony that his department had to keep an eye on the area to make sure it did not create some sort of problem "at a later time," constituted constructive notice of the condition at this corner.

Because I believe the evidence shows there is a genuine issue of material fact on whether City had constructive notice, I would reverse and remand.

The South Carolina Tort Claims Act (SCTCA) provides that "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005). Our legislature has, however, provided certain exceptions to a governmental entity's waiver of immunity. S.C. Code Ann. 15-78-60 (2005 & Supp. 2011).

The parties agree that section 15-78-60(15) of the SCTCA applies to the matter at hand. This section provides, in pertinent part, as follows:

> Governmental entities responsible for maintaining highways, roads, streets, causeways, bridges, or other public ways are not liable for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity

> responsible for the maintenance within a reasonable time after *actual or constructive notice*.

S.C. Code Ann. § 15-78-60(15) (2005) (emphasis added). Thus, City may be liable for Major's injuries only if it had "actual or constructive notice" of "a defect or a condition."

"Constructive notice and actual notice are not one and the same." *Anderson v. Buonforte*, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005). In the context of the SCTCA, "actual notice means all the facts are disclosed and there is nothing left to investigate." *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998). "Actual notice may be shown by direct evidence or inferred from factual circumstances." *Id.* "Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. *Id.* at 63 n.6, 504 S.E.2d at 122 n.6. "Generally, actual notice is synonymous with knowledge." *Id.* On the other hand, in regard to constructive notice, our courts have stated as follows:

> Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed facts.

Id.

Here, I agree with Major that the trial court erred in granting summary judgment to City. While Major concedes City did not have actual notice of the condition of the corner at the time of her accident, viewing the evidence and reasonable inferences therefrom in a light most favorable to Major, there is a genuine issue of material fact as to whether City had constructive notice of the condition that caused Major's injuries.

There is evidence here that (1) a condition, in the form of a depression, rut or some other defect, existed on the corner where Major sustained her injury, (2) that numerous individuals, who worked for City and the local college, frequently observed vehicles being unable to properly navigate a turn at this specific

intersection, resulting in the vehicles cutting over the grassy area of this corner, and (3) both City employee Gardner, the Director of Parks and Leisure Services for City, and Officer Sanchez attributed the depression to the wear and tear from the vehicles cutting across the area. Additionally, I find of particular note the testimony of Gardner, wherein he stated his department addressed the issue in the past by putting sand or clay back in the area, but such effort seemed fruitless, as the area would be in the same condition a few days later, and after two or three attempts to remedy the matter, their solution was to keep an eye on that area to make sure that it did not create some sort of problem at a later time. I believe this testimony provides some evidence City was aware the vehicles were cutting across this particular corner causing the condition, that City attempted in the past to correct the condition, that their attempts appeared futile, and, consequently, there was a need to observe the area thereafter. Accordingly, given the evidence presented, I believe there is a genuine issue as to whether City had knowledge of facts sufficient to put it on inquiry, such that constructive notice was imputed to City. *Strother*, 332 S.C. at 63 n.6, 504 S.E.2d at 122 n.6.

I find further support for this conclusion based on our courts' consideration, in the cases of *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007) and *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001), that constructive notice may be found where there is a recurring problem. In *Fickling*, the plaintiff filed a negligence action alleging she suffered injuries after she stepped into a hole in a city sidewalk. *Id.* at 600, 643 S.E.2d at 112. There, this court found conflicting evidence was presented as to whether the City of Charleston had constructive notice of the defect in the sidewalk, observing that in viewing it in a light most favorable to Fickling, there was at least some evidence that (1) there were numerous City of Charleston personnel within the area of the defect who could have seen and reported the problem; (2) the condition had existed for a while; and (3) the City of Charleston had an established policy in place to deal with defects in the sidewalks, and problems with the sidewalks were an expected and "recurrent" or "continual" condition of which it had notice. *Id.* at 610, 643 S.E.2d at 116-17. Additionally, this court noted in *Fickling* that our supreme court observed in *Wintersteen* that two prior slip-and-fall cases involved conditions of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident, "because they established certain patterns 'wherein the recurrence is of such a nature as to amount to a continual condition' and this, coupled with other factors, 'may be sufficient to create a jury issue' as to constructive notice." *Fickling*, 372 S.C. at 610 n.37, 643 S.E.2d at 117 n.37. In *Wintersteen*, our supreme court stated as follows:

> Although mere recurrence alone is insufficient to establish constructive notice, there may be certain factual patterns . . . wherein the recurrence is of such a nature as to amount to a continual condition, and that factor, when coupled with other evidence, such as store employees' knowledge thereof, may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident.

Id. at 36 n.1, 542 S.E.2d at 730 n.1.

Thus, while mere recurrence alone is insufficient to establish constructive notice, our courts have intimated that where the recurrence is of such a nature as to amount to a continual condition, that continual condition, when coupled with other evidence such as an employee's knowledge of the recurring nature of the problem, may be sufficient to create a jury issue as to constructive notice at the time of the accident. Here, there was evidence presented that City had knowledge of the recurring problem of vehicles cutting across the corner of the land in question thereby creating a depression in the area, and that it was a recurring problem that continued even after City's attempts to ameliorate it.

By finding "Major offered no evidence the City was on notice of the particular depression, rut, or hole she alleges caused her injury," the majority is essentially employing an actual notice standard rather than one of constructive notice. In spite of the fact that City may not have been on notice in the days, weeks or months prior to Major's accident that a "particular" defect existed on the corner, such would amount only to actual notice, and I believe the evidence presented shows a genuine issue of material fact as to whether City was on constructive notice of a defect at that location. Accordingly, I would hold the trial court erred in granting City's motion for summary judgment.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Howard Hammer, Appellant,

v.

Shirley Hammer, a/k/a Shirley Grace Hightower,
Respondent.

Appellate Case No. 2010-164067

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Published Opinion No. 4980
Heard May 9, 2012 – Filed June 6, 2012

AFFIRMED

Susan Batten Lipscomb, of Lipscomb Law Firm, P.A., of Columbia, for Appellant.

Stephanie Nichole Weissenstein and Desa Allen Ballard, of Ballard, Watson, & Weissenstein, of West Columbia, for Respondent.

LOCKEMY, J.: In this appeal, Howard Hammer (Appellant) argues the circuit court erred in dismissing his complaint for lack of subject matter jurisdiction. Appellant sought a declaratory judgment and other relief in connection with a contract with Shirley Hammer (Respondent). Appellant contends: (1) Respondent failed to file a proper motion to dismiss pursuant to Rule 7(b), SCRCP; (2) the

contract clearly demonstrated the parties' intent that the family court not have exclusive jurisdiction over the contract; and (3) sections 20-3-690 and 63-3-530 of the South Carolina Code do not provide for exclusive family court jurisdiction in the present case. We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellant and Respondent were married on August 4, 1998 and had two children. On September 2, 2005, Respondent filed a complaint seeking an order of separate maintenance and support, custody, equitable distribution of property, and other relief. Subsequently, on December 6, 2007, Respondent filed a second amended complaint seeking a divorce and other relief. The family court litigation was settled in two phases. First, the divorce and property settlements were agreed to and incorporated into the family court's May 12, 2008 order. The May 2008 order adopted a settlement agreement (May 2008 contract) which included terms involving the parties' former marital home and Appellant's retirement accounts. The May 2008 contract included a final clause stating, "[t]his agreement is a binding contract and is enforceable as such under law." In its May 2008 order, the family court stated it retained "jurisdiction to issue any orders necessary to effectuate the terms of the [May 2008 contract]." Second, in June 2009, the parties settled issues relating to child custody and visitation. On August 19, 2009, the family court entered an order approving the settlement agreement and ending the action. The family court also expressly re-affirmed the May 2008 order.

Appellant challenged the May 2008 contract, the 2009 settlement agreement, and the family court orders on four occasions. First, on May 4, 2009, Appellant sought to amend, modify, void, and set aside the May 2008 order and requested a new trial pursuant to Rule 60(b), SCRCP. The family court dismissed Appellant's motion with prejudice. Second, Appellant filed a motion to withdraw, rescind, and repudiate his consent to the June 2009 settlement agreement. The motion was denied by the family court on January 27, 2010. Third, on September 4, 2009, Appellant filed a motion to reconsider, amend, alter, modify, and/or for a new trial and stay of the following family court orders: (1) order for transfer of individual retirement account; (2) order sealing record; (3) order approving settlement agreement; and (4) order (ending action). The family court denied Appellant's motion.

On November 9, 2009, Appellant filed an amended complaint in the circuit court seeking a declaratory judgment and other relief in connection with the May 2008 contract. Appellant asserted the May 2008 contract was void *ab initio* as violating

public policy because a key term of the contract was a payment of funds by Appellant to Respondent in exchange for her agreement to drop certain criminal charges against Appellant. Appellant also asserted causes of action for breach of contract, breach of contract accompanied by fraudulent intent, conversion, and breach of covenant of good faith and fair dealing.

In her first amended answer, motion to dismiss, and counterclaims, Respondent asserted three defenses: (1) lack of subject matter jurisdiction; (2) failure to state facts sufficient to constitute a cause of action; and (3) *res judicata*. Respondent's counterclaims included slander of title, tortious interference with an existing contractual relationship, intentional infliction of emotional distress, abuse of process, invasion of privacy, wrongful intrusion as to contracts to sell and purchase, and malicious prosecution. A hearing was held before the circuit court on March 2, 2010. In an April 14, 2010 order, the circuit court dismissed Appellant's complaint for lack of subject matter jurisdiction. The circuit court held its decision did not end the action as to Respondent's counterclaims. Subsequently, the circuit court denied Appellant's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

This is an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP. "The question of subject matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "We are free to decide questions of law with no deference to the [circuit] court." *Id.*

LAW/ANALYSIS

Motion to Dismiss

Appellant argues the circuit court erred in granting Respondent's motion to dismiss because Respondent failed to file a proper motion pursuant to Rule 7(b), SCRCP.[1] Appellant also contends the circuit court erred in relying on the sealed family court record. We disagree.

Pursuant to Rule 7(b)(1), SCRCP

[1] Appellant incorrectly refers to Rule 7(b), SCRCP as Rule 7(e), SCRCP in his brief.

> An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Appellant argues Respondent failed to make a separate and distinct motion to dismiss and "merely entered a denial of Appellant's allegation that the circuit court had subject matter jurisdiction." Appellant further contends the findings of the circuit court were based solely on statements of Respondent's counsel and on Respondent's memorandum of law, which referenced the sealed family court record. Appellant maintains portions of the sealed record contained in Respondent's memorandum were improperly included in the circuit court's findings of fact.

