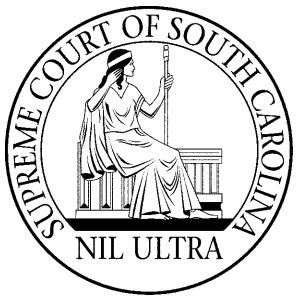

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 7, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2010-UP-298-Carey Graham and Rodney A. Chardukan v. Malcolm M. Babb et al.
(Horry, Judge J. Michael Baxley)

2010-UP-299-Brummitt v. Brummitt
(Sumter, Judge Wayne M. Creech)

2010-UP-300-Kenneth Dale Motsinger v. Lura Williams
(Charleston, Judge R. Markley Dennis, Jr.)

PETITIONS FOR REHEARING

4637-Shirley's Iron Works v. City of Union	Denied 05/20/10
4653-Ward v. Evans	Denied 05/27/10
4661-SCDOR v. Blue Moon of Newberry	Denied 05/28/10
4662-State v. M. Smith	Pending
4664-Tranquil Properties v. Dorchester County	Denied 05/28/10
4666-Southeast Toyota v. Jim Hudson	Denied 05/27/10
4669-Gorecki v. Gorecki	Pending
4670-SCDC v. Cartrette	Denied 05/28/10
4671-SCDC v. Tomlin	Denied 05/28/10
4672-State v. Porter	Pending
4673-Bailey v. SCDHEC	Pending
4674-Brown v. James	Pending
4675-Middleton v. Eubank	Pending
4677-Moseley v. All Things	Pending
4680-State v. Garner	Pending

4682-Farmer v. Farmer	Pending
4683-Hale v. Finn	Pending
4687-State v. S. Taylor	Pending
2008-UP-668-State v. S. Terry	Denied 05/28/10
2009-UP-596-Todd v. SCDPPPS	Pending
2010-UP-117-State v. N. Teamer #1	Pending
2010-UP-143-State v. L. Leverette	Pending
2010-UP-159-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-225-Novak v. Joye, Locklair & Powers	Denied 05/28/10
2010-UP-227-SCDSS v. McGuire	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-231-Ervin v. Colleton County (2)	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-234-In re: Mortgage (DLJ v. Jones)	Pending
2010-UP-237-Miller v. SCDC	Pending
2010-UP-238-Nexsen v. Driggers	Denied 05/28/10
2010-UP-239-Barron v. State	Denied 05/28/10
2010-UP-244-SCDSS v. Davis	Denied 05/28/10
2010-UP-247-State v. Hoyt	Denied 05/28/10
2010-UP-251-SCDC v. James	Pending
2010-UP-253-State v. M. Green	Denied 05/28/10

2010-UP-256-State v. Senior Denied 05/28/10

2010-UP-267-State v. Tanner Pending

2010-UP-268-State v. Gadson Pending

2010-UP-269-Adam C. v. Margaret B. Pending

2010-UP-273-Epps v. Epps Pending

2010-UP-276-Ford v. S.Carolina Pending

2010-UP-287-Kelly v. Rachels Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page Pending

4370-Spence v. Wingate Pending

4451-State of South Carolina v. James Dickey Pending

4462-Carolina Chloride v. Richland County Pending

4472-Eadie v. Krause Pending

4473-Hollins, Maria v. Wal-Mart Stores Pending

4474-Stringer v. State Farm Pending

4476-Bartley, Sandra v. Allendale County Pending

4480-Christal Moore v. The Barony House Pending

4491-Payen v. Payne Pending

4493-Mazloom v. Mazloom Pending

4510-State v. Hicks, Hoss Pending

4518-Loe #1 and #2 v. Mother Pending

4525-Mead v. Jessex, Inc.	Pending
4526-State v. B. Cope	Pending
4527-State v. J. Sanders	Dismissed 05/26/10
4528-Judy v. Judy	Granted 05/28/10
4529-State v. J. Tapp	Pending
4534-State v. Spratt	Pending
4541-State v. Singley	Pending
4545-State v. Tennant	Pending
4548-Jones v. Enterprise	Pending
4552-State v. Fonseca	Pending
4553-Barron v. Labor Finders	Pending
4554-State v. C. Jackson	Pending
4560-State v. C. Commander	Pending
4561-Trotter v. Trane Coil Facility	Pending
4574-State v. J. Reid	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending
4578-Cole Vision v. Hobbs	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending

4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Pending
4604-State v. R. Hatcher	Pending
4605-Auto-Owners v. Rhodes	Pending
4606-Foster v. Foster	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending
4622-Carolina Renewal v. SCDOT	Pending
4630-Leggett (Smith v. New York Mutual)	Pending
4631-Stringer v. State Farm	Pending
4633-State v. G. Cooper	Pending

4635-State v. C. Liverman	Pending
4639-In the interest of Walter M.	Pending
4640-Normandy Corp. v. SCDOT	Pending
4641-State v. F. Evans	Pending
4659-Nationwide Mut. V. Rhoden	Pending
2008-UP-126-Massey v. Werner	Pending
2008-UP-285-Biel v. Clark	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-148-State v. J. Taylor	Pending
2009-UP-199-State v. Pollard	Pending
2009-UP-204-State v. R. Johnson	Pending
2009-UP-265-State v. H. Williams	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-276-State v. Byers	Pending
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Baby Spires	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending

2009-UP-359-State v. P. Cleveland	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-396-McPeake Hotels v. Jasper's Porch	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-539-State v. McGee	Pending
2009-UP-540-State v. M. Sipes	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-585-Duncan v. SCDC	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending
2009-UP-594-Hammond v. Gerald	Pending
2009-UP-603-State v. M. Craig	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-111-Smith v. Metts	Pending
2010-UP-136-State v. R. Bryan	Dismissed 05/28/10
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending

2010-UP-154-State v. J. Giles	Pending
2010-UP-156-Alexander v. Abbeville Cty. Mem. Hos.	Pending
2010-UP-158-Ambruoso v. Lee	Pending
2010-UP-162-State v. T. Washington	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-178-SCDSS v. Doss	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-215-Estate v. G. Medlin	Pending
2010-UP-220-State v. G. King	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Cameron Lavar Brown, Appellant.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4691
Submitted February 1, 2010 – Filed June 2, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark

Rapoport, all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

SHORT, J.: In this criminal case, Cameron Lavar Brown appeals his convictions and sentences for voluntary manslaughter and possession of a firearm during the commission of a violent crime. Brown argues the trial court erred by: (1) refusing to permit the jury to view the crime scene; (2) allowing the State to comment on his post-arrest silence; (3) admitting evidence that he smoked marijuana on the day of the shooting; and (4) refusing a motion for mistrial and continuance. We affirm.[1]

FACTS

Regina Scott (Mother) lived with her husband, Henry Scott (the Victim), and her son, Brown, in Charleston. On July 7, 2005, around 9:30 or 10:00 p.m., Mother was washing her hair in the kitchen sink when Brown came into the kitchen and told her something was missing from his room.[2] Mother responded that she would be with him as soon as she finished washing her hair. Brown waited for a moment, but he left the kitchen before Mother finished washing her hair. She stated she then heard some "scuffing around" coming from the second floor of the house, and she heard a loud pop while she was trying to finish washing her hair. This noise was caused by the Victim and Brown.

