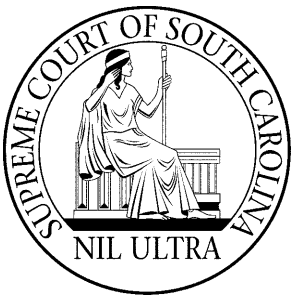

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
June 22, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Arthur Franklin Smith, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26673
Heard February 19, 2009 – Filed June 22, 2009

VACATED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport and Assistant Attorney General Michelle J. Parsons, all of Columbia and Solicitor I. McDuffie Stone, III, of Hampton, for Petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: In this case, Arthur Franklin Smith (Respondent) was convicted of first-degree criminal sexual conduct (CSC) with a minor and sentenced to twenty years in prison. The trial judge granted Respondent a new trial on the ground the minor victim's aunt "coached" him while he was testifying at trial. The State appealed this decision to the South Carolina Court of Appeals.

In a divided opinion, the Court of Appeals affirmed the order of the trial judge. State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (Ct. App. 2007). The State petitioned for and was granted a writ of certiorari for this Court to review the decision of the Court of Appeals. We find the State did not have a right to appeal the trial judge's order. Accordingly, we vacate the opinion of the Court of Appeals.

FACTUAL/PROCEDURAL HISTORY

In the summer of 1998, Respondent, his two minor sons (John Doe and Richard Roe), his wife, and his daughter moved to Bluffton, South Carolina from New York. Shortly after the move, Respondent and his wife were divorced. Doe was removed from his mother's custody after his brother, Richard Roe, discovered him engaging in sexual behavior with the son of his mother's boyfriend. Doe, Roe, and their sister were ultimately placed in the custody of their uncle and aunt, Cynthia Solak, who lived in West Virginia.

Following Doe's exhibition of sexual preoccupation, sexual acting out, and destructive behavior, he underwent counseling and eventually revealed Respondent's molestation of him during one of the counseling sessions.

As a result, Respondent was indicted for first-degree CSC with a minor. At trial, Doe described in detail the sexual abuse. On cross-examination, Doe acknowledged that prior to trial, he and his aunt (Solak), had reviewed the questions that would likely be asked and discussed his testimony. Doe also admitted that he had looked over to

Solak while testifying. However, Doe maintained on re-direct examination that "[t]hese are my answers." Doe also acknowledged that he revealed the sexual abuse while living with Solak because he felt "safe."

After Doe's testimony, Respondent's counsel asked the trial judge to remove Solak from the courtroom while Doe's older brother, Richard Roe, testified during an *in camera* hearing on a Lyle[1] issue. In making this request, counsel stated:

> I didn't object after [Solak] testified to [her] be[ing] in the courtroom. But it was apparent during [Doe's] testimony that there were motions and mouth movement[s] and things going back and forth between the witness and Miss Solak and that was reported to me by individuals in the courtroom.

Subsequently, Solak voluntarily left the courtroom.

Following Roe's *in camera* testimony, Respondent's counsel moved for a mistrial on the ground that Solak improperly coached and influenced Doe during his testimony. In the alternative, counsel moved to strike Doe's testimony. Counsel contended that Solak's misconduct compromised the validity and credibility of Doe's testimony. The trial judge denied counsel's motions, stating:

> You did not, as an officer of the court, call it to my attention so that I could take appropriate action so you knew it was going on . . . and took no action.
>
> And so I think that is a waiver and I do find - - And I watched [this] young man testify - - that I do not believe that this caused any - - influenced his answers because he was basically going over the same things so I'm not going to declare a mistrial . . . .

[1] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

In response, Respondent's counsel claimed that she was not aware of the "magnitude of what was taking place" until she finished her cross-examination of Doe and sat down with her co-counsel who informed her of what he saw between Doe and Solak during the testimony.

The judge then reiterated his denial of the mistrial motion and the motion to strike Doe's testimony, explaining:

> [I]f co[-]counsel knew it, you're charged with knowing it too, because he's sitting at the table with you.
>
> Having failed to bring the matter to the court's attention, you know, if it's a strategic matter, you decided to ask him about it and knowing- - you did not make - - ask for a sidebar or anything, which you could have.
>
> I frankly think what you did was probably the best way because I think the jury's much more influenced in determining the credibility of testimony as to whether or not the will of the young man was overridden by the people in authority . . . .
>
> I have the utmost confidence in the jury to render a just verdict in this case. I believe it certainly is made more difficult by that unfortunate thing happening.

At the conclusion of the State's case, Respondent's counsel renewed the mistrial motion. The trial judge again summarily denied the motion.

After the jury found Respondent guilty of first-degree CSC with a minor, the trial judge sentenced him to twenty years in prison. The next day, the trial judge heard testimony regarding Respondent's motion for a new trial specifically with respect to the issue of Solak's coaching of Doe during his testimony.

At the hearing, Respondent's counsel offered the testimony of three individuals who were present in the courtroom during Doe's testimony.[2]

The first witness testified "I couldn't see [Doe] from where I was so I don't know what he was doing but I could see her sitting over there and she was nodding her head back and forth, up and down and verbally saying stuff." When asked by the trial judge whether it appeared that Solak was trying to assist Doe in answering the questions, the witness responded, "That's what it appeared to be; however, I couldn't see him so I don't know, you know, if he was looking at her but I assumed he was . . . ."

The second witness also testified that she observed Solak making motions with her head during Doe's testimony. She believed Solak was "trying to give the minor, twelve-year old answers to the questions that were being asked."

The third and final witness testified she observed Solak make head gestures toward Doe. She stated she thought Respondent's counsel had observed the motions stating, "when you were questioning him you asked him a question and, and I think you noticed his eyes going towards her. And that's when you moved over in front of her."