Respondent argues subject matter jurisdiction can be raised at any time. Respondent contends Appellant was on notice that lack of subject matter jurisdiction was asserted in the answer and had adequate notice of the March 2010 circuit court hearing. Respondent also argues the sealing order expressly provided the parties could access and use the sealed record in the domestic litigation. Respondent maintains Appellant "opened the door" to the sealed record by "attacking the family court order with his declaratory judgment action," and the circuit court properly determined it lacked subject matter jurisdiction.

We agree with Respondent. Subject matter jurisdiction can be raised at any time and by any means. Rule 12(h)(3), SCRCP provides, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the case." Here, Respondent specifically asserted in her answer, motion to dismiss and counterclaims that the circuit court lacked subject matter jurisdiction and asked the court to dismiss Appellant's complaint. This pleading gave Appellant notice that Respondent was moving to dismiss his complaint for lack of subject matter jurisdiction. Furthermore, Respondent served and filed a memorandum in support of her motion to dismiss on February 24, 2010 and Appellant had notice of the March 2, 2010 circuit court hearing to hear the motion.

Additionally, the sealing order expressly provides that the parties and the court may access and use the sealed file in the "litigation between [Appellant and

Respondent]." Here, the parties to the litigation are the same and the subject matter of the case, the May 2008 contract, was executed in partial settlement of the family court litigation and made an order of the family court. Because Appellant's complaint was a continuation of the marital dispute, the circuit court properly referenced the family court record. Accordingly, we find the circuit court did not err in dismissing Appellant's complaint.

Intent of the Parties

Appellant argues the circuit court erred in dismissing his complaint because the May 2008 contract clearly set forth the parties' intent that the family court did not have exclusive jurisdiction over the contract. We disagree.

In *Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983), our supreme court held that once a settlement agreement is approved by the family court, it may be enforced by the court's contempt powers unless the settlement agreement expressly denies the court continuing jurisdiction. Here, the May 2008 contract and the May 2008 order expressly vest the family court with jurisdiction to enforce the contract. The family court's May 2008 order plainly states, "[t]his Court retains jurisdiction to issue any orders necessary to effectuate the terms of the [May 2008 contract]." Moreover, the May 2008 contract provides that "[w]hen this settlement is approved it shall be enforceable through the contempt powers of the [f]amily [c]ourt." Accordingly, we find the May 2008 contract does not evidence intent by the parties that the family court not have jurisdiction over the contract. Furthermore, under *Moseley*, the family court has continuing subject matter jurisdiction over the claims raised in Appellant's amended complaint.

§ 20-3-690 and § 63-3-530

Appellant argues the circuit court erred in finding the family court had exclusive subject matter jurisdiction pursuant to sections 20-3-690 and 63-3-530 of the South Carolina Code. We disagree.

Pursuant to section 20-3-690 of the South Carolina Code (Supp. 2011), "[t]he family courts of this State have subject matter jurisdiction over all contracts relating to property which is involved in a proceeding under this article and over the construction and enforcement of those contracts." Section 63-3-530 provides

> (A) The family court has exclusive jurisdiction:
> . . .

> (2) to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorney's fees, if requested by either party in the pleadings;
> . . .
> (25) to modify or vacate any order issued by the court;
> . . .
> (30) to make any order necessary to carry out and enforce the provisions of this title, and to hear and determine any questions of support, custody, separation, or any other matter over which the court has jurisdiction, without the intervention of a jury; however, the court may not issue an order which prohibits a custodial parent from moving his residence to a location within the State unless the court finds a compelling reason or unless the parties have agreed to such a prohibition;

S.C. Code Ann. § 63-3-530(A)(2)(25)(30) (2010).

Appellant argues the circuit court has the authority to hear the present case pursuant to sections 15-53-20, 15-53-30, and 15-53-90 of the Declaratory Judgment Act. Section 15-53-20 provides "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations . . . ." S.C. Code Ann. § 15-53-20 (2005). Section 15-53-30 provides

> Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (2005). Pursuant to section 15-53-90,

> When a proceeding under this chapter involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved.

S.C. Code Ann. § 15-53-90 (2005). Appellant contends, in light of the sealed family court record, there is no admissible evidence in the record from which the circuit court could determine any fact other than Appellant's allegations and Respondent's admission that a contract was entered into between the parties. Appellant argues, applying sections 15-53-20, 15-53-30, and 15-53-90, it is clear the circuit court had the power to declare the rights and status of the May 2008 contract, and had the power to hear and determine the question of the validity of the contract.

Respondent argues the circuit court properly relied on sections 20-3-690 and 63-3-530 in dismissing Appellant's complaint. Respondent contends South Carolina law expressly grants the family court subject matter jurisdiction over the construction and enforcement of the May 2008 contract and over all of the marital litigation between the parties.

We agree with Respondent. The May 2008 contract was part of the parties' divorce proceeding. Pursuant to section 20-3-690, the family court has exclusive jurisdiction over contracts relating to property in a divorce proceeding. S.C. Code Ann. § 20-3-690 (Supp. 2011). Moreover, by merging the May 2008 contract into the family court's order, the family court transformed it from a contract between the parties into a decree of the court. *See Emery v. Smith*, 361 S.C. 207, 214, 603 S.E.2d 598, 601 (Ct. App. 2004) (holding that merging an agreement into an order transforms it from a contract between the parties into a decree of the court). In *Emery*, this court held that "[s]ince *Moseley*, our courts 'assume that any settlement in a divorce decree is intended to be judicially decreed unless there is some explicit, clear and plain provision in the court approved separation agreement or the decree.'" *Id.* (quoting *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627). "With the court's approval, the terms become a part of the decree and are binding on the parties and the court." *Id.* (quoting *Moseley* at 353, 306 S.E.2d at 627). As part of the family court order, the agreement "is fully subject to the family court's authority to interpret and enforce its own decrees." *Id.* at 214, 603 S.E.2d at 601-02 (citing e.g., *Terry v. Lee*, 308 S.C. 459, 419 S.E.2d 213 (1992) (stating that the family court has exclusive jurisdiction to determine the rights of the parties under

an agreement incorporated into a family court decree)). Accordingly, the circuit court did not err in finding it lacked subject matter jurisdiction to hear Appellant's complaint.

CONCLUSION

Based on the foregoing, we affirm the circuit court's dismissal of Appellant's complaint for lack of subject matter jurisdiction.

AFFIRMED.

THOMAS, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Hollie McEachern, Appellant.

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

Opinion No. 4981
Heard January 12, 2012 – Filed June 6, 2012

AFFIRMED

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

HUFF, J.: Hollie McEachern was convicted of trafficking in cocaine, trafficking in crack cocaine, and possession with intent to distribute marijuana, and was sentenced to concurrent terms of twenty-five, ten and five years, respectively. McEachern appeals, asserting the trial court erred in admitting various testimony, failing to sustain her objection to certain arguments by the State which exceeded limitations placed by the trial court, denying her mistrial motion based on improper comment by the State and denying her motion for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On March 9, 2007, Hollie McEachern was arrested, along with others, after Dominic Thomas set up a drug deal for the Kershaw County Sheriff's Department, following Dominic's arrest by the Department earlier that day. Dominic testified that after he was caught in a drug transaction involving cocaine, he offered to call some people from whom he could obtain drugs. As a result, he called his friend Raheem, who kept Dominic on hold, telling him "he had to call his girl Hollie." Dominic told Raheem he wanted a "Big 8," which is four and a half ounces of powder cocaine. During this phone call, Dominic had Raheem on speaker phone, where Lieutenant Dowey could hear the conversation. Raheem indicated he was "waiting on his girl to see if she was going to do it," because they were not sure they wanted to meet with Dominic. Arrangements were ultimately made to meet in front of a nail salon beside Domino's Pizza, where the "Big 8" was to be purchased for $3,200. An officer then drove Dominic to the location in Dominic's truck. Dominic got out of his truck and got into a vehicle with Hollie, Terrence Rivera, and Theodore Shepperd, who was known as Raheem. Dominic spoke with the driver, Terrence, who Dominic knew, and then turned to Raheem and asked to see the drugs. Raheem, who was sitting in the back seat with Dominic, had the drugs handed to him from the front seat. Dominic believed it was Hollie who handed Raheem the drugs. Dominic indicated he had half of the money with him, and he told them he was going to get the other half when he got out of the truck, at which time the police then surrounded the area.

Lieutenant Dowey testified that he was standing next to Dominic when Dominic made the phone call to Raheem. When Dominic first called,

Raheem said that "he didn't have that much" and he was "waiting on his girl to get there." Raheem called them back, stating that "she had gotten there" and "she had that much." Raheem declined to meet them at McDonald's as they suggested, stating, "Hollie doesn't want to drive that far . . . with that much weight." Ultimately, an agreement was made to meet at the nail salon. A police officer drove Dominic to the location in Dominic's vehicle. An SUV registered to Hollie arrived at the location, with Terrence driving, Hollie sitting in the front passenger seat, and Raheem sitting in the back, behind the driver. After hearing Dominic say the code word, the officers executed the take-down. Lieutenant Dowey stated a search of the vehicle revealed a black bag, located underneath the bench seat where Raheem and Dominic were seated, which contained cocaine, marijuana, a large quantity of crack cocaine, empty baggies and digital scales. Underneath the front seat the officers located a large quantity of cocaine in a red bag. Also found was a cigar blunt, containing marijuana, in the car's console. Terrence had, on his person, two small bags of marijuana and $1,723. Raheem had $320. Hollie had a black purse in her possession which held $2,133 and 32 grams of marijuana. After the arrest was made, Dominic informed Lieutenant Dowey that Hollie had passed the bag of drugs from the front seat to Raheem in the back.

Terrence Rivera testified that he, Hollie, and Raheem are all cousins. On the day in question, he and Hollie left the restaurant owned by Hollie's mother, where they both worked, and went to their aunt's house. Terrence drove Hollie's car because Hollie had a problem with her license. They gave Raheem a ride to a nail salon so he could pick up some money for a party Raheem was going to have. Hollie was in the passenger seat and Raheem was sitting behind her. Raheem got out and then brought Dominic back to the vehicle with him. When asked if he saw anything handed from the front seat to the back seat, Terrence stated, "Not exactly. I seen her turn around, and that was it." He later reiterated that he saw Hollie turn around in the car, but did not "see exactly what she passed or if it was anything." Terrence stated that he was on the phone at the time, and did not really see what was going on in the car. After that, Raheem said something, Dominic got out of the car, and Terrence looked up to see a gun in his face. Terrence admitted he had a bag of marijuana and some money in his pocket, but claimed he was "not guilty of these offenses." Terrence admitted he wrote a note to Raheem stating as follows:

> Yo, Ra, just left the courthouse and gave my statement, told them everything, just need you to say that I was on the phone and couldn't hear what y'all was talking about. Told them Hollie gave you the drugs. Just remember I was on the phone and we're good.