Initially, Mother attributed this sound to the television. She left the kitchen to investigate and realized the television was not the source of the noise. The Victim then approached her and said, "Faye, that boy shot me," and she saw a gunshot wound in the Victim's stomach. The Victim was taken to the hospital where he died.

---

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

[2] Brown testified he kept the earnings from his job in his room, and his money was missing.

The day following the shooting, Brown turned himself over to the authorities. Brown was charged with murder and possession of a firearm during the commission of a violent crime. The jury returned a guilty verdict for voluntary manslaughter and possession of a firearm during the commission of a violent crime. The trial court sentenced Brown to eighteen years for the voluntary manslaughter conviction and five years for the firearm conviction, with both sentences to run concurrently. This appeal followed.

STANDARD OF REVIEW

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

LAW/ANALYSIS

Brown contends the trial court erred by: (1) refusing to permit a jury view of the crime scene; (2) allowing the State to comment on his post-arrest silence; (3) admitting evidence that he had smoked marijuana on the day of the shooting; and (4) refusing a motion for mistrial and continuance. We address each issue in turn.

A. Jury View

Brown contends the trial court abused its discretion by refusing to permit a jury view of the crime scene because the diagram misled and confused the jury regarding the layout of the house; the jury was unable to hear what it was like inside the house; the evidence admitted at trial did not help the jury appreciate the proximity and the size of the rooms in the house;

and the evidence failed to depict the stairway and the vestibule where the shooting occurred. We disagree.[3]

Jury views are controlled by section 14-7-1320 of the South Carolina Code, which states in pertinent part:

> The jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties **when it appears to the court that such view is necessary** to a just decision . . . .

S.C. Code Ann. § 14-7-1320 (Supp. 2009) (emphasis added).

A jury view is a matter within the discretion of the trial court. State v. McHoney, 344 S.C. 85, 100, 544 S.E.2d 30, 37 (2001). The trial court's decision will not be reversed absent an abuse of discretion. Id.

During Mother's testimony, the State sought to introduce a diagram that showed the layout of the home. The State conceded the diagram was not drawn to scale, but the purpose of the diagram was to show the locations of each of the rooms in the house in relation to each other. Defense counsel stated, "I don't object to the Court's ruling, although I would ask the Court, if it's going to be introduced, that it give more weight to our request for a jury-scene visit, crime scene visit." The trial court admitted the diagram into evidence and denied the jury view request.

---

[3] The State argues this issue is not preserved for review. We disagree. Defense counsel asked for a jury view, and the trial court denied this request. This issue was raised to and ruled upon by the trial court and is properly before this court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The State and defense counsel, along with several witnesses, acknowledged the diagram was not to scale. For example, Mother stated the diagram was not drawn to scale, but was an accurate representation of the location of the rooms with respect to each other. Officer Heath King agreed with the State's contention that the diagram was not drawn to scale, but he stated it showed with accuracy the layout of the house. Officer Richard Holmes agreed with defense counsel that the diagram was not intended to show the size of the rooms, but it was a layout of the house. Officer Rene Charles agreed with the State that the diagram was not to scale, but it accurately depicted the layout of the house. Based on the foregoing, the jury knew the diagram was not drawn to scale but that it correctly portrayed the layout of the house. Thus, the jury was not misled or confused regarding the layout of the house.

As to Brown's contention the jury was unable to hear what it was like inside the house, Mother's testimony shed light on the subject. Mother stated she heard noise coming from the second floor of the house while she was downstairs in the kitchen washing her hair. She also stated she heard the Victim come down the stairs. The jury might not have been able to hear the acoustic conditions of the house, but from Mother's testimony, it was apparent that a person on the first floor could hear what occurred on the second floor.

Additionally, the evidence admitted at trial showed the proximity and the size of the rooms in the house, including the stairway and the vestibule where the shooting occurred. Mother stated the house was small, the stairway narrow and dark, and described the confines of the house in general. Officer Holmes testified the house "is a confined area." Officer Charles, who took photographs of the crime scene, used these photographs to show the location of the Victim when the police arrived. One of these photographs showed the stairway.

Moreover, the trial court, in declining the request for a jury view, stated:

> I was concerned about the representations regarding the scale of the drawing. But as we got further in the trial, it became very apparent to me that the pictures that have been presented of the scene are accurate, they are accurate in scale, and they give a very clear impression of the tightness of this abode. . . . [The pictures] are incredibly accurate in terms of the scale, of the narrowness of the porch, the narrowness of the confines within which this incident took place. . . . If they were not, I think there would be some basis for the Court to go to a jury, to have a jury view. In this instance I do not think it is necessary, and I would find for the record that it is not necessary to a just decision in this case. . . . The photographs are accurate and are sufficient to aid the jury in their decision making as fact finders of this case, and the Court would deny the motion. . . .

Based on the foregoing, we cannot conclude the trial court improperly denied the jury view request. Id. (holding a jury view is a matter within the discretion of the trial court and its decision will not be reversed absent an abuse of discretion); Id. at 100-101, 544 S.E.2d at 37-38 (holding the trial court properly denied a jury view of the crime scene in a murder case when the jury requested to view the scene at night due to their concern that a witness lacked sufficient lighting to identify the defendant because a photograph of the area was admitted into evidence that indicated a street light was in the area and the witness testified that he had enough light to identify defendant).

B. Post-Arrest Silence

Brown next contends the trial court erred by allowing the State to comment on his post-arrest silence. We disagree.

During the trial, the State called Officer Richard Burckhardt to testify. The solicitor asked Officer Burckhardt if Brown complained of any injuries

after he turned himself into the authorities, and Officer Burckhardt replied in the negative. Defense counsel moved for a mistrial, arguing Burckhardt's testimony constituted a statement against Brown's interest.

Brown invoked his Miranda[4] rights immediately after he turned himself over to the authorities. Thereafter, Brown was placed in a patrol car and transported to the City Police Department where he was formally charged and processed. During this time, Officer Burckhardt used a questionnaire to inquire about Brown's mental and medical information, including existing medical conditions.[5]

Defense counsel argued Brown invoked his Miranda rights, and any subsequent statements made by Brown would violate his right to remain silent. The trial court found Miranda inapplicable because Officer Burckhardt's questions were routine administrative questions, and it allowed his testimony. On appeal, Brown asserts this decision was erroneous.

The admission of evidence rests in the sound discretion of the trial court. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). The trial court's decision will not be overturned unless controlled by an error of law resulting in undue prejudice. Id.

The Fifth Amendment to the United States Constitution provides, "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Based on this right against self-incrimination, the Supreme Court announced, "[T]he prosecution may not use

---

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] The questions on this questionnaire include: "Have you ever attempted suicide? Are you thinking about committing suicide? Has anyone in your family committed suicide? Has any close relative died recently? Have you been separated from your wife/husband or children or have you been divorced recently? Do you use any types of drugs such as a tranquilizer? Have you lost your job recently? Do you have a medical condition?"

statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards . . . ." Miranda, 384 U.S. at 444.

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. "Interrogation is defined as express questioning, or its functional equivalent which includes words or actions on the part of the police (**other than those normally attendant to arrest and custody**) that the police should know are reasonably likely to elicit an incriminating response." State v. Sims, 304 S.C. 409, 416-17, 405 S.E.2d 377, 381-82 (1991) (internal quotations omitted) (emphasis added). The Miranda warnings do not apply to routine booking questions. State v. Sullivan, 277 S.C. 35, 49, 282 S.E.2d 838, 846 (1981) (overruled on other grounds by State v. Gilchrist, 342 S.C. 369, 536 S.E.2d 868 (2000)).