After the post-trial hearing, the trial judge granted Respondent's motion for a new trial. In so ruling, the judge found: 1) Solak "used body language and other non-verbal signals in the courtroom during [Doe's] testimony and such communications were directed at [Doe] during his testimony"; 2) "[s]uch behavior on the part of [Solak] may have overridden [Doe's] free will"; and 3) "[Solak's] behavior and the potential for corruption of [Doe's] testimony clearly denied [Respondent] a fair trial."

[2] Neither Doe nor Solak testified at this hearing as they had already returned to their home in West Virginia.

The State appealed the trial judge's order to the Court of Appeals. In a divided opinion, the Court of Appeals affirmed the grant of a new trial. State v. Smith, 372 S.C. 404, 642 S.E.2d 627 (Ct. App. 2007). The majority prefaced its analysis by implicitly finding that the State could appeal the decision on the ground it was based on an error of law. Id. at 408, 642 S.E.2d at 629-30. The majority also concluded that Respondent's counsel's failure to contemporaneously object to the coaching did not waive Respondent's right to request a mistrial given the record did not clearly show the coaching was apparent to Respondent's counsel during Doe's cross-examination. Id. at 409-10, 642 S.E.2d at 630-31. Additionally, the majority believed the trial judge did not have all of the relevant information or much time to consider the issue when he initially denied the mistrial motions. Having determined the issue to be preserved, the majority found evidence in the record to support the trial judge's decision to grant a new trial. Id. at 409, 642 S.E.2d at 630.

The dissent advocated reversing the order of the trial judge and reinstating Respondent's sentence. Id. at 410, 642 S.E.2d at 631. The dissent believed Respondent received the relief sought in his request to remove Solak from the courtroom after Doe's testimony. Because Solak voluntarily left the courtroom, the dissent found counsel's request did not preserve the coaching issue for appellate review. Id. at 411, 642 S.E.2d at 631. Moreover, the dissent determined Respondent waived the issue because his counsel was apprised of Solak's conduct during Doe's testimony but did not object or request a mistrial until after Doe's brother, Roe, testified. Because there was no contemporaneous objection by Respondent's counsel, the dissent found the trial judge erred by granting Respondent's motion for a new trial on this issue after the judge had initially concluded that Respondent waived the coaching issue. Id. at 412, 642 S.E.2d at 632.

This Court granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals.

DISCUSSION

The State contends the trial judge erred in granting Respondent a new trial. In support of this contention, the State avers: 1) the issue was not properly preserved at trial, and 2) the judge erroneously substituted his judgment for that of the jury.

In response, Respondent asserts this Court should dismiss the State's appeal because the State had no right to appeal the order granting Respondent a new trial. In the alternative, Respondent claims the trial judge properly granted him a new trial when it became apparent that Solak improperly coached Doe during his trial testimony.

As a threshold issue, we must resolve whether the State had the right to appeal the trial judge's order. "The State may only appeal a new trial order if, in granting it, the trial judge committed an error of law." State v. Johnson, 376 S.C. 8, 10, 654 S.E.2d 835, 836 (2007). "When determining whether an error of law exists, and therefore whether the State has the right to an appeal, it is necessary to consider the merits of the case." Id. at 11, 654 S.E.2d at 836.

In order to review the merits of this case, we must initially determine whether Respondent was procedurally barred from making a new trial motion challenging Solak's "coaching" of Doe.

Although counsel failed to object to Solak's coaching during Doe's cross-examination, we find the issue was properly preserved in that counsel timely raised the issue to the trial judge and obtained a ruling. After Doe's cross-examination, counsel became aware of the extent of Solak's coaching once she conferred with her co-counsel and other individuals in the courtroom who observed Solak's conduct. At that point, she informed the trial judge of the situation and moved for a mistrial. In view of this procedural posture, we conclude counsel's objection was sufficiently contemporaneous and provided the trial judge an opportunity to rule on the mistrial motion. See State v. McIntosh, 358 S.C 432, 445 n.7, 595 S.E.2d 484, 491 n.7 (2004)

(finding objection was sufficiently contemporaneous where defendant's attorney objected after second improper question); cf. State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (stating that "[h]aving denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object . . ., Appellant is procedurally barred from raising these issues for the first time on appeal").

Because counsel posited a timely objection and received a ruling, we find the grounds for the mistrial motion and, in turn, the new trial motion were not waived. See State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998) (stating "the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court").

Furthermore, at the time the trial judge ruled on the motion for a mistrial, he was not aware of the magnitude of Solak's misconduct. In fact, after Respondent's counsel requested to have Solak removed from the courtroom, the judge indicated that he did not notice Solak's alleged coaching. However, at the hearing on the new trial motion, the trial judge was more fully apprised of Solak's "coaching" of Doe. Based on this additional evidence, the trial judge was able to thoroughly consider the mistrial motion and conclude that his prior ruling regarding waiver was not proper under these circumstances. Thus, not until the new trial hearing was the trial judge able to make an informed decision based upon all the relevant facts, law, and arguments. See I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."); Rhoad v. State, 372 S.C. 100, 108 n.3, 641 S.E.2d 35, 39 n.3 (Ct. App. 2007) ("Until an order is written and entered, the judge is free to change his mind and amend prior rulings."); cf. State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 843 (1988) (stating a ruling on a motion in limine is subject to change based on events at trial). Consequently, we find the mistrial issue was not waived and the trial judge properly considered it as a ground for granting Respondent a new trial.

Having found Respondent did not waive the mistrial issue, we now address the merits of this issue in conjunction with determining the State's right to appeal. Thus, the question becomes whether the trial judge's grant of a new trial constituted an error of law.

This Court is confined by an extremely limited "abuse of discretion" standard of review regarding the grant of a new trial in the circumstances presented in this case. See State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) (stating the grant or denial of a new trial is within the trial judge's discretion and will not be overturned on appeal absent a clear abuse of discretion); 23A C.J.S. Criminal Law § 1605 (2008) ("Except in certain circumstances, it is reprehensible for a spectator to try to influence a witness while the witness is testifying, or to try to convey directions to the witness as to the answers that should be given. It is largely within the discretion of the trial judge as to what should be done when such conduct occurs.").