Terrence stated he wrote the note to let Raheem know what was going on with his side of the case and that he had given a statement. On cross-examination, Terrence agreed his note told Raheem that he had informed authorities that he saw Hollie pass drugs, but testified that was not true because he did not see Hollie pass drugs. When asked on re-direct why he would lie to Raheem in that manner, Terrence stated, "At the time I was writing, my writing just got ahead of myself, and the letter was already out of my hand."

The State also presented the testimony of Raheem. According to Raheem, on March 9, 2007, he received a call from Dominic about buying some drugs. Dominic wanted a "Big 8." Raheem called his cousin Hollie to see if she could supply the drugs, and he waited on her and Terrence to come get him. With Terrence driving, Hollie in the front passenger seat, and Raheem sitting behind Terrence, they drove to the location. Hollie had pulled a plastic sandwich bag out of the black bag and handed Raheem the drugs over the seat. Dominic got in the car with them, and he told them he was waiting on his cousin to get some money. Once Dominic got out of the car, the police came. When asked why he thought he could get the drugs from Hollie, Raheem stated that he was dealing drugs and she was who he used to get his drugs from in the past, stating it was "an ongoing thing," and characterizing himself as the middle man. Raheem testified that all of the drugs found in the car that day were Hollie's, with the exception of the two bags of marijuana found on Terrence.

The marijuana found in Hollie's pocketbook weighed 32.5 grams. The other marijuana found in the common area of Hollie's automobile weighed 25 grams. The various other drugs in individual plastic bags found in the vehicle tested positive for powder cocaine, with weights of 124.73 grams,

28.77 grams, and 6.61 grams, and crack cocaine, with weights of 12.25 grams, 3.31 grams, and 13.7 grams.

Hollie took the stand in her own defense. She testified that in March 2007, she was the manager of her mother's restaurant, drawing a salary of $400 a week and earning tips on top of that. At the time the incident occurred on March 9, 2007, Hollie stated she had cashed two payroll checks in the amount of $400 each, and that money was in her pocketbook at the time she was arrested. Hollie testified that she also had about $700 cash in her pocketbook that she was supposed to use to pay for a delivery of supplies for the restaurant. About $180 in her pocketbook was a roll of "old 20's" that she collected. The rest of the money in her pocketbook was proceeds from the restaurant that she had not yet deposited into the bank. Hollie testified that none of the money found in her pocketbook was drug money.

On the night in question, she and Terrence left the restaurant to go to her aunt's house, where Raheem lived. Terrence was driving because her license had been suspended for a simple possession of marijuana charge. While there, Raheem asked for a ride to pick up some money for a party Raheem was having that night, and Hollie agreed. They drove to the nail place, where Raheem exited the car. There was a man standing outside who Hollie did not know, and this person got in the car with Raheem. The man first talked to Terrence, and then he and Raheem engaged in conversation. The man said "I'll be right back," and then the police came and arrested them. Hollie admitted she had purchased the marijuana found in her pocketbook that day for $150, maintaining it was for her personal use and explaining she had been addicted to marijuana and it was more cost efficient to purchase that amount. She denied that Raheem ever called her and asked her to bring drugs, denied ever selling crack or cocaine to anyone, and denied handing something to the back seat while Dominic was in the car. She proclaimed she did not "have anything to do with the crack and the cocaine that were found in the car that night."

The jury convicted Hollie of trafficking in cocaine, trafficking in crack cocaine, and possession with intent to distribute marijuana. This appeal follows.

ISSUES

1. Whether the trial court erred in admitting testimony concerning Hollie's civil forfeiture of money seized during her arrest, this error being compounded by the State's argument which exceeded the court's limitation on this evidence.

2. Whether the trial court erred in admitting testimony concerning post-arrest assistance Hollie provided to her cousin and co-defendant and failing to sustain her objection to the State's argument based on that evidence which exceeded limitations placed by the trial court.

3. Whether the trial court erred in denying Hollie's mistrial motion based on an improper comment by the State and allowing the State to question her about selling drugs to particular individuals without a proper foundation for such questions, and in denying her motion for a new trial after the State failed to comply with the court's ruling.

4. Whether the trial court erred in denying Hollie's motion for a new trial on the basis of the above errors, singly or cumulatively, and in consideration of multiple instances of improper argument by the State.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

A. Civil Forfeiture of Money

The record shows that during cross-examination in relation to Hollie's direct testimony regarding the money found in her pocketbook, the solicitor began to question Hollie concerning a consent order she signed. Defense counsel objected, and the trial court sustained the objection to the admission of the document. When the solicitor inquired if he could ask Hollie if she consented to the forfeiture, without presenting the order itself, defense counsel again objected. The court ruled the document was not admissible, but concluded whether Hollie forfeited the money was relevant and could be asked. The solicitor agreed he understood that when he argued to the jury, he could not use that evidence as an admission.

When Hollie's cross-examination resumed in front of the jury, she admitted, in spite of her testimony regarding where the $2,133 came from, she agreed to forfeit the vast majority of the money to the State. Hollie went on to explain that she did so after her attorney told her it would be difficult to get the rest of the money back, because of the marijuana in her purse.

During the State's closing argument, the solicitor argued Hollie was not forthright and stated, "[S]he consented she had $2,133, she got $500 back. So she had $1633 she consented to be forfeited as drug proceeds to the State." Defense counsel objected, noting the court had limited the solicitor's argument on this matter, and moved to strike. The trial court sustained the objection and instructed the jury to "[s]trike the most recent statement," noting the only evidence was that there was a forfeiture.

On appeal, Hollie contends the trial court erred in admitting testimony concerning her forfeiture of money. She argues a judgment in a civil action cannot be introduced as evidence in a criminal action to establish the facts on which it was rendered. She asserts, like the forfeiture judgment itself, testimony concerning the forfeiture is inadmissible. Hollie further contends this evidence was not relevant, was extremely prejudicial, and the prejudice

outweighed the probative value such that its admission was reversible error. She further maintains this prejudice was heightened when the solicitor contravened the court's prior limitation on the use of the evidence and argued the fact of consent to the jury.

We need not decide whether evidence concerning a consent forfeiture order is admissible in a criminal trial, as we find Hollie opened the door to this evidence. The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 206, 656 S.E.2d at 368. As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000). When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 398 (1984); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see also State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 878 (1998) (noting an accused may be cross-examined as to all matters which he himself has brought up on direct examination). "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008).

Here, Hollie gave lengthy testimony concerning where all the money came from that was found in her pocketbook to rebut any inference that the money was connected to the drugs. Further, Hollie specifically proclaimed none of the money found in her pocketbook was drug money. Thus, Hollie opened the door to admission of evidence that she agreed to forfeit the money in question, and we therefore find no error in the admission of this evidence. We further note that her testimony on this matter on cross-examination was limited to her acknowledgement that she forfeited the majority of the money

found in her pocketbook to the State, and she was thereafter allowed to explain that she did so on the advice of her attorney, in consideration of the marijuana found in her pocketbook. Accordingly, we do not believe she has shown prejudicial error. Finally, we note in regard to Hollie's assertion that the solicitor exceeded the trial court's limitations placed on this evidence in closing argument, the trial court sustained Hollie's objection and struck the argument as requested. See State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) (holding, where a curative instruction is given and the objecting party does not contemporaneously challenge the sufficiency of the corrective charge or move for a mistrial, no issue is preserved for review), rev'd in part on other grounds, 349 S.C. 576, 564 S.E.2d 103 (2002).

B. Assistance Provided to Terrence

On direct examination Terrence testified, without objection, that his mother, cousins, and family hired his attorney for him. The solicitor then asked if Hollie was involved in hiring his lawyer. Defense counsel objected on the grounds of relevance. The trial court sustained this objection. The solicitor then asked if Hollie ever offered to pay for a lawyer for him. Defense counsel again objected and the trial court sustained this objection as well. The solicitor asserted the matter went to "the continuum of the conspiracy." Out of the presence of the jury, the trial court asked what the relevance was, and the solicitor maintained that Hollie was charged with conspiracy to traffic drugs along with Terrence and Raheem, and that the conspiracy did not end when the parties were arrested. He told the court he had been informed by Terrence that Hollie provided Terrence the financial support to retain his attorney, and this was evidence of a continuing conspiracy between the family members. Defense counsel argued the conspiracy ended once the arrests occurred, and there could be no evidence of conspiracy post-arrest. The trial court sustained defense counsel's objection, and stated "[t]he whole business of how [Terrence's attorney] got retained is not admissible." Thereafter, on redirect examination, Terrence testified Hollie had offered to provide financial assistance to him after his arrest, and this occurred just prior to Terrence retaining his latest counsel. Terrence denied there was any discussion with Hollie in regard to her financial assistance and what his version of the facts were, and was adamant that the

financial assistance offer was not tied to his testimony whatsoever. Defense counsel did not object to this line of questioning on redirect.

Following Hollie's direct testimony, the solicitor sought to cross-examine her regarding her visiting Terrence's attorney. In a proffer, Hollie stated she went to the attorney's office with Terrence's mother because his mother did not have a vehicle. Hollie denied assisting Terrence's mother financially in retaining representation for Terrence, stating she only gave his mother money to put in Terrence's account at jail. Defense counsel objected to this testimony as being irrelevant. The solicitor argued it tied in with the evidence concerning the note from Terrence to Raheem regarding them coordinating their testimony and Terrence's testimony that Hollie offered him financial assistance. The trial court indicated it would allow the evidence. Defense counsel then argued the prejudicial value outweighed any probative value. The solicitor reiterated that the evidence was probative of the conspiracy, which involved the cover-up of the crime. The trial court ultimately determined it was "going to allow it, but only in a very limited sense," and instructed the solicitor to not go beyond what Hollie "just testified."

When cross-examination of Hollie resumed before the jury, the solicitor asked her if she ever sent money, either directly or through someone else, to Terrence's account in jail. Hollie responded that she had given Terrence's mother some money at one time because she had indicated Terrence was "doing really bad," and he was unable to call anyone or get any food or long johns. She also acknowledged she took Terrence's mother to obtain a lawyer for him.

During the State's closing argument, the solicitor stated, "[U]sually when you have a conspiracy case it ends when the arrest is made, but this one was interesting because we've got [Terrence] still trying to coordinate testimony, we've got [Hollie] offering financial assistance to [Terrence]…." At this point, defense counsel objected, stating he thought the trial court had "ruled in this area that that was not evidence of the ongoing conspiracy," and the solicitor was "again disregarding [the court's] ruling." The solicitor stated that he did not recall that being the court's ruling, and the trial court then stated, "Move on." Thereafter, the solicitor argued that Terrence testified he

received financial assistance from Hollie right before he obtained his attorney, and Hollie admitted she gave money for Terrence's account and went to the office of his attorney for him. No further objection was made to this argument.