In response to the question, "[A]re there any current physical conditions that we would need to know about, meaning serious things of any serious nature that would need treatment," Brown referred to a heart condition he suffered during the 1990s, but said he had no current problems. The question posed was a routine booking question. As Officer Burckhardt explained, he used this questionnaire on all inmates as part of the booking process. Officer Burckhardt testified that the purpose of the questions was to determine whether an inmate was fit to be incarcerated or needed to be taken to a medical facility to receive medical attention. We find no reversible error in the trial court's ruling.

C. Marijuana Use

Brown argues the trial court erred by admitting evidence indicating he had smoked marijuana on the day of the shooting because it was improper character evidence and inadmissible under Rule 404(b), SCRE. We disagree.

As noted above, the admission of evidence rests in the sound discretion of the trial court, and the trial court's decision will not be overturned unless it

is controlled by an error of law resulting in undue prejudice. Johnson, 318 S.C. at 196, 456 S.E.2d at 443. "The mere asking of an improper question is not necessarily prejudicial, however, where no evidence is introduced as a result." State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999).

The solicitor asked Brown if he had used any drugs prior to the shooting, to which Brown replied in the negative. The solicitor asked Brown whether he remembered speaking to a nurse and telling her that he had smoked marijuana on the day of the shooting. Brown replied, "No, sir, I don't remember that."

Even if we assume that the solicitor's questions were improper, the State did not introduce evidence to show Brown had used marijuana on the day of the shooting. In fact, Brown denied using marijuana on the day of the shooting. Thus, Brown suffered no prejudice as a result of the solicitor's questions.

D. Mistrial and Motion for a Continuance

Brown argues the trial court erred by refusing his motion for mistrial and continuance. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162-63 (Ct. App. 2006). The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. South Carolina courts favor the exercise of wide discretion of the trial court in determining the merits of such a motion in each individual case. Id. It is only in cases where there is an abuse of discretion resulting in prejudice to the defendant that we will intervene and grant a new trial. Id.

A manifest necessity must exist for the trial court to discharge the jury and declare a mistrial. Id. However, the trial court is left to determine, in its discretion, whether, under all the circumstances of each case, such necessity

exists. Id. The mistrial should be granted only if there is a manifest necessity or the ends of public justice are served. Id. The trial court should first exhaust other methods to cure possible prejudice before declaring a mistrial. Id.

Similarly, the trial court's decision to deny a motion for continuance is a matter within the trial court's discretion. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). As such, this court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. Id.

During the trial, the State called Sergeant Michael Gordon to testify. Sergeant Gordon stated he was contacted by Oscar Douglas. Douglas was working for defense counsel as a private investigator. Douglas had received a shell casing recovered by Mother as she was cleaning her house a few days after the shooting. Douglas met Gordon and turned over this evidence.

A day after this meeting, Gordon contacted Mother regarding the shell casing. Gordon stated Mother told him that defense counsel represented the family, and that she would not give a statement. Defense counsel moved for a mistrial on the grounds that the testimony indicated he represented the family, and the representation that Mother would not cooperate with the police was untrue and highly prejudicial to Brown. Defense counsel argued he would need to subpoena Douglas to disprove Gordon's statement. Douglas was in Iraq, and counsel asked for a continuance in order to subpoena Douglas. The trial court denied the mistrial motion and the motion for a continuance.

Initially, we question whether this issue is preserved for our review. After making the motions for a mistrial and a continuance, the State and defense counsel came to a compromise regarding Gordon's testimony. The parties agreed they would stipulate that defense counsel only represented Brown, and defense counsel did not instruct Mother not to cooperate. The parties successfully petitioned the court to instruct the jury that a stipulation is an agreement which requires no further proof. Counsel got the relief asked for and cannot complain on appeal. State v. Sinclair, 275 S.C. 608, 610, 274

S.E.2d 411, 412 (1981) (holding where the defendant had received the relief requested from the trial court, there is no issue for the appellate court to decide). Additionally, there is a second ground on which to conclude this issue is unpreserved.

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. State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996) (holding no issue is preserved for appellate review if the complaining party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge). In the present case, the trial court issued a curative instruction and defense counsel failed to challenge the sufficiency of the curative instruction, making this issue unpreserved for review.

Furthermore, even if this issue were preserved, we believe the trial court's instruction to the jury cured any error. A curative instruction is usually deemed to cure an alleged error. Id. The trial court instructed the jury to:

> [D]isregard the last question and last answer, asked of the witness in its entirety. You are to give absolutely no consideration to the question or the answer. It is not to be discussed in any way during your deliberation. You are to completely disregard it, and you are to completely disabuse your mind of it. And I am instructing your foreperson that if it is discussed in any way during deliberations, it is to be reported to the Court immediately.

The trial court's curative instruction cured any error presented by Gordon's testimony because the jury was told to disregard that testimony completely. Based on the foregoing, the trial court did not commit reversible error.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter of The Care and Treatment of Bobbie Manigo, Appellant.

Appeal From Colleton County
John M. Milling, Circuit Court Judge

Opinion No. 4692
Heard March 3, 2010 – Filed June 2, 2010

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Deborah R. J. Shupe, Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

SHORT, J.: The State commenced an action pursuant to the South Carolina Sexually Violent Predator Act[1] (the Act), alleging Bobbie Manigo

[1] S.C. Code Ann. §§ 44-48-10 et seq. (Supp. 2009).

met the statutory criteria for confinement as a sexually violent predator (SVP). Based on the Act, the State sought Manigo's commitment in a secure facility for long-term care, control, and treatment. The jury found Manigo was an SVP, and the trial court issued an order committing Manigo to the Department of Mental Health for long-term care and treatment. Manigo argues the trial court erroneously: (1) denied his motion for summary judgment; (2) allowed hearsay testimony; and (3) limited the number of witnesses he could call. We affirm.

FACTS

In 1987, Manigo was convicted of assault and battery of a high and aggravated nature for making sexual remarks while touching the victim. Manigo made sexual remarks to the victim, touched her on her breasts and vagina, and pushed her to the ground and attempted to have sex with her. Manigo was sentenced to ten years' imprisonment, suspended on the service of two years and five years' probation. In 1990, while on probation for the 1987 offense, Manigo was indicted for assault with intent to commit criminal sexual conduct in the first degree. Manigo used a knife and physical force to sexually assault the victim. Manigo pleaded guilty to assault with intent to commit criminal sexual conduct in the second degree. Manigo was sentenced to twenty years' imprisonment. In 2004, the State unsuccessfully sought to classify Manigo as an SVP, and Manigo was released from prison.

In 2006, Manigo followed the victim, masturbated, and urinated in front of her, and repeatedly exposed himself. Manigo pled guilty to indecent exposure. He was sentenced to three years' imprisonment, suspended upon the service of nine months and two years' probation. The State sought to classify Manigo as an SVP. The case went to trial, and a jury found Manigo to be an SVP. The trial court issued an order for commitment, committing Manigo to the Department of Mental Health for long-term control, care, and treatment. This appeal followed.

LAW/ANALYSIS

The Act provides for the involuntary civil commitment of SVPs who are mentally abnormal and extremely dangerous. S.C. Code Ann. § 44-48-20 (Supp. 2009). In order to commit an individual under the Act, a series of steps must occur. White v. State, 375 S.C. 1, 6-7, 649 S.E.2d 172, 174-75 (Ct. App. 2007). Initially, the multidisciplinary team, appointed by the Director of the Department of Corrections, must determine if the person meets the definition of an SVP. Id.