Based on our review of the record, there is evidence to support the judge's decision. All parties admitted that Solak acted inappropriately in mouthing words and making nonverbal signals to Doe during his testimony. Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.").

Because Doe was the key witness in the prosecution's case, we cannot disregard the trial judge's conclusion concerning the prejudicial impact on Respondent's right to a fair trial. Cf. Sharp v. Commonwealth, 849 S.W.2d 542, 546-47 (Ky. 1993) (reversing trial judge's denial of defendant's motion for a mistrial where child witness was coached by a family friend and finding "the violations here as so egregious and inimical to the concept of a fair trial that they cannot be disregarded in the name of trial court discretion"); State v. Dayhuff,

158 P.3d 330, 342 (Kan. Ct. App. 2007) (holding trial court's refusal to allow defendant, at the time of trial, to develop a factual basis for his motion for a mistrial that was based on the allegation that the child advocate's gestures during child witness's testimony served to coach or vouch for the child warranted a new trial).

Although we are aware of the trauma a trial may bring to minor victims, we reach our decision constrained by our standard of review and the necessity to uphold the integrity of the judicial system. In view of the clearly improper "coaching" by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting Respondent a new trial. In so holding, we are guided by the following principle:

> When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law.

State v. Britt, 235 S.C. 395, 425, 111 S.E.2d 669, 685 (1959) (emphasis added), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Because we find the trial judge properly exercised his authority to grant a new trial upon the facts, we conclude the judge's decision was not predicated "wholly upon error of law." See State v. Dasher, 278 S.C. 395, 399-400, 297 S.E.2d 414, 416 (1982) (recognizing trial judge's power to grant a new trial upon the facts)[3]; cf. State v. Des

[3] In Dasher, a jury found the defendant guilty of conspiracy to violate the South Carolina Controlled Substance Act. After the verdict, the defendant filed a post-trial motion for judgment in his favor notwithstanding the verdict. Prior to sentencing, the trial judge, without the assignment of any grounds, "supplanted the jury verdict of guilty and entered a verdict of his own of not guilty." Dasher, 278 S.C. at 395, 297 S.E.2d at 414. The State appealed the trial judge's decision. Finding no precedent in this state to support the trial judge's decision, this Court

Champs, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923) ("[W]here the grant of a new trial in a criminal cause is predicated wholly upon error of law, we think an appeal by the [S]tate will lie."). Accordingly, we hold the State did not have the right to appeal the trial judge's order.

CONCLUSION

Based on the foregoing, we hold the State did not have the right to appeal the trial judge's decision to grant Respondent a new trial. As a result, we vacate the opinion of the Court of Appeals.

VACATED.

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

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reversed. Id. at 400, 297 S.E.2d at 416. In so ruling, this Court reasoned that "[t]his is not a case in which a trial judge has granted a *new trial* upon the facts (a power which he admittedly has), but rather one in which a trial judge has entered a verdict of *not guilty* in the face of conflicting evidence (a power he has never had in this jurisdiction)." Id. Because the trial judge set aside the verdict of the jury in the face of conflicting facts and substituted his judgment for that of the jury, this Court concluded that the judge committed an error of law. Id. at 400, 297 S.E.2d at 417.

The instant case is distinguishable from Dasher. Here, the trial judge did not set aside the verdict of the jury. Instead, the trial judge properly exercised his authority to grant a new trial upon the facts given "an injustice had been done" during the trial. Id. at 400, 297 S.E.2d at 416. Thus, unlike the trial judge in Dasher, the judge did not invade the province of the jury or substitute his verdict for that of the jury.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the State had a right to appeal the trial judge's granting of a new trial because the order was based upon an error of law.

In reviewing the trial court's order granting a new trial, the majority is correct to observe that we review the trial court according to an abuse of discretion standard. However, we must apply this standard in the context with which a trial court may exercise its discretion to grant a new trial. We have said many times that the granting of a mistrial is an extreme measure that should only be taken where an incident is so grievous that prejudicial effect can be removed in no other way. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (citing *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998)). Furthermore, we must consider the entire trial record when considering whether the trial court abused its discretion in ordering a new trial. *See State v. Johnson*, 334 S.C. 78, 91, 512 S.E.2d 795, 803 (1999) ("The prejudicial character of the error must be determined from its relationship to the entire case.")

My review of the record reveals no evidence to support the trial court's finding that Respondent was "clearly denied" a right to a fair trial. In my view, the trial court's own factual finding that Solak's behavior "may have over-ridden the victim's free will" does not support such a conclusion. Doe confirmed that his testimony was his own, and Solak left the courtroom once it was alleged that she was coaching Doe's testimony. Even if Solak's behavior did result in some degree of prejudice to Respondent, I believe this prejudice was outweighed by the ample evidence in the record to support the jury's verdict. I find no foundation for the trial court's order and believe that the trial court abused its discretion in granting Respondent a new trial. I would therefore reverse the opinion of the court of appeals, reverse the order of the trial court, and reinstate Respondent's conviction and sentence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Shawn Wiles, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Saluda County
William P. Keesley, Circuit Court Judge

Opinion No. 26674
Heard May 13, 2009 – Filed June 22, 2009

AFFIRMED AS MODIFIED

Appellate Defender M. Celia Robinson, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE WALLER: Petitioner Shawn Wiles was indicted for assault and battery with intent to kill (ABIK), failure to stop for a blue light, and possession of a stolen vehicle. A jury convicted him of assault and battery of a high and aggravated nature (ABHAN) and failure to stop for a blue light.[1] Pursuant to Rule 220(b), SCACR, the Court of Appeals affirmed in an unpublished opinion. See State v. Wiles, Op. No. 2007-UP-318 (S.C. Ct. App. filed June 14, 2007). We granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision. We affirm as modified.