On appeal, Hollie contends the trial judge erred in admitting testimony concerning her post-arrest financial assistance to Terrence, and further erred in not sustaining her objection to the State's argument, which exceeded the limitation imposed by the trial court. She argues any conspiracy which may have existed terminated upon the arrest of the three defendants. Hollie maintains her assistance in her family's efforts to hire a lawyer for her cousin and provision of incidental expenses while he was in jail was not evidence of an ongoing conspiracy, and was irrelevant to any issue in the case. Additionally, Hollie contends the solicitor "blatantly exceeded the court's limitation," as the court specifically ruled that how Terrence's attorney got retained was not admissible. She therefore asserts the court committed additional error in not striking the solicitor's argument to the jury in this regard.

Generally, all relevant evidence is admissible. Rule 402, SCRE; State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

First, it should be noted that the trial court sustained Hollie's objections to the questioning of Terrence in regard to how Terrence's attorney was retained, and no unobjected to testimony from Terrence was admitted in this regard. Thus, the only testimony admitted on this subject for which an objection is preserved for review is that of Hollie.

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE (emphasis added). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984)). Rule 608(c), SCRE, "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

We find the evidence was properly admitted to show bias.[1] Here, evidence that Hollie provided Terrence's mother transportation to assist in attaining an attorney for Terrence, as well as evidence that she provided him financial assistance by giving Terrence's mother some money to put in his account was relevant to Terrence's potential bias toward Hollie. Additionally, we note that evidence was admitted through Terrence, without objection, that Hollie had offered to provide financial assistance to him after his arrest, and this assistance occurred just prior to Terrence retaining his latest counsel. Accordingly, even assuming arguendo the admission of Hollie's testimony in this regard was error, any such error is harmless. See Holder, 382 S.C. at 289, 676 S.E.2d at 696-97 (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence). See also State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (noting whether an error is harmless depends on the particular facts of each case, including:

[1] We note that this court may affirm based on any ground appearing in the record. Rule 220(c), SCACR.

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case). "'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." Id. 349 S.C. at 334, 563 S.E.2d at 319.

We further find no merit to Hollie's assertion that the court committed error in not striking the solicitor's argument to the jury, because the solicitor exceeded the court's limitation in its admonishment concerning the inadmissibility of how Terrence's attorney was retained. First, we do not believe the solicitor exceeded the court's admonishment. Defense counsel's objection to this argument by the solicitor was that the trial court had ruled this was not evidence of the ongoing conspiracy, and the solicitor was therefore disregarding the court's ruling. However, the record does not reflect such a ruling by the trial court. Rather, the ruling to which Hollie points on appeal is the court's initial determination that evidence of how Terrence's attorney was retained was inadmissible. The trial court never determined that the evidence objected to did not qualify as evidence of an ongoing conspiracy. As to Hollie's assertion that the trial court erred in not striking the solicitor's argument in this regard, Hollie never requested the court strike the argument. After Hollie's initial objection, the court instructed the solicitor to "move on." When the solicitor thereafter argued Terrence testified he received financial assistance from Hollie right before he obtained his attorney, and Hollie admitted she gave money for Terrence's account and went to the office of his attorney for him, defense counsel raised no further objection. See State v. Carlson, 363 S.C. 586, 606, 611 S.E.2d 283, 293 (Ct. App. 2005) (noting, where a party objects to improper comments in closing arguments and the objection is sustained, the issue is not preserved unless the party further moves to strike or requests a curative instruction). Finally, after reviewing the solicitor's argument in context of the entire record, we find no reversible error. See State v. Finklea, 388 S.C. 379, 385-86, 697 S.E.2d 543, 547 (2010) (noting the trial court is vested with broad discretion in dealing with the range and propriety of closing arguments, and ordinarily his rulings on such matters will not be disturbed; the burden is on the appellant to show that any alleged error deprived her of a fair trial; the relevant question is

whether the solicitor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process; and the appellate court must review the argument in the context of the entire record).

C. Selling of Drugs to Particular Individuals

During cross-examination of Hollie, the solicitor asked her if she knew "Earl Warren." When Hollie replied, "not by that name," the solicitor then asked, "You hadn't just sold him four cookies of crack that same night?" Hollie replied that she had not, and did not even know who he was. Defense counsel objected, at which point the solicitor stated, "She testified earlier that she had never sold any before, so I'm going to ask her specific names of people that we have heard that she was supplying to." Defense counsel objected again, and the trial court had the jury removed from the courtroom for counsel to further argue the matter. Defense counsel then stated his objection as follows:

> Your Honor, I recognize he is on cross-examination, but he hasn't laid any sort of foundation for this question. And then he blurted out in front of the jury, well, we have heard that she sold cookies to these people. I mean, he is testifying. I don't know how you can unring that bell. I would first request a curative instruction and ask you to ask the jury to disregard the remarks that [the solicitor] made about what they heard and that it is not evidence in this case. If not, I would have to ask for a mistrial.

The trial court found the solicitor's comment, that they had heard Hollie was supplying to specific people, was the equivalent of the solicitor testifying. The solicitor maintained he had a good faith basis to ask Hollie the question because Raheem's attorney relayed information that she was the supplier for Earl Warren and Jarminski Cook, and defense counsel had asked Hollie if she ever sold the drugs, thus making the question about previous incidents proper. Defense counsel argued that his question to Hollie did not "open the door for an improper comment by the solicitor." The trial court agreed with defense counsel on that point, and indicated it would give a curative

instruction on the matter. As to the line of questioning concerning sales to other individuals, the court determined the solicitor could ask Hollie "if she had ever sold it to, blank", but he was not allowed to state "we have heard that you have," because that would be the solicitor testifying. The court noted the solicitor may have inadvertently informed the jury that he had heard that information, but he was not "to do it anymore." It then stated as follows:

> Now, if you bring these witnesses in to contradict her, that's fine. If she denies that she sold it to X or Y or Z, you can bring those people in. One has already testified. But that is as far as I'm - - I mean, you can't bring them in to prove that she is - - to impeach her and prove that she is not telling the truth.

Defense counsel inquired whether the trial court intended to give a curative instruction, and the court informed him that it did. Defense counsel then said, "And you have overruled my motion for a mistrial," to which the court stated, "At this point."

Once the jury returned to the courtroom, the trial court instructed as follows:

> All right, ladies and gentlemen of the jury, with regard to the last comment by the solicitor about, we know this or we know that, I'm going to ask you to disregard that comment. It is not evidence in this case. As I told you at the beginning of the trial, the evidence comes from the witness, not from what the solicitors may say or ask or make any comment about. This lady is all the evidence that you are hearing at this time. So I'm going to ask you to disregard that last comment and strike it from the record and strike it from your consideration in this case.

When Hollie resumed her cross-examination, the solicitor asked her if she knew Jarminski Cook and whether she supplied his drugs. Hollie testified she knew Cook, but denied supplying him drugs. The solicitor then asked if she knew Jarvis Gibbs, and she denied knowing him. Hollie agreed that she did not know Earl Warren or Jarvis Gibbs, but she did know Jarminski Cook. The solicitor then asked, "And you deny being involved with all three of them," to which Hollie replied, "Yes, sir." No further objection was noted by defense counsel.

On appeal, McEachern argues the trial court erred in denying her motion for a mistrial based on the improper comment by the State and in allowing the State to question her about selling drugs to particular individuals without a proper foundation for such questions, and further erred in denying her motion for a new trial after the State failed to comply with the court's ruling. Hollie makes three separate arguments in this regard.

First, she contends the improper comment by the solicitor in the presence of the jury was not capable of being cured by an instruction to the jury to disregard it, such that the trial court's failure to grant a mistrial was an abuse of discretion.

Second, Hollie argues the solicitor did not have a proper foundation for asking about whether she knew or supplied drugs to these individuals. She maintains the solicitor gave no basis "whatsoever for questioning [her] about . . . Jarvis Gibbs." As to the others, she contends the State's information was "based on pure hearsay from an unnamed attorney for one of the co-defendants," and "[t]here was no representation that the information was based on that attorney's personal knowledge of the alleged facts" or that attorney had obtained the information from a reliable source. She argues the information was not from someone with first-hand knowledge of the alleged sales, such that the State did not have a good faith basis for these questions. Accordingly, she maintains, because the State failed to provide any foundation for its question concerning Jarvis Gibbs, and inasmuch as it did not provide a sufficient foundation for its questions concerning Earl Warren and Jarminski Cook, the trial court abused its discretion in allowing this line of cross-examination.

Finally, Hollie contends the trial court abused its discretion in not granting a new trial after the State failed to comply with the court's requirement that it produce the witnesses if Hollie denied she had previously sold drugs to the three individuals. She argues the court instructed the solicitor as to this requirement, and upon the State's failure to produce the foundation witnesses as the court instructed, the trial court should have granted her motion for a new trial.

First, we find no reversible error in the trial court's denial of Hollie's motion for a mistrial based on the improper comment by the State. The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary. Id. at 13, 515 S.E.2d at 514. Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice. Id.

Here, Hollie clearly requested a curative instruction, and in the event the trial court declined to give such an instruction, requested that the court grant her a mistrial. The trial court then instructed the jury to disregard the solicitor's comment, noting it was not evidence in the case, and the jury was told to strike it from the record and from their consideration. Accordingly, Hollie received the relief she sought and should not now be heard to complain. See State v. Parris, 387 S.C. 460, 466, 692 S.E.2d 207, 210 (Ct. App. 2010) (holding where a defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide); State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (finding, where defense counsel received the relief asked for, the defendant could not complain on appeal). Hollie contends, however, that the issue is nonetheless preserved because defense counsel noted in argument to the trial court that he did not know how the court could "unring that bell," thus indicating the defense was seeking a mistrial and, following argument on the issue and learning the court intended to give a curative instruction, specifically inquired about the mistrial motion. We note, however, that defense counsel failed to object to the curative instruction as given, and did not make a mistrial motion after the giving of the instruction. "If a trial court issues a curative instruction, a party

must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review." Brown, 389 S.C. at 95, 697 S.E.2d at 628. Where an objection is sustained, the trial court has rendered a favorable ruling to the party, and it therefore "becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue." State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) (emphasis added). "Moreover, as the law assumes a curative instruction will remedy an error, . . . failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review." Id. Because Hollie failed to object to the curative instruction, and additionally failed to move for a mistrial after the trial court gave its curative instruction, we find the mistrial issue is not preserved for review. Furthermore, even if this issue were properly preserved, we believe the trial court's explicit curative instruction cured any error, and that the prejudicial effect is minimal such that a mistrial was not warranted. See Brown, 389 S.C. at 95, 697 S.E.2d at 628 (noting a curative instruction is usually deemed to cure an alleged error); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given).