If the multidisciplinary team finds the person meets this definition, then it refers the case to the prosecutor's review committee. Id. The prosecutor's review committee must determine whether probable cause exists to commit the person as an SVP. Id. If this committee determines probable cause is present, the Attorney General may file a petition in the circuit court to request a probable cause hearing. Id.

At the probable cause hearing, the trial court must determine if there is probable cause to believe the person is an SVP. Id. If the trial court concludes there is probable cause, the person is transferred to a secure facility for evaluation by a court-approved qualified expert. Id. Ultimately, a trial must be conducted, at which the State must convince the court or jury beyond a reasonable doubt that the person is an SVP. Id.

A. Summary Judgment

Manigo argues the trial court erred in denying his summary judgment motion. Specifically, Manigo argues the Act is triggered only if a person is currently serving a sentence for a sexually violent offense, and because his 2006 offense of indecent exposure does not qualify as a sexually violent offense, the trial court lacked jurisdiction to commit him. We disagree.

When reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving

party. Laurens Emergency Med. Specialist, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003). A summary judgment motion should be granted when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.

An SVP is "a person who: (1) **has** been convicted of a sexually violent offense; and (2) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1) (Supp. 2009) (emphasis added). Section 44-48-40 sets out when a person is to be referred to the multidisciplinary team to determine if the person meets the definition of an SVP. This section states the multidisciplinary team is to be notified "when a person **has** been convicted of a sexually violent offense . . . ." S.C. Code Ann. § 44-48-40 (Supp. 2009) (emphasis added).

The cardinal rule of statutory construction is to determine and give effect to the intent of the legislature. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). The best evidence of legislative intent is the text of the statute. Id. If the terms of the statute are clear, the court must apply those terms according to their literal meaning. Id.

Both parties agree that Manigo's conviction for assault with intent to commit criminal sexual conduct is a sexually violent crime. See S.C. Code Ann. § 44-48-30 (Supp. 2009) (stating assault with intent to commit criminal sexual conduct qualifies as a sexually violent offense). The Act only requires that a person "has been convicted of a sexually violent offense." S.C. Code Ann. §§ 44-48-30(1) and 44-48-40 (Supp. 2009). Neither section requires the person to be currently serving an active sentence for a sexually violent offense. The statutes do not use present tense language, rather they state if the person has committed such an offense and meets the other qualifications set out in sections 44-48-30 and 44-48-40, then the person should be referred to the multidisciplinary team. The Act is unambiguous, and we must give meaning to its terms. See City of Columbia v. Am. Civil Liberties Union of

S.C., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (stating if the language in the statute is plain and unambiguous, there is no need to resort to the rules of statutory interpretation and the court must apply those terms according to their literal meaning).[2]

If the statutes used present tense language, then our interpretation would be different. The case of Townes v. Commonwealth of Virginia, 609 S.E.2d 1 (Va. 2005), which interpreted Virginia's Sexually Violent Predator Act (SVPA), is instructive on this point. In that case, Townes was convicted of statutory rape in 1973, and this offense qualified as a sexually violent offense for the determination of whether a person is an SVP. Townes, 609 S.E.2d at 2. In 1991, Townes completed serving his sentence for the statutory rape conviction. Id. However, Townes had committed offenses, none of which were sexually violent, while he was in prison, and as a result, he did not get released on parole until 2002. Id. Shortly after his release, Townes was returned to prison for violating his parole. Id.

Four months before his scheduled release, the Director of the Virginia Department of Corrections notified the Commitment Review Committee that Townes was subject to review for civil commitment because he had committed a sexually violent offense and had been identified as being likely to reoffend. Id. The Commitment Review Committee completed its review of Townes' case and forwarded to the Attorney General of Virginia a recommendation that Townes be committed as an SVP. Id.

The Commonwealth of Virginia filed a petition with the trial court for the civil commitment of Townes. Id. The trial court conducted a probable

[2] Manigo urges us to construe the Act in favor of him and against the State, arguing the Act is penal in nature. We respectfully decline this invitation because "while the Act bestows some of the rights normally associated with criminal prosecutions, it is not intended to be punitive in nature; rather, it sets forth a civil process for the commitment and treatment of [SVPs]." In re Care & Treatment of Canupp, 380 S.C. 611, 617-18, 671 S.E.2d 614, 617 (Ct. App. 2008).

cause hearing, held there was probable cause to believe that Townes was an SVP, and ordered that Townes remain in custody until a full hearing could be conducted. Id. Townes' counsel filed a motion and argued the trial court lacked jurisdiction because Townes had completed his sentence for the 1973 statutory rape conviction, and he was not incarcerated for a predicate sexually violent offense at the time of the petition. Id. The trial court ruled that although Townes had completed his sentence for the statutory rape conviction, he was subject to commitment as an SVP because he remained incarcerated on another offense. Id. Ultimately, the trial court found Townes to be an SVP and ordered him to be committed to the custody of Virginia's Department of Mental Health, Mental Retardation and Substance Abuse Services. Id. at 2-3.

On appeal to the Virginia Supreme Court, Townes argued the trial court erred in finding he remained subject to the SVPA, despite the fact that he had completed serving his sentence for the statutory rape conviction, which served as the sexually violent offense. Id. The Commonwealth argued the statutes in question did not specifically require the prisoner to be currently serving a sentence for the sexually violent offense, only that a person be in prison and have been convicted of a sexually violent offense. Id. The Virginia Supreme Court began by looking at the statutes in question. Id. The court stated:

> In relevant part, Code § 37.1-70.4 provides:
>
> B. The Director of the Department of Corrections shall establish and maintain a database of prisoners in his custody **who are incarcerated for sexually violent offenses.**
>
> C. Each month, the Director shall review the database of prisoners **incarcerated for sexually violent offenses** and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of four or more on the Rapid Risk Assessment for Sexual Offender Recidivism or a like score on a

> comparable, scientifically validated instrument as designated by the Commissioner. Upon the identification of such prisoners, the Director shall forward their name, their scheduled date of release, and a copy of their file to the [Commitment Review Committee] for assessment.
>
> Code § 37.1-70.5 provides:
>
> Within 90 days of receiving notice from the Director pursuant to § 37.1-70.4 regarding a prisoner **who is incarcerated for a sexually violent offense,** the [Commitment Review Committee] shall (i) complete its assessment of such prisoner for possible commitment pursuant to subsection B and (ii) forward its recommendation regarding the prisoner, in written form, to the Attorney General pursuant to subsection C.

Id. at 3 (emphasis in original).

The Virginia Supreme Court did not agree with the Commonwealth's argument that the language of these statutes did not limit the application of the SVPA to those prisoners who are currently serving a sentence for a sexually violent offense because such an interpretation would "ignore the present tense of that language." Id. Rather, the Virginia high court reasoned that following the Commonwealth's interpretation "would require us to add language and broaden the scope of the act by applying it to prisoners 'who are or previously have been incarcerated for sexually violent offenses.'" Id. at 4.