FACTS

On December 26, 2003, a state trooper clocked two vehicles traveling 101 mph on Highway 25 in Edgefield County. The first vehicle was a pickup truck, and the second was a stolen 1997 Ford Crown Victoria driven by petitioner. Putting on his blue light and siren, the trooper gave chase. The truck lost control and veered off the road. The Ford then pulled over, but as the trooper approached it, the car turned around and headed back on the highway.

The high-speed chase again ensued with the trooper and another highway patrol vehicle pursuing petitioner. The trooper testified that petitioner turned onto Route 378 toward Saluda and drove at speeds over 120 mph while passing other cars on the road in an unsafe manner. A few miles outside the city of Saluda, the trooper's supervisor directed him to terminate the chase because of safety concerns.

However, Saluda County Sheriff's deputy Frank Daniel was at that same time responding to the call about the chase. Deputy Daniel was in an

[1] Petitioner moved for a directed verdict on the possession of a stolen vehicle charge because evidence admitted at trial indicated that petitioner himself had stolen the car in Georgia. The trial court granted the motion. See State v. McNeil, 314 S.C. 473, 445 S.E.2d 461 (Ct. App. 1994) (the possession of a stolen vehicle statute requires that the defendant receive the goods from someone who actually stole them; he cannot receive the vehicle from himself).

intersection waiting to make a left turn onto Route 378 when petitioner ran a red light and crashed into Deputy Daniel's car.[2]

The force of the collision with the deputy's car propelled the Ford into a nearby building. Petitioner and his female passenger exited the car, and went into the building. A SWAT team responded to the scene, and eventually petitioner was located in the building hiding above the ceiling tiles. Petitioner was unarmed, and the SWAT team apprehended him without further incident.

At trial, evidence was admitted that approximately one week before the chase petitioner had escaped from a South Carolina prison.[3] A Department of Corrections (DOC) investigator interviewed petitioner when he was re-incarcerated. According to the investigator, petitioner's thoughts while driving 140 mph were that "he was about to be killed or would end up killing someone in the process of trying to get away from the police." On cross-examination, the DOC investigator acknowledged petitioner had told him that he panicked when he saw the trooper and he did not intentionally try to ram into the deputy's car.

The jury convicted petitioner of the lesser included offense of ABHAN and failure to stop for a blue light. The trial court sentenced petitioner to consecutive sentences of 10 years for ABHAN, and three years for the failure to stop.

On appeal, petitioner argued the trial court erred in allowing evidence of petitioner's escape. Finding the issue unpreserved, the Court of Appeals affirmed.

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[2] The deputy was taken to the hospital and missed 5 days of work, but he was not seriously injured.

[3] The record reflects that in a separate proceeding prior to the instant trial, petitioner pled guilty to, and was sentenced for, the escape.

ISSUES

1. Did the Court of Appeals err in finding petitioner's issue on appeal unpreserved?

2. Did the trial court err in admitting evidence of petitioner's escape?

DISCUSSION

1. Issue Preservation

Prior to jury selection, petitioner made a motion *in limine* to exclude evidence of his escape. The trial court ruled the evidence admissible to show *res gestae*, motive and intent. Petitioner appealed the trial court's ruling, but the Court of Appeals found the issue unpreserved for appellate review. See State v. Wiles, supra (citing State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). Petitioner argues the Court of Appeals erred because the trial judge's ruling was final. Furthermore, petitioner contends that counsel renewed his objection when the escape evidence was admitted. We agree with petitioner that this issue is preserved.

Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. State v. Forrester, 343 S.C. at 642, 541 S.E.2d at 840. There is an exception to this general rule when a ruling on the motion *in limine* is made "immediately prior to the introduction of the evidence in question." Id. This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection. Id. (citing State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct.App.1995)).[4]

[4] See also Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

In the instant case, the evidence was not immediately introduced after the motion *in limine*. Nonetheless, by his actions, the trial judge clearly indicated that his ruling was a final, rather than preliminary, one because he commented **to the jury** about petitioner's escape before any evidence was admitted. Specifically, the trial judge told the jury the following:

> The State is gonna attempt to introduce evidence related to the fact, in their view, that [petitioner] was an escapee from another institution …. The evidence … related to an escape is only allowed to be used for you to evaluate what his motives were, what his intents were, whether there was a mistake or accident, something like that.

Moreover, the escape was then referenced by both the State and petitioner's counsel in their opening statements.

In our opinion, the trial court's ruling on the admission of evidence regarding petitioner's escape was a final ruling, and therefore, petitioner's argument that the evidence was improperly admitted is preserved for appellate review.[5] See Forrester, supra.

Thus, we find the Court of Appeals erred in ruling that the issue raised on appeal was procedurally barred.

2. Evidence of Escape

Turning to the merits, petitioner argues the trial court judge erred in allowing the evidence of his escape to be admitted at trial on the ABIK and failure to stop charges. Petitioner contends the evidence should have been excluded as improper evidence of prior bad acts and because it was more prejudicial than probative. We disagree.

Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy. See Rules 401 & 402,

[5] In any event, we note counsel did specifically renew his objection on the record when this evidence was first admitted.

SCRE. Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence 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. The evidence admitted must logically relate to the crime with which the defendant has been charged. E.g., State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009); State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000).

Stated differently, evidence which is "logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973); see also State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime charged, is admissible as *res gestae* evidence).

Nonetheless, even where the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded. See Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis. State v. Stokes, supra; State v. Beck, supra.