In regard to Hollie's argument that the solicitor failed to have a proper foundation to ask Hollie questions concerning her selling drugs to individuals because the State's information was based on hearsay from an unnamed attorney and, in the case of Jarvis Gibbs, there was no basis whatsoever for the questioning, we find no reversible error. As noted by Hollie, our courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct. State v. Joseph, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997). Counsel should not be permitted to go on a fishing expedition, and "[m]erely asking a question that has no basis in fact may be prejudicial." State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979). Here, however, the argument made by defense counsel in this regard was to the solicitor's question of whether Hollie sold crack to Earl Warren the night of this incident, at which point defense counsel objected because the solicitor had not "laid any sort of

foundation for this question." Defense counsel also objected at that time to the improper comment by the solicitor. The solicitor then explained his basis for asking the question, and defense counsel did not thereafter contest the basis given by the solicitor as being insufficient, but concentrated his argument instead on the solicitor's improper argument in front of the jury. It is only on appeal that Hollie contends the foundation given by the solicitor was insufficient to provide a factual basis and amounted to a fishing expedition. Accordingly, the argument made on appeal, that the solicitor's stated foundation was insufficient, was not presented to the trial court, and therefore is not preserved for our review. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting 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; the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). We further note that defense counsel raised no objection whatsoever concerning any questions related to Jarvis Gibbs. Additionally, we note that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result. Brown, 389 S.C. at 93, 697 S.E.2d at 627. Here, Hollie denied even knowing Warren or Gibbs, and denied "being involved" with any of the three men. Thus, we find any error in allowing these questions was harmless.

Finally, we find no merit to Hollie's argument the trial court abused its discretion in not granting a new trial because the State failed to comply with the court's requirement that it produce the witnesses if Hollie denied she had previously sold drugs to the three individuals. First, we believe appellate counsel has misinterpreted the trial court's ruling. The court did not, as Hollie suggests, require the solicitor to produce witnesses if Hollie testified she had not previously sold drugs to these individuals. Rather, a reading of this portion of the court's ruling indicates only that the court prohibited the

solicitor from testifying as to what the State "heard," but indicated the State might possibly be allowed to present those witnesses if Hollie denied selling the drugs to them. At any rate, this issue is clearly not preserved, as it was never raised to or ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); State v. McKnight, 352 S.C. 635, 646-47, 576 S.E.2d 168, 174 (2003) (noting contention must be raised to and ruled upon by trial court to be preserved for appellate review).

D. Motion for New Trial based on Singular and Cumulative Errors

Lastly, Hollie argues the trial judge erred in denying her motion for a new trial based upon the above argued errors, singly or cumulatively, as well as in consideration of multiple instances of improper argument by the State. First, she contends the trial court abused its discretion in failing to grant her a new trial based upon each of the errors argued in her first three issues. Next she argues, even if no single error sufficiently prejudiced her, that the cumulative effect of the errors was so prejudicial as to deprive her of a fair trial. She maintains that if the trial court erred as to any two or three of these issues, the jury likely based its verdict on these multiple improper considerations. Finally, Hollie argues the cumulative prejudice should be evaluated in light of other improper comments and arguments by the solicitor, as to which objections were sustained. Thus, Hollie maintains, against the backdrop of these numerous prosecutorial excesses, the trial court's error with respect to any single evidentiary issue, or multiple errors in combination, was so prejudicial as to require reversal and warrant a new trial.

We find the facts of this case do not support a finding of cumulative errors warranting reversal. An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). The errors must adversely affect her right to a fair trial to qualify for reversal on this ground. Id. In this regard, our courts have "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

Id. (quoting State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998)).

First, because we have found no errors in regard to the other issues, this issue is without merit. See State v. Kornahrens, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986) (holding where the appellate court found no errors, appellant's assertion the trial judge should have granted a new trial because of the cumulative effect of the asserted trial errors had no merit); State v. Nicholson, 366 S.C. 568, 581, 623 S.E.2d 100, 106 (Ct. App. 2005) (holding, where appellant asserted the cumulative effect of the errors he alleged warranted a new trial, because the appellate court determined that the trial judge did not err in any of the particulars alleged in the appeal, the cumulative error doctrine was inapplicable). Further, even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial. See Johnson, 334 S.C. at 93, 512 S.E.2d at 803 (finding the defendant failed to show he suffered prejudice warranting a new trial based on cumulative trial errors); State v. Wyatt, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995) (error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted). As to the other sustained objections of which Hollie complains, our reading of the record does not support the prejudice she maintains in her appellate brief. Accordingly, we find Hollie failed to demonstrate cumulative errors adversely affected her right to fair trial.

For the foregoing reasons, Hollie's convictions are

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Katie Green Buist, Respondent,

v.

Michael Scott Buist, Appellant.

Appeal From Abbeville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 4982
Heard January 25, 2012 – Filed June 6, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART

Scarlet Bell Moore, of Greenville, for Appellant.

C. Rauch Wise, of Greenwood, for Respondent.

WILLIAMS, J.: On appeal, Michael Buist (Husband) contests the family court's division of marital assets, arguing the family court failed to properly assess the fair market value of the marital property. In addition, Husband appeals the family court's decision to grant primary placement of the parties' minor child with Katie Buist (Wife). Moreover, Husband challenges the family court's determination of the visitation schedule and child support payments. Finally, Husband alleges the family court erred in failing to make the necessary findings of fact in awarding attorney's fees to Wife. We affirm in part, reverse in part, and remand in part.

FACTS/PROCEDURAL HISTORY

Husband and Wife were married on April 10, 1999, and are the parents of one minor child, R.B., who was born on September 2, 1999. After marital difficulty, the parties separated in December 2007. The same month, Wife filed a complaint seeking, among other things, custody of the parties' child, child support, equitable division of the marital property, alimony, and attorney's fees and costs. Husband answered and counterclaimed, seeking custody of the parties' child, child support to be held in abeyance, title and possession of the marital home, and equitable division of the marital property.

After Husband and Wife amended their pleadings, the parties appeared before the family court on multiple occasions prior to the final hearing in this matter. On December 28, 2007, the parties entered into a temporary consent order, agreeing to joint custody of R.B. with primary placement of R.B. to be with Wife. The order also provided for reasonable and liberal visitation privileges to Husband. In addition, the temporary consent order provided that Husband continue to pay R.B.'s monthly school tuition directly to Wife and allowed Wife to retain possession of the marital home. Several months later, the parties returned to court and modified the temporary consent order to require Husband to pay the mortgage on the marital home, while being reimbursed for a portion of the mortgage by the Wife. In addition, the temporary consent order mutually prohibited the parties from "disposing, selling, transferring, destroying, or giving away any property of the marriage

without the written consent of the other or by further Order" of the family court.

In June 2008, Husband and Wife returned yet again to family court. At this hearing, the parties agreed to grant visitation to Husband consistent with the standard visitation schedule. In its second temporary consent order, the family court appointed a guardian ad litem, imposed a mutual restraining order on the parties, and required the parties to attend family counseling. Wife subsequently moved for a rule to show cause after Husband encumbered marital assets and entered the marital home without Wife's permission and in violation of the restraining order. The family court found Husband in contempt for entering the marital home without Wife's consent and ordered him to pay Wife's attorney's fees for the hearing.

On November 25, 2008, Husband and Wife entered into a final consent order to address several financial matters. The parties agreed Husband would take possession of the marital home and pay Wife $31,500 for her share of the equity in the parties' home. The parties also agreed to the distribution of certain personal property, determined the Husband's IRA was marital property, and agreed Wife would be responsible for one-half of the balance for her plastic surgery. Additionally, in an order dated September 25, 2009, the family court granted the parties a divorce for "living separate and apart without cohabitation for a period of one year" pursuant to section 20-3-10(5) of the South Carolina Code (1976).

At the final hearing on November 5, 2009, the family court received testimony from the parties, their witnesses, and the guardian ad litem. After carefully weighing the evidence, the family court found "both parents love the minor child," but it concluded "the best interest of the child would be served for the current joint custodial situation to continue with primary placement being with [Wife], with liberal visitation to [Husband]." The family court also received into evidence financial documents pertaining to the parties' income and some evidence regarding the assets and debts of the marital estate, including Husband's business, Landscape Supply. In its decision to divide the marital estate, the family court awarded both real and

personal property to each party; however, the family court did not properly value all of the assets and debts it awarded. In addition, the family court awarded Wife attorney's fees and costs.

On December 11, 2009, Husband timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order. The family court subsequently denied Husband's motion. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 651-52 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lewis, 392 S.C. at 385, 709 S.E.2d at 651-52. The burden is upon the appellant to convince this court that the family court erred in its findings. Id.

LAW/ANALYSIS

I. Equitable Division

Husband asserts the family court improperly assessed the fair market value of the assets and debts of the parties and erred in dividing the property. Specifically, Husband contests (1) the valuation of the Highway 25 property; (2) the failure to include Landscape Supply as a marital debt; and (3) the failure to assign a specific value to all of the assets and debts of the marriage. We agree.

Section 20-3-620(B) of the South Carolina Code (Supp. 2011) provides that the family court must consider fifteen factors in apportioning the marital

estate and give each factor its proper weight.[1] These criteria are intended to guide the family court in exercising its discretion over apportionment of marital property. Johnson v. Johnson, 296 S.C. 289, 297, 372 S.E.2d 107, 112 (Ct. App. 1988). Utilizing these fifteen factors, the family court must: (1) identify the marital property to be divided between the parties; (2) determine the fair market value of the property; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which the distribution is to take place. Gardner v. Gardner, 368 S.C. 134, 136, 628 S.E.2d 37, 38 (2006).

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[1] Section 20-3-620(B) lists the following fifteen factors the family court must consider: (1) the duration of the marriage along with the ages of the parties at the time of the marriage and at the time of the divorce; (2) marital misconduct or fault of either or both parties, if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) either spouse's need for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding the family home as part of equitable distribution or the right to live in it for reasonable periods to the spouse having custody of any children; (11) the tax consequences to either party as a result of equitable apportionment; (12) the existence and extent of any prior support obligations; (13) liens and any other encumbrances on the marital property and any other existing debts; (14) child custody arrangements and obligations at the time of the entry of the order; and (15) any other relevant factors that the family court expressly enumerates in its order.

Here, the family court failed to make the appropriate findings in apportioning the marital estate. The family court did not identify all the parties' marital property, but instead selectively divided certain real and personal property without determining the fair market value of all the property. In particular, the family court did not determine the fair market value of Landscape Supply, which constituted a considerable debt of the marriage. Moreover, the family court failed to determine the direct and indirect contributions of the parties to the acquisition of the marital property. It is unclear from our review of the record the value of the marital estate or the fairness of the overall apportionment. Additionally, counsel for both Husband and Wife conceded during oral argument that the family court never placed a value on Landscape Supply or the entire marital estate.