The Virginia statutes use present tense language; however, the South Carolina statutes do not. Namely, section 44-48-40 states the multidisciplinary team is to be notified "when a person **has** been convicted of a sexually violent offense . . . ." S.C. Code Ann. § 44-48-40 (Supp. 2009)

(emphasis added). As it relates to this case, our statute is different from Virginia's in this one critical aspect.[3]

Additionally, the legislative intent supports our conclusion that the Act only requires that a person be convicted of a sexually violent offense to trigger the process of commitment. Section 44-48-20 states:

> The General Assembly finds that a mentally abnormal and extremely dangerous group of [SVPs] exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these [SVPs] will engage in repeated acts of sexual violence if not treated for their mental conditions is significant. Because the existing civil commitment process is inadequate to address the special needs of [SVPs] and the risks that they present to society, the General Assembly has determined that a separate, involuntary civil commitment process for the long-term control, care, and treatment of [SVPs] is necessary. The General Assembly also determines that, because of the nature of the mental conditions from which [SVPs] suffer and the dangers they present, it is necessary to house involuntarily-committed [SVPs] in secure facilities separate from persons involuntarily committed under traditional civil commitment statutes. The civil commitment of [SVPs] is not intended to stigmatize the mentally ill community.

S.C. Code Ann § 44-48-20 (Supp. 2009).

The foregoing clearly demonstrates our Legislature's intent to identify and provide treatment to SVPs to protect the people of South Carolina. Our Legislature's intent in enacting the Act was to provide treatment through

[3] Also, the Virginia Supreme Court in interpreting the statutes stated they were "subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed." Townes, 609 S.E.2d at 4.

involuntary commitment to individuals who suffer from a mental abnormality to prevent such persons from committing future acts of sexual violence. See Wade, 348 S.C. at 259, 559 S.E.2d at 844 (holding the cardinal rule of statutory construction is to determine and give effect to the intent of the legislature).

B. Hearsay Testimony

Manigo argues the trial court improperly allowed hearsay testimony. We disagree.

Dr. Pam Crawford, the forensic psychiatrist who evaluated Manigo, testified about what she learned from Dr. Burke, Manigo's sex offender treatment provider. The following colloquy took place between the State's attorney and Dr. Crawford:

> Q: Now, is it important when taking sex offender treatment to admit to the sex offense provider all of your offense?
>
> A: I think it is.
>
> Q: Do you understand that [Manigo] did that?
>
> A: What I learned from [Dr. Burke] was that [Manigo] did not tell Dr. Burke about his prior sex offenses, so Dr. Burke was not aware of the proper pleas, but was only aware of the indecent exposure.
>
> . . .
>
> Q: Was that information a part of the basis for your opinion in this case?
>
> A: Yes.

Manigo objected to this testimony and argued it was hearsay. The trial court overruled the objection.

The admission of evidence is within the sound discretion of the trial court. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007). To constitute an abuse of discretion, the conclusions of the trial judge must lack evidentiary support or be controlled by an error of law. Id. The admissibility of an expert's testimony is within the trial judge's sound discretion, whose decision will not be reversed absent an abuse of discretion. Hundley ex rel. Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 294, 529 S.E.2d 45, 50 (Ct. App. 2000).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. However, an expert witness may state an opinion based on facts not within his or her firsthand knowledge. Rite Aid of S.C. Inc., 339 S.C. at 295, 529 S.E.2d at 50-51. The expert may base his or her opinion on information, whether or not admissible, made available before the hearing if the information is of the type reasonably relied upon in the field to make opinions. Id. Additionally, an expert may testify as to matters of hearsay for the purpose of showing what information he or she relied on in giving an opinion of value. Id.

In the present case, Dr. Crawford testified that she relied on information she received from Dr. Burke to form the basis of her opinion that Manigo was an SVP. Thus, the trial court's ruling does not constitute a reversible error. See Rule 703, SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

C. Witnesses

Manigo argues the trial court improperly excluded testimony by some of his witnesses. On appeal, Manigo asserts his rights to confront and call witnesses were impeded by the trial court's ruling in violation of his United States and South Carolina constitutional rights. Neither of these constitutional arguments were presented to the trial court, and therefore, they are not preserved for our review. In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review.").

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan R., Respondent,

v.

Donald R., Appellant.

Appeal from Spartanburg County
James F. Fraley, Jr., Family Court Judge

Opinion No. 4693
Submitted April 1, 2010 – Filed June 2, 2010

AFFIRMED AS MODIFIED

Christopher Paul Thompson and David Michael Collins, Jr., both of Spartanburg, for Appellant.

Richard H. Rhodes and Ruth L. Cate, both of Spartanburg, for Respondent.

WILLIAMS, J.: In this appeal, Donald R. (Husband) contends the family court erred by (1) requiring Husband to pay Susan R.'s (Wife) premarital medical expenses and costs; (2) imputing additional income to Husband; and (3) awarding attorneys' fees to Wife. We affirm as modified.[1]

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

FACTS

On June 22, 2006, Wife filed for divorce on the grounds of Husband's adultery and habitual drunkenness. In Wife's complaint, she sought, inter alia, custody of the parties' children, child support, contribution for their children's uncovered medical expenses, equitable distribution of the parties' assets and debts, alimony, restraining orders, and attorneys' fees. Husband counterclaimed, seeking a decree of separate maintenance and support and requesting custody, child support, contribution for their children's uncovered medical expenses, equitable division of their assets and debts, restraining orders, and attorneys' fees.

The majority of Husband's and Wife's claims were resolved in the parties' settlement agreement, which the family court approved at the final hearing. During the final hearing on May 5 and 6, 2007, the family court heard testimony regarding several outstanding issues not agreed upon by Husband and Wife, namely the parties' income for purposes of computing child support, responsibility for payment of Wife's medical bills, and attorneys' fees.

In its subsequent divorce decree dated June 7, 2008, the family court made the following findings of fact and conclusions of law relevant to this appeal: (1) Husband and Wife married on May 24, 2004, in Spartanburg County; (2) the parties had two children together, one child being born during the marriage and the other child being born prior to the marriage; (3) several witnesses, including two of Husband's paramours, admitted to engaging in an adulterous relationship with Husband, thus entitling Wife to a divorce on the grounds of adultery; (4) Wife waived her claim for alimony; (5) for purposes of child support, Husband's gross monthly income from his employment with Mitsubishi Polyester Film was $4,651.66, which included $100 per month in proceeds from a rental property and $400 per month from Husband's part-time farrier business; (6) Wife's gross monthly income as a nurse was $2,849.41; (7) the $18,542.13 in debt for Wife's surgery at Spartanburg Regional Medical Center was a result of Wife's miscarriage; thus, it was a marital debt, despite being incurred prior to the parties' marriage; and (8) Husband was responsible for paying half of Wife's attorneys' fees.

Husband timely filed a Rule 59(e), SCRCP, motion, arguing the family court erred in its award of attorneys' fees, imputation of additional income to Husband, and requirement for supervised visitation with the parties' children. The family court denied Husband's Rule 59(e) motion.[2] This appeal followed.

STANDARD OF REVIEW

On appeal from a family court order, this court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). When reviewing decisions of the family court, we are cognizant that the family court had the opportunity to see the witnesses, hear "the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character." DuBose v. DuBose, 259 S.C. 418, 423, 192 S.E.2d 329, 331 (1972).

ISSUES ON APPEAL

Husband claims the family court erred by (1) requiring Husband to pay Wife's premarital medical expenses and costs; (2) imputing additional income to Husband for purposes of child support; and (3) requiring Husband to pay $13,000 of Wife's attorneys' fees. We affirm as modified.