Here, the evidence of petitioner's escape was logically relevant for several reasons. First, the evidence of escape shows his **motive** for fleeing from police; thus, it was relevant on the failure to stop for a blue light charge. See Rule 404(b), SCRE. Second, the evidence that petitioner was an escapee was relevant to his alleged **intent** on the ABIK charge. Id.; cf. State v. Green, supra (where the Court held that evidence of appellants' escape from prison, and their status as fugitives, was admissible on the issues of intent and common design in an attempted armed robbery case). Finally, this evidence was also admissible under the *res gestae* theory. See State v. Adams, supra.[6]

[6] We agree with the State that the evidence of petitioner's escape was "the first link in a chain of circumstances" which led to the criminal charges in the instant case. State v. Green, 261 S.C. at 372, 200 S.E.2d at 77.

Further, we find this evidence was not unduly prejudicial. See Rule 403, SCRE; State v. Stokes, supra; State v. Beck, supra.

Accordingly, the trial court did not err in admitting the evidence of petitioner's escape, and the Court of Appeals' opinion is **AFFIRMED AS MODIFIED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lawrence Brayboy, Employee, Respondent,

v.

WorkForce, Employer and American Home Assurance, Carrier, Defendants,

Of Whom WorkForce, Employer, is the Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26675
Heard April 9, 2009 – Filed June 22, 2009

REVERSED

Kirsten L. Barr, of Trask & Howell, of Mt. Pleasant, for Appellant.

John S. Nichols, of Bluestein & Nichols, of Columbia and Matthew Jackson, of Joye Law Firm, of North Charleston, for Respondent.

JUSTICE KITTREDGE: In this workers' compensation case, claimant Lawrence Brayboy made material misrepresentations on his employment application. Subsequently, Brayboy claimed workers' compensation benefits, which the Workers' Compensation Commission awarded. The circuit court upheld the award on the basis of the substantial evidence standard of review. Because the issue of Brayboy's employment status is jurisdictional, the Court makes findings based on its view of the preponderance of the evidence. We find the employer, Workforce, established the three-factor test in *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973), and reverse.

I.

On April 18, 2003, Brayboy sustained a back injury, which required lumbar fusion surgery. On the day of the injury, Brayboy moved a lot of lumber and while removing a chain link fence, he felt a terrible pull in his back. Brayboy worked the entire day, which was a Friday, and reported the injury on Monday. Subsequently, Brayboy filed a workers' compensation claim against his putative employer, WorkForce.

Brayboy's employment application included the following disclaimers:

> ***If I do not give accurate and truthful information on this Medical History Questionnaire, which forms the second and final part of my employment agreement, the entire employment agreement shall be considered null and void.***
>
> **MISREPRESENTATIONS AS TO PREEXISTING PHYSICAL OR MENTAL CONDITIONS MAY CAUSE FORFEITURE OF YOUR WORKERS' COMPENSATION BENEFITS.**

(emphasis in original). Notably, Brayboy signed his name under these cautionary statements. Despite these warnings, Brayboy responded in the

negative to all questions inquiring if Brayboy had prior back injuries, physical defects, medical conditions, or previous workers' compensation claims. However, at the workers' compensation hearing, Brayboy testified about multiple prior physical problems. These conditions included a back injury while in the Navy, a back injury in 1996 resulting in a workers' compensation claim, and a pinched nerve in 1996.

Specifically, during his service in the Navy in the early 1970s, Brayboy fell, slid on the ship's deck, and hit a rail. According to Brayboy, the Navy x-rayed his back and gave him medicine for treatment. The Navy also diagnosed Brayboy with a back deformity he had since birth — a missing piece of bone. Brayboy further stated he was honorably discharged in 1973 due to his back defect.

Notably, since the 1970s, Brayboy has received benefits from the Department of Veterans' Administration (VA). The impairment rating increased from ten to twenty percent due to a pinched nerve. Following the 2003 injury, the VA raised Brayboy's disability rating from twenty to forty percent as the "service connected condition(s) has/have worsened."

Brayboy further testified he filed a workers' compensation claim in 1996 while working for McCrory Construction. The claim arose from an accident when Brayboy was in a hole thirty to forty feet deep taking measurements while other workers poured concrete for a parking garage. Brayboy stated a backhoe was too close to the edge of the hole, and "[the hole] collapsed, and I was pulled out by several of my workers." This accident injured Brayboy's middle to low back and right ankle.

Brayboy filed a workers' compensation claim for this injury, received a settlement for this claim, and was given a five percent impairment rating for his back as well as five percent for his ankle. Brayboy testified in deposition that his current back pain was "primarily in the same area" as the cave-in injury; however, at the hearing, he disputed the similarity of the injuries. Additionally, Brayboy testified he suffered a pinched nerve in his right hip in 1996. This was unrelated to the cave-in and was due to wearing a heavy tool belt.

Brayboy testified he did not report any of his prior injuries to WorkForce as he did not feel the injuries were relevant to a construction job. Also, Brayboy stated he did not include the cave-in injury as it had "cleared up very quickly."

The single commissioner found a compensable injury and Brayboy credible when testifying he filled out the employment application in adherence to his belief he was neither permanently impaired nor disabled. The Workers' Compensation Commission upheld the award of the single commissioner. The circuit court affirmed.

WorkForce appealed and the court of appeals issued an unpublished opinion reversing. Following a petition for rehearing, the court of appeals withdrew its opinion and requested certification under Rule 204(b), SCACR. We granted certification.

II.

The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review. *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); *Vines v. Champion Bldg. Prods.*, 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993); *Givens v. Steel Structures, Inc.*, 279 S.C. 12, 13, 301 S.E.2d 545, 546 (1983); *Cooper v. McDevitt & St. Co.*, 260 S.C. 463, 466, 196 S.E.2d 833, 834 (1973); *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971); Hon. Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 170 (2d ed. 2002).

We must determine if Brayboy was an employee at the time of his injury and thus eligible for workers' compensation benefits. *Alewine v. Tobin Quarries, Inc.*, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945) ("No award under the [Workers' Compensation] Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which claim is made. This relation is contractual in character . . . ."). An employee is statutorily defined in section 42-1-130 of the South Carolina Code (Supp.