We, therefore, reverse the family court's division of the parties' marital property and remand the issue. In determining the property division, the family court shall identify all marital property and the contributions of each party consistent with the findings in this opinion. See § 20-3-620(B); see also Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1993) (holding section 20-3-620(B)(13) creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is marital debt and must be factored in the totality of equitable apportionment); Rowland v. Rowland, 295 S.C. 131, 132-133, 367 S.E.2d 434, 435 (Ct. App. 1988) (remanding the issue of equitable distribution when the family court failed to make findings on the parties' contributions and on other factors).

II. Best Interests of R.B.

Husband contends the family court abused its discretion in granting primary placement of R.B. with Wife. In addition, Husband asserts the family court erred in modifying the visitation schedule and the method of making child support payments.

a. Primary Placement

Husband argues the family court abused its discretion in awarding primary placement of R.B. to Wife. We disagree.

In a child custody case, the welfare of the child and what is in the child's best interest are the primary, paramount, and controlling considerations of the family court. Davis v. Davis, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003). In determining the best interest of the child, the family court considers several factors, including: "who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children." Patel v. Patel, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001). In other words, "the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995) (emphasis added).

Husband contends the best interests of the child would be served by granting him primary placement of R.B. In support of this contention, Husband asserts that while Wife had primary placement of the child, R.B. did not have his own room to sleep in and often witnessed fights between Wife's brother and Wife's father. In addition, Husband testified that when R.B. was picked up for Boy Scouts, he often lacked shoes, socks, and underwear. Moreover, Husband presented evidence of unsanitary conditions in the marital home when Wife and R.B. lived there as an additional reason why the best interests of the child would be served by granting primary placement of R.B. with Husband.

The family court properly considered this evidence and other testimony on the strengths and weaknesses of each parent and weighed the totality of circumstances in determining the child's best interests would be served by awarding custody to Wife. After hearing extensive testimony on the custody issue from the parties and several character witnesses, and after reviewing the guardian ad litem's report, the family court made in-depth findings to support

its decision to award primary placement of the child to Wife. We find ample support in the record for these findings.

Initially, the family court found Wife has been the primary caretaker of R.B. and continued to do so since the parties separated and agreed to have joint custody of R.B. The family court also considered the spiritual aspect of the child's life in noting Wife has "carried the minor child to church and church activities since he was very young." Additionally, the family court noted that although Wife lives with her parents, R.B. has a very close relationship with the maternal grandparents and he has excellent living accommodations, including a separate bedroom.

In addition, the child's education is a proper factor for consideration in determining custody. See Glanton v. Glanton, 314 S.C. 58, 60, 443 S.E.2d 810, 812 (Ct. App. 1994) ("The education of a child is something that affects his best interest."). The family court entertained testimony from Wife, R.B.'s tutor, and Husband's mother, who all recounted Wife's efforts to improve R.B.'s education. Based upon this testimony, the family court concluded R.B.'s learning disability required him to repeat the first grade. The family court further found Wife fully recognizes the scope of R.B.'s learning disability and took the affirmative step to employ a tutor to help R.B. Moreover, the family court found Wife "aided the tutor and has participated with the remedial procedures for the child's improvement" and noted R.B.'s "current grades are exceptional for the Fall Semester of 2009." Wife's approach to the child's education, coupled with the child's improved performance while in Wife's primary care, supports the family court's award of primary placement to Wife. Glanton, 314 S.C. at 60, 443 S.E.2d at 812.

The family court's findings show it properly considered the fitness of each parent and the relevant factors that would affect R.B.'s best interests in making its custody and placement determination. See Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) ("When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken

into consideration."). Accordingly, the family court did not err in awarding primary placement of R.B. with Wife.

b. Visitation Schedule

Next, Husband asserts the family court erred in failing to adopt the visitation schedule set forth in the temporary order.[2] We disagree.

As an initial matter, we note Husband abandoned this issue on appeal. In Husband's brief, he fails to cite any supporting authority for his position, and all arguments are merely conclusory statements. See Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (finding an issue listed in the statement of issues on appeal but not addressed in the brief is abandoned); Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (holding when an issue is not argued within the body of the brief but is only a short, conclusory statement, it is abandoned on appeal). We address this issue, however, because "procedural rules are subservient to the court's duty to zealously guard the rights of minors." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000).

As with child custody, the welfare and best interests of the child are the primary considerations in determining visitation. Woodall v. Woodall, 322 S.C. 7, 12, 471 S.E.2d 154, 158 (1996). Similarly, visitation is addressed to

[2] Husband asserts the family court modified the visitation times in the final order contrary to the visitation schedule set forth in the temporary order without his consent. We take this opportunity to reiterate that temporary hearings are not de facto final hearings, and we adhere to the principle that temporary orders must be without prejudice to the rights of the parties at the final hearing. See Rimer v. Rimer, 361 S.C. 521, 527 n.6, 605 S.E.2d 572, 575 n.6 (Ct. App. 2004). As this court aptly stated in Rimer, "To assign weight to the amount of support awarded pendente lite or view the award as having any precedential value at the merits hearing or on appeal would discourage parties from amicably agreeing upon temporary support for fear the slightest concession would prejudice their position at the final hearing." Id.

the broad discretion of the family court and its decision will not be disturbed on appeal absent abuse. Paparella v. Paparella, 340 S.C. 186, 191, 531 S.E.2d 297, 300 (Ct. App. 2000).

At the merits hearing, Husband wanted the same visitation schedule as set forth in the temporary consent order. Wife requested three changes to the visitation schedule in the temporary consent order at the final hearing, arguing the changes were in the best interests of the child. Wife asked the family court to alter the weekend visitation dates so R.B. could play with a cousin similar in age who has visitation with Wife's brother on those particular weekends. In addition, Wife asked the family court to order the Monday evening visitation to conclude at 8 p.m. because 9 p.m. is R.B.'s usual bedtime and R.B. was getting home too late. Finally, Wife requested the family court order the Christmas visitation schedule to allow R.B. to participate in her family's Christmas activities. The family court agreed with Wife and concluded the welfare and best interests of R.B. were served in ordering the changes. In doing so, the family court ordered the following visitation schedule:

> (1) Husband shall have three non-consecutive weeks of visitation in the summer with the weeks running from Sunday at 6pm until Sunday at 6pm and the first week shall be the third week of June, the second week being the first week of July and the third week being the first week of August.
> (2) Husband shall have Thanksgiving visitation starting when the child gets out of school and going to Sunday at 6pm on even years and the Mother having odd years.
> (3) Husband shall always get visitation for the weekend when Father's Day occurs and Wife shall get visitation for the weekend when Mother's Day occurs.

(4) Weekend visitation will be switched with Husband having two (2) consecutive weeks to allow for this change.
(5) Husband shall have weekly visitation every Monday evening from 5:00 p.m.-8:00 p.m. for boy scouts or on any weekday evening that the boy scouts meet and any other times the parties agree.
(6) Husband will have the child from the beginning of Christmas vacation until 10:30 a.m. on Christmas morning. Wife will have the child from 10:30 a.m. Christmas morning until school resumes.

It is clear from our review of the record that Wife's requests were for the benefit of R.B. and the family court considered the welfare and best interests of the child in determining visitation. See Woodall, 322 S.C. at 12, 471 S.E.2d at 158 (holding the welfare and best interests of the child are the primary considerations in determining visitation). Moreover, we conclude that Husband has failed to establish that the family court abused its discretion. Paparella, 340 S.C. at 191, 531 S.E.2d at 300. Accordingly, the family court did not err in entering an appropriate visitation schedule at the final hearing on the merits.

c. Child Support Payments

Husband also contends the family court erred in determining he is required to make child support payments through the clerk of court. We agree.

In the instant case, the family court made the following pertinent finding of fact:

> I find that the respective incomes of the parties remains virtually the same as when child support was ordered in the Temporary Order and shall continue to

> be paid in the amount of Four Hundred Thirty-Three and 00/100 ($433.00) Dollars per month, together with costs, to the Clerk of Court for Abbeville County.

(emphasis added). However, this finding of fact is inconsistent with the family court's conclusion of law that Husband's child support payments "will continue to be paid in the amount and method he currently pays." (emphasis added). The testimony presented at trial by both Husband and Wife established Husband consistently made his payments directly to Wife. Regardless of the contradictory nature of the family court's order with regard to the child support payments, Wife states in her brief she has no objection to Husband directly depositing the payment into her account. Accordingly, Husband is required to make child support payments in the same amount as previously ordered by the family court, but he is permitted to directly deposit the payment into Wife's banking account, thereby avoiding any additional costs assessed by the Clerk of Court for Abbeville County.

III. Attorney's Fees

Last, Husband argues the family court abused its discretion in awarding $8,000 in attorney's fees to Wife. Specifically, Husband argues the family court did not make the necessary findings of fact regarding each of the Glasscock[3] factors. We find this issue is not preserved for our review.

"An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the [family] court." In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). At trial, counsel for Wife and Husband both submitted affidavits for

[3] Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), sets forth the following factors to be considered in determining the amount of attorney's fees to be awarded: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services.

attorney's fees incurred in the representation of their respective clients during the course of litigation. Husband did not challenge Wife's fee affidavit at the hearing and, therefore, failed to procure a ruling from the family court on this issue. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (holding an unchallenged ruling, right or wrong, is the law of the case and requires affirmance); Smith v. Smith, 386 S.C. 251, 273, 687 S.E.2d 720, 732 (Ct. App. 2009) (stating to preserve an issue for appellate review, it must be raised to and ruled upon by the court).

While Husband failed to challenge the attorney's fees affidavit presented by Wife's counsel at trial, he did raise a general argument in a subsequent Rule 59(e), SCRCP, motion stating, "the Court required [Husband] to pay large sums of money to [Wife], her attorney, and the guardian ad litem within 180 days when the record clearly establishes through expert testimony that [Husband] does not have the ability to borrow any money or to pay those sums within that time frame." Although Husband objects to what he contends is an unreasonable period of time to pay, his argument is not based on a specific challenge to an award of attorney's fees. Further, any request at the 59(e) stage of the proceedings was untimely because Husband could have raised this issue at trial. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[A]n issue may not be raised for the first time in a post-trial motion."). Accordingly, we find this issue is not preserved for our review.

CONCLUSION

In summary, we find the family court erred in dividing the marital estate and reverse and remand for further proceedings consistent with this opinion. However, we affirm the family court's decision with regard to primary placement of the minor child and the visitation schedule. In addition, the family court's ruling as to the method of child support payments is reversed. Because Husband failed to properly preserve the issue of attorney's fees, we affirm the family court's ruling on this issue. Accordingly, the family court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

James Ervin Ramsey, Respondent.