LAW/ANALYSIS

I. Wife's Medical Expenses

Husband contends the family court lacked jurisdiction to order Husband to pay a portion of Wife's medical bills because the surgery

[2] The family court did modify one paragraph in its order by permitting Husband to petition the family court to terminate supervised overnight visitation with his children once a psychiatrist informed both parties' attorneys in writing that Husband no longer needed supervised overnight visitation.

occurred prior to the parties' marriage; thus, it was a nonmarital debt. We disagree.

The family court found Wife's medical bill from Spartanburg Regional Medical Center for $18,542.13 was a marital debt because although the surgery occurred prior to the parties' marriage, it related to the miscarriage of Husband and Wife's child. Therefore, it was a shared expense of the parties. While we agree with the family court's decision to require Husband to contribute towards the repayment of this debt, we modify the family court's classification of this debt as marital because the surgery occurred prior to the parties' marriage. See Wooten v. Wooten, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005) (citing S.C. Code Ann. § 20-7-472(13) (Supp. 2004) (currently S.C. Code Ann. § 20-3-620(13) (Supp. 2009)) (stating marital debts include, among other things, "any other existing debts incurred by the parties or either of them during the course of the marriage").

Despite the acquisition of this debt prior to the parties' marriage, we find this debt would not have occurred but for Husband and Wife's relationship, which merits Husband's participation in its repayment. See S.C. Code Ann. § 20-5-60 (Supp. 2007) ("A husband shall not be liable for the debts of his wife contracted prior to or after their marriage, except for her necessary support and that of their minor children residing with her."); see also Richland Mem. Hosp. v. Burton, 282 S.C. 159, 160-61, 318 S.E.2d 12, 13 (1984) (reaffirming common law doctrine requiring a husband to be responsible for necessary debts incurred by a wife prior to and during marriage and holding a hospital could initiate a collection action against husband for medical services rendered to deceased wife based on this doctrine).

Furthermore, the family court has jurisdiction "to include in the requirements of an order for support the providing of necessary shelter, food, clothing, care, *medical attention, expenses of confinement, both before and after [] birth*, . . . and other proper and reasonable expenses . . . ." S.C. Code Ann. § 63-3-530(15) (Supp. 2009) (emphasis added). Section 63-3-530(15) grants the family court exclusive jurisdiction to include in any support order a provision for payment of medical expenses and hospital bills that are attendant to childbirth. Regardless of whether Husband and Wife were

married on the date of the surgery, Wife's hospital bill was a direct result of her pregnancy and ensuing miscarriage,[3] and the procedure was necessary to Wife's health. Not requiring Husband to share in the responsibility for defraying this expense would thwart the ultimate goal of ensuring a just, equitable, and fair outcome to both parties. Thus, we conclude the family court had jurisdiction, and consequently the authority, to order Husband to pay half of Wife's hospital bill.

II. Imputing Income to Husband

Next, Husband claims Wife presented insufficient evidence regarding Husband's farrier business and rental property to justify the family court's decision to impute additional income to Husband for purposes of calculating his child support obligations. We disagree.

Child support awards are within the family court's sound discretion and, absent an abuse of discretion, will not be disturbed on appeal. Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). An abuse of discretion occurs when the family court's decision is controlled by some error of law or when the order, based upon the findings of fact, is without evidentiary support. Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996).

[3] Husband argues the primary purpose of the surgery was to remove Wife's gallbladder, and Wife failed to provide any medical records to substantiate her testimony that the surgery related to her miscarriage. Despite Wife's failure to supplement the record with medical documentation, we believe both parties' testimony sufficiently establishes that the surgery was a direct result of Wife's miscarriage. Additionally, Husband failed to contest the source of this debt or Wife's lack of documentation after the final hearing, despite his ability to do so by way of a post-trial motion. See Kneece v. Kneece, 296 S.C. 28, 33, 370 S.E.2d 288, 291 (Ct. App. 1988) (finding a party's failure to move pursuant to Rule 59(e) to have the family court amend its decree to consider the issue of transmutation prevented consideration of issue on appeal).

Generally, the family court determines gross income for purposes of calculating child support based upon the financial declarations submitted by the parties. S.C. Code Ann. Regs. 114-4720(A)(6) (Supp. 2009). "Gross income includes income from any source including salaries, wages, commissions, royalties, bonuses, [and] rents (less allowable business expenses) . . . ." S.C. Code Ann. Regs. 114-4720(A)(2) (Supp. 2009). Additionally, "[u]nreported cas[h] income should also be included if it can be identified." Id. When income reflected on the financial declaration is at issue, the family court may rely on suitable documentation to verify income, such as pay stubs, employer statements, receipts, or expenses covering at least one month. Regs. 114-4720(A)(6).

We note neither Husband's 2006 financial declaration nor his 2007 income tax return reflected any income from his farrier business or rental property. As a result, it was proper for the family court to consider invoices from Husband's farrier business for purposes of calculating his child support obligation. At the final hearing, Wife introduced invoices from 2004 until 2006 that documented Husband's yearly and monthly income from his farrier business. Wife testified Husband charged between $75 and $135 per horse and shoed horses almost every day of the week. Husband did not contest the validity of the invoices Wife submitted, but he stated he typically charged $50 per horse, which netted him approximately $110 every two weeks based on his current workload. Husband also discussed the ordinary and necessary expenses he incurred as part of running his farrier business during his testimony. In explaining the large discrepancies between his current earnings and past profits, Husband stated his income from the farrier business had decreased because he was spending more time with his son, and the increased cost of gas prevented him from shoeing as many horses as he had in the past.

In regards to Husband's rental property, Husband stated he had not rented his mobile home in more than two years, but when he did rent it, he was charging $450 per month in rent and was splitting the proceeds with his father who owns the land.[4] Husband contended, however, that he was unable to currently rent the property because it needed "a lot of work to get it where

[4] Husband later testified he only gave his father $100 per month, as opposed to $225 per month, from the rent he collected on the mobile home.

it can be rented." Wife also stated Husband rented out the mobile home for between $400 and $475 per month when she filed for divorce, but it was unoccupied on the date of the final hearing, despite Husband's ability to rent it. Husband estimated it cost him approximately $100 per month to maintain the mobile home and surrounding property.

After considering the parties' testimony and the submitted invoices, the family court concluded Husband earned $921.75 per month in 2004,[5] $1,459.33 per month in 2005, and $1,578.50 per month in 2006. In its decision to impute additional income to Husband, the family court acknowledged the parties' conflicting testimony and determined Husband should be attributed an additional $400 per month from his farrier business and $100 per month for his rental property.

Based on the evidence adduced at the final hearing, the family court did not abuse its discretion in determining Husband's gross income. The documented monthly income from Husband's farrier business was far greater than the $400 actually imputed to Husband, which demonstrates the family court took Husband's expenses and varied workload into consideration in its decision. Furthermore, Husband failed to account for this income in either his financial declaration or his most recent tax return. As a result, the family court did not err in relying on these invoices as they were the most reliable source for computing Husband's gross income. See Regs. 114-4720(A)(6); see also Spreeuw v. Barker, 385 S.C. 45, 66-67, 682 S.E.2d 843, 853-54 (Ct. App. 2009) (upholding family court's decision to deviate from the father's most recent financial declaration in imputing additional income to the father for child support purposes where financial declaration understated father's gross income).