2008) as "every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written . . . ." Brayboy asserts his status as an employee as a result of the contract for hire with Workforce. Workforce relies on the principle that an employment relationship may be vitiated when there is a material misrepresentation in the employment contract. *Givens*, 279 S.C. at 13, 301 S.E.2d at 546.

In *Cooper*, this Court set forth three necessary factors for a material misrepresentation in the employment application to vitiate the employment relationship:

> (1) The employee must have knowingly and wilfully made a false representation as to his physical condition.
> (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.
> [and]
> (3) There must have been a causal connection between the false representation and the injury.

260 S.C. at 468, 196 S.E.2d at 835.

We are firmly convinced that Workforce has established all three factors. First, Brayboy failed to report a host of prior back problems, as well as a prior workers' compensation claim for an injury to his back. The willful nature of Brayboy's false responses pervades the record. Brayboy admits he provided false information on the employment application. The suggestion that Brayboy could make material misrepresentations on his employment application because he believed he was fit for construction work is a specious position.

Turning to part two of the test, WorkForce presented credible evidence it relies heavily on the employment application. In this regard, Workforce's reliance is twofold: the employment application is important in the hiring *and* placement decisions. Clearly, the questionnaire portion of the application protects the employer and employee. Had Brayboy given truthful information, Workforce would have been able to give him suitable job

assignments, which would not have included heavy lifting. Even Brayboy at one point conceded the importance of providing truthful information on the employment application when he stated, "[WorkForce] wouldn't want to put a person with impairments or disabilities on a construction job that [he] couldn't handle." We find WorkForce detrimentally relied on Brayboy's fraudulent application.[1] *Small v. Oneita Indus.*, 318 S.C. 553, 554-55, 459 S.E.2d 306, 306-07 (1995) (noting an agent of the employer testified Small's prior injury would affect job placement decisions, not hiring decisions, and affirming the denial of workers' compensation benefits due to a false representation on an employment application).

Concerning the third factor, we find irrefutable evidence of a causal connection between the false information and the aggravation of his pre-existing back injury. Brayboy conceded that the April 2003 injury was in "primarily in the same area" as the 1996 cave-in injury. The April 2003 injury is also directly linked to his military disability, as evidenced by the VA raising Brayboy's disability rating from twenty to forty percent as the "service connected condition(s) has/have worsened."

Pursuant to *Cooper*, we hold Brayboy's fraudulent responses on his employment application vitiated his employment relationship and barred his recovery of workers' compensation benefits.

REVERSED.

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

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[1] WorkForce provides temporary employment and, therefore, a WorkForce employee may be assigned to various jobs during their employment. On the day of his alleged injury, Brayboy was assigned to heavy labor, the very type of assignment WorkForce claims it would not have given Brayboy had he been truthful in his employment application.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Velveteen Jackson King, Respondent,

v.

Wendell Junius King, Appellant.

Appeal From Darlington County
R. Kinard Johnson, Jr., Family Court Judge

Opinion No. 4565
Heard March 17, 2009 – Filed June 16, 2009

AFFIRMED

Dwight C. Moore, of Sumter, for Appellant.

Cheryl T. Hopkins, of Florence, for Respondent.

KONDUROS, J.: In this domestic action, Wendell Junius King (Husband) argues the family court erred in awarding Velveteen Jackson King (Wife) alimony and attorney's fees because it failed to consider the applicable factors. Husband further contends the family court erred in its division of

marital property by assigning no value to two vehicles, despite Wife's testimony those vehicles were worth a total of $24,000. We affirm.

FACTS

Husband and Wife married on May 24, 1997. This was the parties' second marriage to each other. They had two children born during their first marriage, one in 1978 and the other in 1985, but none during their second marriage. In 2005, Wife filed a complaint seeking a divorce, alimony, the marital home, and the equitable division of other property. Husband filed an answer and counterclaim. At the beginning of the hearing on the matter, Wife withdrew her request for a divorce. Husband moved to supplement his pleadings to seek a divorce. However, Wife objected based on insufficient notice and after Husband conceded Wife lacked notice, the family court denied the motion.

Following the hearing, the family court issued an order awarding the Wife permanent, periodic alimony of $1,000 per month. In making that award, the court noted the marriage lasted eight years and both parties were forty-eight years old and in good health. The family court determined Husband's gross monthly income was $3,585 from Georgia Pacific and the Army Reserve, which was "significantly higher" than Wife's income of $936 a month. The court noted Wife currently worked as a housekeeper at Holiday Inn Express but was previously employed as a welder. The family court found the parties had a modest standard of living; they lived in a mobile home on land they owned. The court further found "Husband gave no reason for leaving home" and had "moved in with another woman but claim[ed] to be only a boarder in her home." The court indicated the tax consequences of a permanent, periodic alimony award were the alimony would be deductible to Husband and taxable to Wife. The court also determined "Wife's financial declaration reflects a need for assistance to be able to realize her monthly budget. The Husband's declaration reflects the ability to assist the Wife." Based on those factors, the family court awarded Wife permanent, periodic alimony of $1,000 per month.

Additionally, the family court determined although the marital home had been Wife's premarital property, the couple transmuted it into marital property. The court found the land and mobile home had a net negative value of $10,486 and apportioned it to Wife. Husband had two retirement accounts with a total value of $22,654, of which the family court found half to be marital property. The court determined, "While the Husband made the greater financial contributions, the Wife earned some outside income and was the primary homemaker doing the traditional duties normally associated with the Wife such that a 50/50% division of the marital estate is appropriate." Accordingly, the family court awarded Wife $5,663 of Husband's retirement accounts to be accomplished by a Qualified Domestic Relations Order (QDRO).

The family court also divided the parties' vehicles. The court awarded Wife the Toyota Forerunner, which Wife had valued at $9,000 and testified had a $9,000 balance remaining on it, and the Nissan Maxima, which Wife valued at $15,000 with a $15,000 balance. Additionally, the court awarded Husband his truck, which had a net value of $6,000.