Appellate Case No. 2009-146306

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

Published Opinion No. 4983
Heard March 27, 2012 – Filed June 6, 2012

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina J. Catoe, Assistant Attorney General Curtis A. Pauling, III, all of Columbia, for Appellant.

Christopher A. Wellborn, Christopher A. Wellborn, P.A., of Rock Hill, for Respondent.

FEW, C.J.: This appeal involves the circumstances in which the State may use a uniform traffic ticket to commence judicial proceedings in the magistrate court on

a charge of criminal domestic violence, first offense (CDV). We hold that the ticket officers issued to James Ramsey for CDV did not commence judicial proceedings. We affirm the dismissal of the charge.

I. Facts and Procedural History

On February 18, 2006, officers responded to a call from Ramsey's estranged wife and arrested him for burglary and CDV. The officers issued Ramsey a uniform traffic ticket for the CDV. They did not seek an arrest warrant on that charge.

The circuit court held a preliminary hearing on the burglary charge. Finding a lack of probable cause, the court dismissed the burglary and remanded the CDV to the magistrate court. Ramsey then made a motion to dismiss the CDV for lack of probable cause. The magistrate granted the motion, and the circuit court affirmed. The supreme court reversed and remanded, holding magistrates may not conduct preliminary hearings in cases within their trial jurisdiction. *State v. Ramsey*, 381 S.C. 375, 377-78, 673 S.E.2d 428, 429 (2009).

On remand, Ramsey made another motion to dismiss. He argued his case was not properly before the magistrate court because service of the ticket on him did not commence proceedings in that court. The magistrate granted the motion, holding service of a uniform traffic ticket for CDV first offense does not commence proceedings in the magistrate court if an officer did not see the offense being committed.

The circuit court affirmed on a different ground. It held that with the exception of offenses listed in section 56-7-10 of the South Carolina Code, proceedings do not begin in magistrate court until an arrest warrant is issued and served. Because CDV is not listed in that section and an arrest warrant was not issued for the charge, the circuit court concluded the magistrate properly dismissed the case.

II. Commencement of Proceedings in Magistrate Court

Section 22-3-710 of the South Carolina Code (2007) provides "[a]ll proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." Under this section, and subject to exceptions we will discuss, the State may not commence judicial proceedings in

the magistrate court without first obtaining an arrest warrant. *See Bayly v. State*, ___ S.C. ___, ___, 724 S.E.2d 182, 184-85 (2012) (discussing section 56-7-10's elimination in limited circumstances of the requirement for an arrest warrant in order to commence judicial proceedings in the magistrate court); *State v. Fennell*, 263 S.C. 216, 220, 209 S.E.2d 433, 434 (1974) (finding it necessary to have an arrest warrant to commence judicial proceedings in the magistrate court unless an exception applied); *State v. Praser*, 173 S.C. 284, 286, 175 S.E. 551, 551 (1934) (affirming the issuance of a writ of habeas corpus on the basis that, under the precursor to section 22-3-710, the municipal court had no power to hear a case as to which no arrest warrant was issued).

In 1971, the Legislature created an exception to the warrant requirement of section 22-3-710. Under what is now codified as section 56-7-10, law enforcement officers may use a uniform traffic ticket in arrests for "traffic offenses" and offenses listed in the section. S.C. Code Ann. § 56-7-10 (Supp. 2011). The section goes on to provide: "The service of the uniform traffic ticket shall vest all traffic, recorders', and magistrates' courts with jurisdiction[[1]] to hear and to dispose of the charge for which the ticket was issued and served." *Id.* Through these provisions, section 56-7-10 "eliminates the need for an arrest warrant and authorizes the use of a uniform traffic ticket to notify an accused and commence judicial proceedings in the magistrate court." *Bayly*, 724 S.E.2d at 184-85. Therefore, if the offense is a traffic offense or is listed in section 56-7-10, an officer may make an arrest with a uniform traffic ticket, and the State may proceed to trial in the magistrate court without an arrest warrant. *Id.*

In 1990, the Legislature enacted section 56-7-15, which provides that the uniform traffic ticket "may be used by law enforcement officers to arrest a person for an offense committed in the presence of a law enforcement officer if the punishment

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[1] The term "jurisdiction" in this section does not refer to a court's subject matter jurisdiction, "which is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Rather, it refers to the fact that, as to appropriate charges, the section authorizes the use of a uniform traffic ticket to notify an accused and commence judicial proceedings in the magistrate court.

is within the jurisdiction[2] of magistrates court . . . ." S.C. Code Ann. § 56-7-15(A) (Supp. 2011). This subsection "specifically references section 56-7-10, to expand the list of offenses for which a uniform traffic ticket may be used to arrest a person" and to commence proceedings in magistrate court. *Bayly*, 724 S.E.2d at 186. Thus, if subsection 56-7-15(A) applies to an offense, the State may proceed to trial in the magistrate court using a uniform traffic ticket instead of an arrest warrant. 724 S.E.2d at 186-87.

Under sections 56-7-10 and 56-7-15, therefore, there are three categories of offenses for which the State may use a uniform traffic ticket instead of an arrest warrant to commence proceedings in the magistrate court: (1) traffic offenses; (2) offenses specifically listed in section 56-7-10; and (3) offenses within the subject matter jurisdiction of the magistrate court that are committed in the presence of a law enforcement officer.

III. Subsection 56-7-15(A) Does Not Apply to the Offense in this Case

The issue in this case is whether Ramsey's alleged offense fits within the third category.[3] In other words, because the State did not obtain an arrest warrant, it may not proceed to trial in Ramsey's case unless we determine that despite the language in subsection 56-7-15(A) limiting its application to offenses "committed in the presence of a law enforcement officer," and despite the fact that no officer was present when the CDV occurred, the State may use a uniform traffic ticket to formally charge Ramsey with CDV. We find the State did not properly commence judicial proceedings in this case because subsection 56-7-15(A) does not apply to Ramsey's alleged offense.

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[2] In this section, "jurisdiction" refers to the subject matter jurisdiction of the magistrate court. *See Bayly*, 724 S.E.2d at 186 (stating the enactment of section 56-7-15 "did not operate to increase the subject matter jurisdiction of the magistrate court").

[3] The magistrate court has subject matter jurisdiction over criminal domestic violence, first offense. S.C. Code Ann. § 16-25-20(B)(1) (Supp. 2011). The issue before us therefore involves only the "committed in the presence" requirement of subsection 56-7-15(A).

The subsection does not apply because the offense was not committed in the presence of a law enforcement officer. Ramsey's estranged wife called 911 to report that Ramsey had broken into her apartment. Ramsey is accused of injuring her hand in an effort to take the phone from her during the 911 call. As the State concedes, no officer was present when any of this happened. The officers did not arrive at Mrs. Ramsey's apartment until eleven minutes after she called 911. Therefore, the alleged offense does not fit into the third category of exceptions, and the State cannot use the ticket to commence proceedings in the magistrate court. Because the State never sought an arrest warrant, and because the use of a uniform traffic ticket to commence proceedings was not authorized under sections 56-7-10 or 56-7-15, the magistrate could not hear the case.

IV. The State's Arguments

The State makes several arguments in support of its position that the ticket served on Ramsey did commence proceedings in the magistrate court. First, the State argues that the offense was "freshly committed" when the officers arrived, and that a freshly committed offense was committed in the officer's presence. We agree the offense was freshly committed. We disagree, however, that a freshly committed offense is committed in an officer's presence.

The State's argument is based on a series of decisions in which our appellate courts held that an officer may make a warrantless arrest for an offense not committed in the officer's presence if the offense was "freshly committed" when the officer arrived on the scene. For example, in *State v. Martin*, 275 S.C. 141, 143, 268 S.E.2d 105, 106 (1980), the supreme court stated, "while generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when the facts and circumstances *observed by the officer* give him probable cause to believe that a crime has been freshly committed." 275 S.C. at 145-46, 268 S.E.2d at 107.

Relying on *Martin*, the State argues an officer's observation of the aftermath of a freshly committed offense satisfies the "in the presence" requirement of subsection 56-7-15(A). The State is incorrect in arguing the reasoning of *Martin* applies to this case. *Martin* actually illustrates that offenses committed in an officer's presence and "freshly committed" offenses are distinct concepts, such that an offense is "freshly committed" only if it is not committed "in the presence of a law enforcement officer." The State's argument, however, equates these concepts.

Such a position is contrary to *Martin*, and to the Legislature's treatment of these concepts in other statutes. *See* S.C. Code Ann. § 16-25-70(A)-(B) (Supp. 2011) (permitting an officer to arrest a suspect upon probable cause to believe the suspect "is committing *or* has freshly committed" a criminal domestic violence offense (emphasis added)); § 23-1-212(B)(3) (2007) (permitting a federal law enforcement officer to enforce state criminal laws either when the crime is "committed in the federal law enforcement officer's presence *or* under circumstances indicating a crime has been freshly committed" (emphasis added)). Therefore, we reject the State's argument.

Second, the State argues the application of several rules of statutory construction indicates the Legislature intended that subsection 56-7-15(A) would authorize the use of a uniform traffic ticket to commence judicial proceedings even when an offense was not committed in the officer's presence. We find the principle of statutory construction that penal statutes are to be strictly construed against the State defeats the State's argument. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant.").

Third, the State argues the supreme court already addressed the issue before us in the first appeal of this case. We disagree. The first appeal involved only the question of whether the magistrate had the power to hold a probable cause hearing on Ramsey's CDV charge. *See Ramsey*, 381 S.C. at 376, 673 S.E.2d at 428. We have reviewed the briefs and record from *Ramsey*, and the applicability of subsection 56-7-15(A) is not mentioned by either party or by the lower courts. We believe the supreme court's statement that Ramsey's "CDV charge was within the magistrate's jurisdiction," 381 S.C. at 377, 673 S.E.2d at 429, was a comment that the magistrate court has subject matter jurisdiction over the type of offense with which Ramsey was charged, not a case-specific determination that the ticket served on Ramsey commenced proceedings in the magistrate court.

The State's remaining arguments are not preserved, and therefore we do not address them. *See State v. Sheppard*, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) ("Our law is clear tha[t] an issue may not be raised for the first time on appeal.").

V. Conclusion

Section 56-7-15(A) does not authorize the use of a uniform traffic ticket to commence judicial proceedings in the magistrate court unless the offense charged was "committed in the presence of a law enforcement officer." Because officers arrived on the scene after the alleged CDV ended, the service of the uniform traffic ticket on Ramsey did not commence judicial proceedings, and the magistrate court properly dismissed the charge. The decision of the circuit court to affirm the magistrate court is

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bennie Golston, Appellant.