As to the $100 attributed to Husband from his rental property, both Husband and Wife stated Husband had rented the mobile home in the past for approximately $450 per month. While Husband and Wife differed on

[5] The family court's order misstated Husband's 2004 income, as the 2004 invoice for Husband's farrier business reflected monthly earnings of $851.50 as opposed to $921.75. Despite this apparent scrivener's error, we discern no error in the family court's overall award.

whether the mobile home was currently suitable for rental purposes, Husband conceded that he had a tenant one month prior to Wife filing for divorce and that he lived in the mobile home during the pendency of the marital litigation. Furthermore, Husband's own testimony indicates he actually earned $250 per month from the rental property after taking into consideration deductions for maintenance and use of the surrounding property.[6] Because the family court has the authority to include rent for purposes of calculating gross income, we discern no error in the family court's decision to impute this amount to Husband. See Regs. 114-4720(A)(2) ("Gross income includes income from any source including . . . rents (less allowable business expenses) . . . .").

III. Attorneys' Fees

Last, Husband argues Wife was not entitled to attorneys' fees. In the alternative, Husband contends the family court's award of attorneys' fees was unreasonable and excessive pursuant to Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

"An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). In order to award attorneys' fees, a court should consider several factors including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. E.D.M., 307 S.C. at 476-77, 415 S.E.2d at 816. In determining the amount of attorneys' fees, the family court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock, 304 S.C. at 161, 403 S.E.2d at 315.

At the final hearing, Wife's attorney submitted a fee affidavit documenting fees of $26,155.15. Husband did not object to the affidavit or

[6] Husband testified it cost him approximately $100 per month to maintain the property, and he paid his father $100 per month for use of the surrounding property.

attempt to cross-examine Wife or her attorney on any portion of the affidavit at the final hearing. Citing to Glasscock in its final order, the family court required Husband to pay $13,000 of Wife's attorneys' fees because the results were beneficial, the fee was reasonable, Husband was at fault, and he had the ability to contribute.

Husband first claims Wife is not entitled to attorneys' fees because he successfully defended against some of Wife's claims. Even though Husband may have prevailed on some issues, Wife obtained beneficial results regarding child custody, child support, Husband's adultery, and her entitlement to a portion of Husband's pension and 401(k) plan. See Golden v. Gallardo, 295 S.C. 393, 395, 368 S.E.2d 684, 685 (Ct. App. 1988) (finding the family court properly awarded the mother a portion of her fees and costs in suit brought by father to enforce visitation rights when both parties prevailed on some issues). Husband is correct in his contention that his fault in causing the break-up of the marriage should not be a factor in awarding attorneys' fees. See Doe v. Doe, 370 S.C. 206, 219, 634 S.E.2d 51, 58 (Ct. App. 2006) ("A party's fault in causing a divorce . . . is not a factor to be considered when awarding attorney's fees."). Regardless of Husband's adultery, it is evident from the record Husband has a greater ability to pay the fees based on his superior income, which necessarily affects his ability to pay the award and the effect of the award on his standard of living. Taking these factors into consideration, we do not find the family court erred in ordering Husband to contribute towards Wife's attorneys' fees.

Regarding Husband's argument on the reasonableness of Wife's fees, we do not believe the amount awarded by the family court was excessive. We note the family court did not make specific findings on all six factors from Glasscock in its order as it is required to do pursuant to Rule 26(a), SCFCR. See Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 534-35 (Ct. App. 1998) (remanding issue of attorneys' fees because of family court's failure to set forth specific findings of fact on each of the six required factors to be considered in determining the amount of the fees pursuant to Glasscock). Specifically, Rule 26(a) directs: "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."

However, we find the record is sufficient to affirm the fees award based on the family court's order and Wife's affidavits concerning costs and fees. See Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) (stating that when an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court "may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence"). The family court enumerated four of the six factors from Glasscock, and Wife's counsel's affidavit demonstrates her fees and hours were reasonable in light of the length of the litigation and her experience and professional standing within the legal community. Accordingly, we affirm the reasonableness of Wife's fees based on our review of the record.

Husband also takes specific issue with certain fees assessed for time that Wife's counsel billed relating to a rule to show cause hearing and a separate DSS action. This issue is not preserved for our review because Husband did not object to the affidavit or attempt to cross-examine Wife's attorney on those issues at the final hearing. See King v. King, 384 S.C. 134, 145, 681 S.E.2d 609, 615 (Ct. App. 2009) (noting husband's objection to Wife's affidavit documenting her attorney's fees was untimely because he never objected or attempted to cross-examine Wife's counsel on the affidavit at the final hearing). Furthermore, while Husband generally contested the attorneys' fees award in his Rule 59(e), SCRCP, motion on the grounds the award was excessive, he failed to specifically object to the propriety of including these fees at the final hearing. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 48, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). As a result, we decline to address this particular argument on appeal. See Doe, 370 S.C. at 212, 634 S.E.2d at 55 (finding wife failed to preserve argument when she did not raise the issue specifically at the final hearing or in her Rule 59(e) motion and only generally asserted the decree was unsupported by the evidence).

IV. Conclusion

Based on the foregoing, we affirm the family court's decision to impute additional income to Husband for purposes of calculating child support and to

require Husband to pay half of Wife's attorneys' fees. Additionally, we modify the portion of the family court's order regarding its classification of Wife's medical expenses as marital debt but affirm its decision to divide the debt equally between the parties.

Accordingly, the family court's decision is

AFFIRMED AS MODIFIED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherlock Holmes Pub, Inc.,	Plaintiff,
v.	
City of Columbia, South Carolina; HFB Associates, LLC; Enterprise Bank of South Carolina; London I, LLC; and Greenwall Construction Services, Inc.,	Defendants,
and Enterprise Bank of South Carolina,	Third-Party Plaintiff,
v.	
Rakesh "Rick" Patel,	Third-Party Defendant,
of whom Enterprise Bank of South Carolina is	Respondent,
and London I, LLC and Rakesh "Rick" Patel are	Appellants.

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

Opinion No. 4694
Submitted March 1, 2010 – Filed June 2, 2010

AFFIRMED

Louis H. Lang, of Columbia, for Appellants.

Johnston Cox, of Columbia, for Respondent.

THOMAS, J.: In this nonjury matter, the circuit court ordered Appellants London I, LLC, and Rakesh "Rick" Patel, the principal of London I, to pay attorney's fees and costs to Enterprise Bank of South Carolina (EBSC) pursuant to an indemnity provision in an assignment and assumption of leases. Appellants contend the indemnity provision did not cover legal expenses. We affirm.[1]

FACTS AND PROCEDURAL HISTORY

On August 6, 2004, London I entered into an Agreement of Sale and Purchase with EBSC, under which London I agreed to purchase from EBSC property located in Columbia, South Carolina. The property is commonly known as the Palmetto Building and is located at the corner of Main and Washington Streets. The Purchase Agreement contained the following language:

> The parties recognize that the City of Columbia, its contractors and agents have planned, or

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

> are in the process of constructing, adjacent to the Property, significant streetscaping improvements and that the construction of these improvements might negatively affect the value and use of the Property. The risk of any negative impact on value and the cost and expense of any loss of use by Buyer or any tenants of the Property is the responsibility of Buyer. Buyer and Seller agree to release each other from and against any and all claims, losses, costs, expenses, and liabilities including reasonable attorneys' fees arising out of or by reason of such streetscaping improvements, together with any repairs or modifications to the basement required with connection herewith. This release includes, but is not limited to, claims for reductions in value, business interruption, water damage, injuries and property damage.