The family court found the total marital estate had a net value of $6,840 and awarded each party half of that value. Because the property allocated to Wife had a negative value of $4,823 and Husband's allocation had a positive value of $11,663, the family court ordered Husband pay Wife an additional $8,243 out of his retirement accounts in the form of a QDRO.

As to attorney's fees, the family court found Wife's attorney billed her at the rate of $150 an hour, which is the fee normally charged in the locale. The family court noted Wife was represented by counsel who regularly appeared before it. The family court also found counsel obtained beneficial results for Wife; specifically, she was successful in the issues raised in her complaint, was awarded the marital residence and alimony, and successfully challenged Husband's motion to supplement the pleadings. The family court also stated it considered Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), and Doe v. Doe, 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006), in arriving at its award. Although Wife's affidavit requested attorney's fees of $4,885.50, the court acknowledged that figure did not take into account

preparing the QDRO, which the family court ordered Wife's counsel to prepare. The court determined Husband was in a better financial position than Wife to pay attorney's fees. The court noted "[a]fter paying $1000.00 per month alimony, the net cost to the Husband will be only $747.00 per month and the Wife, after realizing the taxable alimony award will realize only $820.00 per month. The Husband will continue to have more disposable income even after the payment of alimony." Accordingly, the family court ordered Husband to contribute $5,000 to Wife's attorney's fees at a rate of $250 per month.

Husband filed a motion for reconsideration. The family court denied the motion finding the order contained sufficient findings to support alimony, equitable division, and attorney's fees and also properly valued the vehicles. This appeal followed.

STANDARD OF REVIEW

"On appeal from a family court order, this [c]ourt 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). "Because the family court is in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad discretion." Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003). When the evidence is disputed, the appellate court may adhere to the family court's findings. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. ALIMONY

Husband argues the family court abused its discretion in awarding alimony because it failed to properly consider and weigh the statutory factors. Additionally, he contends the family court erroneously awarded alimony before determining the equitable distribution. We disagree.

The amount to be awarded for alimony, as well as a determination of whether the spouse is entitled to alimony, is within the sound discretion of the family court. Smith v. Smith, 264 S.C. 624, 628, 216 S.E.2d 541, 543 (1975); see also Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) ("The amount of alimony is within the [family] court's sound discretion and should not be disturbed on appeal unless an abuse of discretion is shown."). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings without evidentiary support. Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004).

The family court should consider the following factors in awarding alimony:

> (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

Davis v. Davis, 372 S.C. 64, 79-80, 641 S.E.2d 446, 454 (Ct. App. 2006) (citing S.C. Code Ann. § 20-3-130(C) (Supp. 2008)). "The court is required to consider all relevant factors in determining alimony." Id. at 80, 641 S.E.2d at 454. The South Carolina Supreme Court has held "[t]hree important factors in awarding periodic alimony are (1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other." Patel, 359 S.C. at 529, 599 S.E.2d at 121. In determining whether to award alimony and what amount and type of alimony to award, "[n]o one factor is dispositive." Pirri v. Pirri, 369 S.C. 258, 267, 631 S.E.2d

279, 284 (Ct. App. 2006). "[A]ll of the facts and circumstances disclosed by the record should be considered . . . ." Nienow v. Nienow, 268 S.C. 161, 171, 232 S.E.2d 504, 510 (1977). Rule 26(a), SCRFC, provides that "[a]n 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." See also Griffith v. Griffith, 332 S.C. 630, 646, 506 S.E.2d 526, 534-35 (Ct. App. 1998) (holding the family court must make specific findings of fact on the record for each of the required factors to be considered in making its decisions).

Husband asserts the family court did not consider (1) marital misconduct and fault but noted "Husband gave no reason for leaving home"; (2) the emotional condition of each spouse; (3) Husband's educational background, employment history, and earning potential; and (4) whether either spouse had a prior support obligation. The family court is only required to consider relevant factors. Husband does not point to any misconduct or fault on Wife's part. Further, although Husband and Wife had two children together during their first marriage, both were emancipated at the time of the family court's hearing. Father does not provide any support obligations the family court failed to consider. Additionally, the family court found both parties to be in "good health" and did not limit that finding to only physical health. Once again, Husband does not bring to our attention any emotional health issues the family court failed to take into account. While Husband filed a motion for reconsideration, he did not mention which of the factors the family court failed to consider, simply that the order did "not set out specific finding of fact and conclusion of law as it relates to awarded alimony and equitable division of property." Although the family court did not specify which findings corresponded with each statutory factor, it does appear the family court considered all of the relevant factors.

Additionally, Husband's contention the family court must make its equitable distribution before awarding alimony is not preserved for our review. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. 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). Husband did not object when the family court made its ruling from the bench

on alimony nor did he file a Rule 59(e), SCRCP, motion making this argument once the family court issued its order. Accordingly, we find Husband's argument that the family court improperly awarded alimony before making the equitable distribution is unpreserved. Because the family court did not abuse its discretion in awarding alimony, we affirm the award.

II. EQUITABLE DISTRIBUTION

Husband argues the family court abused its discretion in making the equitable distribution when it assigned zero value to two automobiles Wife testified were worth a combined value of $24,000. We disagree.

Marital property includes all real and personal property the parties acquired during the marriage and owned as of the date of filing or commencement of marital litigation. S.C. Code Ann. § 20-3-630(A) (Supp. 2008). "The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership." Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996). The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership. Johnson v. Johnson, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988).