Appellate Case No. 2009-127766

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Published Opinion No. 4984
Heard May 13, 2012 – Filed June 6, 2012

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

FEW, C.J.: Bennie Golston appeals his conviction for criminal domestic violence of a high and aggravated nature (CDVHAN). His primary contention on appeal is that the trial court erred in declining to charge the jury on criminal domestic violence (CDV) as a lesser-included offense. We affirm.

I. Facts and Procedural History

Golston and the victim lived together "off and on" for approximately five years. On the morning of March 22, 2008, a neighbor found the victim lying on a mattress in her house. Her breathing was shallow and her face was so swollen that she could not open her eyes. The neighbor called 911, and deputies and paramedics came to the victim's house. According to the deputies who responded to the scene, the victim told them Golston attacked her the previous night using his fists, a log, and a hatchet. The victim's adult son also came to her house. Her face was so swollen that he did not recognize her. The son testified:

> I went into the house, went to the back, and I saw my momma laying there. That was my momma but that wasn't my momma. I wasn't prepared for that. I worked at Rocket Rescue[1] for about two years, and I've seen wrecks with fatalities. I've never seen anybody's face swollen like that. If she hadn't talked, I wouldn't have known that was my momma.

The paramedics drove the victim to a hospital, where doctors ordered a CAT scan and a blood test for internal trauma. Although the CAT scan revealed no bone fractures and the blood test results were normal, a nurse testified "the doctor documented that she was so swollen he couldn't do the type of exam that he wanted to do to make sure that she could have vision." The victim left the hospital that night with her children. Over the next few days, she continued to have difficulty breathing and could not feed or bathe herself. The swelling continued to prevent her from opening both of her eyes. She was able to open her right eye after four or five days, but she could not open her left eye for about a week and a half. When she finally was able to open her eyes and doctors examined them, she began wearing glasses for the first time.

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[1] It is not clear from the record what the son meant by "Rocket Rescue," but it appears the phrase is a colloquialism for emergency medical services companies.

Golston was indicted and tried for CDVHAN. At trial, the State and Golston presented conflicting accounts of the incident. The victim testified Golston came home between 11:00 p.m. and midnight, smelling of alcohol, and told her he should beat her up for allowing another man inside "our home" earlier that day.[2] Golston hit her "many, many, many times" in the face with his fists. She managed to get outside to her car, but he pulled her out of the car before she could start it. As she lay on the ground, Golston straddled her and continued beating her in the face. As he hit her, Golston said that she disrespected him by letting another man into the house and that he should kill her. She thought she was going to die. Golston then raised a hatchet over the victim, brought it down slowly, and rubbed the blade on her skin. While he rubbed the blade on her, he again said he should kill her. She begged him not to strike her with the hatchet. He raised the hatchet over his head, but then dropped it and walked away. The victim could not stand up and asked Golston for help. He started to pick her up, but then shoved her back to the ground and left.

Golston testified to a different version of events. According to his testimony, when he arrived at the house, the victim met him outside and was furious. She said "I'm going" and began walking off. As she walked away, Golston followed her and said, "Where you going? You ain't going nowhere." Without provocation, the victim then turned around, jumped on him, and clawed his face with her fingernails, cutting his face. He testified, "I slapped her, both sides of the face" and "she fell." He then went into the house, washed his face, and retrieved his hatchet. When he went back outside, she asked him for help getting up. He placed the hatchet on her car, helped her walk back to the house, and left.

Golston requested a jury charge on CDV as a lesser-included offense of CDVHAN.[3] He also requested a charge on self-defense. The trial court found that depending on whether the jury believed the State or Golston, he either was guilty of CDVHAN or acted in self-defense and thus was not guilty. The trial court

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[2] The other man was a longtime friend of the victim. He and his wife had helped the victim move furniture that day.

[3] Golston also requested a charge on simple assault and battery, but does not challenge on appeal the trial court's decision not to charge it.

therefore charged the jury on self-defense but not on CDV. The jury found Golston guilty, and the trial court sentenced him to ten years in prison.

II. CDV as a Lesser-Included Offense of CDVHAN

A person is guilty of CDV when the State proves he either "cause[d] physical harm or injury to [his] own household member," or "offer[ed] or attempt[ed] to cause physical harm or injury to [his] own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A), (B) (Supp. 2011). A person is guilty of CDVHAN when, in addition to proving CDV, the State proves one of the aggravating circumstances set forth in subsection 16-25-65(A) of the Code, such as that the defendant's conduct "result[ed] in serious bodily injury to the victim." § 16-25-65(A)(1) (Supp. 2011).

In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN. In this case, for example, Golston's statement to the victim "you ain't going nowhere" and his admitted "slap[ping] her face" could be found by a jury to amount only to CDV and not CDVHAN. However, the mere existence of evidence that Golston committed these acts in addition to other acts which could constitute CDVHAN, such as beating the victim with his fists so severely that her own son could not recognize her and she could not open one of her eyes for ten days, does not warrant a jury charge on simple CDV. Rather, to warrant a jury charge on the lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense *instead of* the indicted offense. *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("A trial judge is required to charge the jury on a lesser included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed."). In other words, the existence of evidence that Golston committed simple CDV in addition to CDVHAN does not warrant the charge. There must be evidence from which the jury could conclude the defendant committed only the lesser offense. *See State v. Brown*, 269 S.C. 491, 495-96, 238 S.E.2d 174, 176 (1977) ("The trial judge committed no error in refusing to charge simple assault and battery since there was no evidence tending to show appellant was only guilty of the lesser offense.").

Therefore, the task of the trial court in deciding whether to charge the lesser offense, and of this court reviewing that decision on appeal, is to examine the record to determine if there is evidence upon which the jury could find the defendant was guilty of the lesser offense, but not guilty of the greater offense.[4] In this case, the jury could have found Golston not guilty of any offense if it determined the State failed to prove he was the person who assaulted the victim, or failed to disprove at least one element of self-defense.[5] It is also possible the jury could have determined Golston committed some act which constituted CDV. However, there is no evidence in the record that anyone else caused injury to the victim. Therefore, if the State proved Golston committed CDV, then he was necessarily the person whose attack caused all of the victim's injuries. There is no evidence in the record upon which the jury could have found that those injuries were not "serious bodily injur[ies]" under subsection 16-25-65(A)(1). Under these circumstances, it was not possible for the jury to find Golston guilty of CDV but not guilty of CDVHAN.

Golston makes several arguments in support of his position that the charge should have been given. First, he argues simply that whether the victim's injuries were "serious" under subsection 16-25-65(A)(1) is a question of fact, and if the jury found the injuries were not serious, he could be guilty only of CDV. In support of this argument, Golston points out the phrase "serious bodily injury" is not defined in the statute,[6] indicating the Legislature's intent that the question be decided by a

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[4] In making this inquiry, we are mindful that Golston had no burden of proof. However, we are not permitted to speculate that the jury might not have believed some of the evidence that was presented. *See State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense.").

[5] As to the State's burden to disprove self-defense, see *State v. Bixby*, 388 S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (stating self-defense consists of four elements, and when a defendant raises that defense, the State bears the burden of disproving at least one of the elements beyond a reasonable doubt).

[6] "Serious bodily injury" is defined in another section of the Code as "a physical condition which creates a substantial risk of death, serious personal disfigurement,

jury. We agree there will be many instances in which the question is one for the jury. However, just as in situations where minor injuries cannot possibly be found by a jury to be serious, and therefore the defendant cannot be guilty of CDVHAN, we find the victim's injuries in this case cannot possibly be found not to be serious. The only evidence in the record is that the blows to the victim's face caused swelling so severe that her son could not recognize her, she had difficulty breathing and feeding herself for several days, and she could not open one of her eyes for ten days. The doctors were so concerned by the severity of the injuries to her face that they ordered a CAT scan and testing for internal trauma. The beating caused such severe swelling that doctors were initially unable to examine her eyes, but when they could, they found permanent injury in that she had to wear glasses for the first time. We disagree with Golston that a jury could possibly find these injuries were not serious.

Golston also argues the jury could have found the State failed to prove two other aggravating circumstances: "an assault and battery which involves the use of a deadly weapon" under subsection 16-25-65(A)(1), and "an assault . . . which would reasonably cause a person to fear imminent serious bodily injury or death" under subsection 16-25-65(A)(2). Additionally, as to the serious bodily injury aggravating circumstance, Golston argues the victim did not suffer any broken bones, she did not permanently lose her eyesight, and there was no evidence she sustained cuts or required stitches. We find it unnecessary to address these arguments because, as we have explained, the only evidence in the record is that the injuries the victim did sustain were serious, and thus the State necessarily proved at least one aggravating circumstance—serious bodily injury. The fact that there may be conflicting evidence as to other aggravating circumstances, or that there may be other serious bodily injuries the victim did not sustain, does not affect the existence of some serious bodily injury, and therefore the necessity that, on these facts, Golston was either not guilty or guilty of CDVHAN.

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or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 23-31-400(A)(2) (2007). We do not decide whether that definition applies to subsection 16-25-65(A)(1). However, even if we decided it did, we do not believe there is any evidence in the record that the victim's injuries do not meet that definition, as she suffered temporary serious disfigurement to her face, protracted loss of the use of her eyes from the swelling, and permanent impairment of vision.

Because there is no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN. The trial court properly refused to charge CDV.

III. Other Issues

Golston also argues the trial court erred in rejecting his challenge to the sufficiency of his indictment and in denying his motion to suppress evidence of the hatchet deputies found in his house while executing a warrant for his arrest. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

As to the challenge to the sufficiency of the indictment: *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (stating the primary purposes of an indictment are to apprise the defendant "of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted").

As to the motion to suppress: *State v. Loftin*, 276 S.C. 48, 51, 275 S.E.2d 575, 576 (1981) ("A valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence 'when there is reason to believe the suspect is within.'" (quoting *Payton v. New York*, 445 U.S. 573, 603 (1980))); *United States v. Green*, 599 F.3d 360, 375-76 (4th Cir. 2010) ("Where law enforcement officers possess an arrest warrant and probable cause to believe a suspect is in his home, the officers may enter and search anywhere in that residence in which the suspect might be found.") (citing *Maryland v. Buie*, 494 U.S. 325, 332-33 (1990)); *State v. Morris*, 395 S.C. 600, 605, 720 S.E.2d 468, 471 (Ct. App. 2011) (stating on appeal of the denial of a motion to suppress, this court reviews a trial court's legal conclusions for clear error and factual findings under the any-evidence standard).

IV. Conclusion

We find there is no evidence in the record upon which the jury could have found Golston committed CDV instead of CDVHAN, and therefore the trial court properly refused to charge CDV as a lesser-included offense. We affirm.

AFFIRMED.

HUFF and SHORT, JJ., concur.