The transaction closed on September 16, 2004. Among the documents executed by EBSC, London I, and Patel during the closing was an Assignment and Assumption of Leases. Of particular interest here is the following provision appearing in this document:

> Notwithstanding anything stated herein to the contrary, Purchaser acknowledges that (a) basement of the subject property has been leased to Andrea Bailey Cooper d/b/a Sherlock Holmes Pub (the "Basement Tenant"), (b) there has been water damage to the basement which threatens the structural integrity of the basement, (c) the Basement Tenant has been forced to leave the basement due to the water and structural issues stated above, and (d) the Basement Tenant has not paid rent for three months and does not intend to pay rent until all alleged defects in the basement are cured. Purchaser hereby

> releases Seller from any and all claims for loss of damage which Purchaser may sustain arising as a consequence of the condition of the basement including, but not limited to, those resulting from claims and demands from the Basement Tenant or the City of Columbia. Further, Purchaser and its Principal, Rick Patel, hereby agree to indemnify and save harmless Seller from and against and [sic] and all losses, claims or damages suffered by or made against Seller as a consequence of the condition of the basement. Seller has reduced the purchase price by the sum of $100,000 as consideration for the release and indemnification contained herein, the receipt and sufficiency of which is acknowledged by the parties hereto.

On August 19, 2005, Sherlock Holmes Pub, the lessee referred to in the document, filed a civil action against the City of Columbia, EBSC, London I, and others on various causes of action concerning its lease of the basement of the Palmetto Building. In its responsive pleadings, EBSC asserted (1) a cross-claim against London I and (2) a third-party complaint against Patel. In both of these claims, EBSC alleged it was entitled to attorney's fees and costs associated with the claims asserted against it as well as any payment of damages it eventually would have to pay to Sherlock Holmes. Appellants timely responded to the claims.

EBSC eventually entered into a settlement with Sherlock Holmes, but incurred attorney's fees and costs in defending the lawsuit and sought to have those paid by Appellants pursuant to the indemnity provision of the assignment. Although Appellants did not dispute they owed $7,000.00 to EBSC as indemnification for the amount EBSC paid to settle the matter, they denied any further indemnity obligation.

The circuit court found the indemnity agreement required Appellants to pay EBSC reasonable attorney's fees of $30,000.00 and costs of

$3,518.57. Both sides moved to alter or amend the judgment. The circuit court denied Appellants' motion; however, it granted EBSC's motion to include in the award the sum it paid to settle the underlying lawsuit.

ISSUE

The sole issue on appeal is whether the circuit court erred in awarding attorney's fees and costs to EBSC pursuant to the assignment and assumption of leases in view of the fact that attorney's fees and costs were not specifically referenced in the indemnity provision of the document.

STANDARD OF REVIEW

"Generally, an action to construe a contract is one at law." Ward v. W. Oil Co., 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried, without a jury, the appellate court's standard of review extends only to the correction of errors of law." Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006).

LAW/ANALYSIS

Appellants contend that the failure to provide specifically for attorney's fees and costs in the indemnity terms of the assignment prevents EBSC from recovering these expenses. In support of their position, they emphasize that their indemnity obligation is contractual rather than equitable and therefore must be strictly construed.

We agree the indemnity obligation at issue here arises out of contract and for that reason is subject to strict construction; however, we do not believe the rule of strict construction requires an indemnity provision to include an itemized listing of covered losses. On at least two prior occasions, the South Carolina Supreme Court has indicated that the absence

of any specific mention of attorney's fees and legal costs in an indemnity provision does not absolve an indemnitor from paying these expenses. See Addy v. Bolton, 257 S.C. 28, 33 183 S.E.2d 708, 710 (1971) (quoting with approval authority supporting the proposition that when the duty to indemnify arises under a contract, the indemnitee may recover reasonable attorney's fees in defending the claim indemnified against); S.C. Elec. & Gas Co. v. Util. Constr. Co., 244 S.C. 79, 83-85, 135 S.E.2d 613, 614-15 (1964) (affirming the circuit court's ruling that the plaintiff was entitled to indemnification "by reason of the express contract of indemnity" and the award of "the full amount prayed for," which included attorney's fees, even though the indemnity clause did not specifically mention counsel fees). We realize that the court, when issuing these rulings, was not directly responding to the question raised in the present appeal, namely, whether counsel fees and legal costs are covered by an indemnity clause that does not specifically include these expenses. Nevertheless, these rulings are directly on point regarding the controversy before us, and we are therefore reluctant to disregard them. See Yaeger v. Murphy, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987) ("But those who disregard dictum, either in law or in life, do so at their peril.").

In upholding the circuit court's determination that EBSC was entitled to recover attorney's fees and costs pursuant to the indemnity provision of the assignment, we concur in the circuit court's reliance on Dent v. Beazer Materials & Services, 993 F. Supp. 923, 939 (D.S.C. 1995), in which the South Carolina District Court allowed a lessor to recover "attorneys' fees, settlement costs, and all other allowable costs" pursuant to a lease indemnity provision that required the lessee to "hold the lessor harmless for any claim made against the lessor arising out of the use of the leased premises." Although, as Appellants argue, the District Court cited decisions concerning equitable indemnification rather than contractual indemnification in support of its decision, the holding in Dent is consistent with cases from other jurisdictions and other persuasive authority. See, e.g., S. Ry. v. Arlen Realty, 257 S.E.2d 841, 844 (Va. 1979) (noting the majority of jurisdictions follow the rule that when "the right of the indemnitee is based upon an express contract, and no provision of the contract provides otherwise, . . . the

indemnitee may recover reasonable attorney's fees and expenses of litigation spent in defense of the claim indemnified against") (emphasis added); 42 C.J.S. Indemnity § 44 (2007) ("[W]here the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.").

Appellants also contend the fact that the release provision in the Purchase Agreement expressly included recovery by the indemnitee of attorney's fees and costs demonstrates that the parties intended to exclude these items from the indemnity provision. We disagree. First, Appellants have not argued to this Court that the indemnity provision was ambiguous; therefore, there is no need to "look beyond the four corners to discern the parties' intentions." Silver v. Aabstract Pools & Spas, 376 S.C. 585, 592, 658 S.E.2d 539, 543 (Ct. App. 2008). Second, even if we were to consider circumstances outside the agreement, under our standard of review, we would not consider the specific mention of these terms in another agreement between the parties dispositive of the question of the parties' intent even though it is arguably evidence supporting Appellants' position. Finally, the indemnity provision at issue here, which includes "losses, claims or damages suffered by" as well as those "made against" EBSC, is, if anything, even more open to the interpretation that attorney's fees and costs are covered than is the analogous provision in Dent.[2]

[2] We also agree with EBSC that the indemnity clause at issue in this appeal is distinguishable from the indemnity agreement in BP Oil v. Federated Mutual Insurance Co., 329 S.C. 631, 496 S.E.2d 35 (Ct. App. 1998), which Appellants have cited in their brief. In that case, the particular indemnity provision under which this Court rejected the indemnitee's claim for attorney's fees included only "liabilities for loss," rather than the loss itself. Id. at 641, 496 S.E.2d at 40.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's decision that notwithstanding the absence of any specific references to attorney's fees and costs in the indemnity provision of the parties' agreement, EBSC is entitled to recover these expenses pursuant to the terms of the assignment.

AFFIRMED.

HUFF and KONDUROS, JJ., concur.