The division of marital property is within the family court's discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004). If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant. Id. "For purposes of equitable distribution, 'marital debt' is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable." Hardy v. Hardy, 311 S.C. 433, 436-37, 429

S.E.2d 811, 813 (Ct. App. 1993). "The same rules of fairness and equity that apply to the equitable distribution of marital property also apply to the equitable division of marital debts." Thomson v. Thomson, 377 S.C. 613, 624, 661 S.E.2d 130, 136 (Ct. App. 2008). "In the absence of contrary evidence, the court should accept the value the parties assign to a marital asset." Pirri, 369 S.C. at 264, 631 S.E.2d at 283 (quoting Noll v. Noll, 297 S.C. 190, 194, 375 S.E.2d 338, 340-41 (Ct. App. 1988)). "A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." Abercrombie v. Abercrombie, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct. App. 2007).

Examining the overall distribution of property, the end result is fair. The parties did not have significant assets and had some debt. Both parties contributed to the marital estate; Husband through his income from employment and Wife through both her income and her assumption of duties as a traditional homemaker. Husband's main contention is that the family court gave the Maxima and the Forerunner both zero values, although Wife gave them a value of $15,000 and $9,000, respectively. However, Wife also testified both of the vehicles had debt equal to their value. Husband provided no testimony or evidence the vehicles' values were not as Wife provided. Because the family court's valuation of the vehicles was equal to Wife's valuation, the family court did not abuse its discretion. Further, even though Wife received assets to make up the difference, she actually received more debt than Husband. Because the overall distribution appears fair, we affirm the family court's equitable distribution.

III. ATTORNEY'S FEES

Husband argues the family court abused its discretion in awarding attorney's fees because it failed to properly consider and weigh the statutory factors. We disagree.

The family court has discretion in deciding whether to award attorney's fees, and its decision will not be overturned absent an abuse of discretion. Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An

abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings lacking evidentiary support. Degenhart, 360 S.C. at 500, 602 S.E.2d at 97. In deciding whether to award attorney's fees, the family court should consider: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living. Patel, 359 S.C. at 533, 599 S.E.2d at 123. In determining reasonable attorney's fees, the six factors the family court should consider are: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Husband argues the family court failed to consider the nature, extent, and difficulty of the case or the time necessarily devoted to the case. However, the family court referenced Wife's attorney's affidavit and also the fact that the attorney would also be preparing the QDRO in addition to the time the affidavit took into account. Further, Husband did not object to the affidavit or cross-examine counsel on it. We believe the family court considered the applicable factors as evidenced by the record and its reference to Glasscock. Accordingly, we affirm the award of attorney's fees.

CONCLUSION

The determination of alimony, equitable distribution, and attorney's fees are all left to the family court's discretion. Although the family court did not specifically list all of the factors for each determination, the order indicates it considered all the relevant factors. Further, the overall equitable distribution is fair. Accordingly, the family court's order is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Don D. Gause, Appellant,

v.

Nathan Dale Smithers, Edward W. Hunt, and Edward Raymond Hunt, Defendants,

Of Whom Edward Raymond Hunt is Respondent.

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 4566
Heard April 23, 2009 – Filed June 16, 2009

AFFIRMED

David E. Rothstein, of Columbia, for Appellant.

Gene M. Connell, Jr., of Surfside Beach, for Respondent.

KONDUROS, J.: Don Gause appeals the circuit court's dismissal of his negligence claims against Edward Raymond Hunt (Son) because the claims violated the statute of limitations. We affirm.

FACTS

On November 15, 2003, Gause, a Conway police officer, was involved in a DUI traffic stop of a car driven by Son, but owned by Edward W. Hunt (Father). During the stop, a second car driven by Nathan Smithers, hit and injured Gause. Almost three years later, on November 2, 2006, Gause filed a lawsuit against Father as the driver of the car, alleging negligence.[1] Father was served on November 20, 2006, after the statute of limitations had expired, but within the 120 days after filing provided for in Rule 3(a)(2), SCRCP. Father answered claiming he was not the driver of the car involved in the accident.

Realizing his error in identifying the driver, Gause filed an amended complaint on December 19, 2006, naming Son as another defendant based on his negligence in driving the car, and adding causes of action against Father for negligent entrustment and under the family purpose doctrine. Son was served with the amended complaint on January 25, 2007. Son moved to dismiss the claims against him alleging he had been added as a party after the statute of limitations had run. Gause contended he was merely substituting Son as the real driver pursuant to Rule 15(c), SCRCP, so the amended complaint should relate back to the filing of the original complaint. The circuit court determined Son was being added as a party instead of substituted, and thus, Rule 15(c) did not save the claims against Son. This appeal followed.

[1] The portion of the accident report identifying the driver was blank, because Son was taken to the hospital before the report was completed. After seeing Father's name as the owner of the vehicle, Gause proceeded in filing his suit believing Edward W. Hunt was both the owner and driver of the vehicle.

STANDARD OF REVIEW

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the [c]ourt, the motion shall be treated as one for summary judgment . . . ." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr, 377 S.C. 217, 225, 659 S.E.2d 213, 217 (Ct. App. 2008). "When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id.

LAW/ANALYSIS

Gause contends the circuit court erred in analyzing the amended complaint as an attempted addition of a party rather than as the change of a party for purposes of Rule 15(c), SCRCP. We disagree.

Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but

> for a mistake concerning the identity of the proper party, the action would have been brought against him.

Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), discussed the application of Rule 15(c) at length. In that case, Jackson amended her complaint after the statute of limitations had expired in a John Doe hit and run action. Id. at 554, 537 S.E.2d at 568. Jackson added a named party as the defendant but did not dismiss John Doe as a defendant. Id. The majority of the court concluded the second paragraph of Rule 15(c) only applied to a substitution or change in party, not the addition of a defendant. Id. at 558, 537 S.E.2d at 570. ("The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of the party.").[2] Cline v. J.E. Faulkner Holmes, Inc., more recently followed this view. 359 S.C. 367, 371 n.2, 597 S.E.2d 27, 29 n.2 (Ct. App. 2004) (finding Rule 15(c) did not allow plaintiff to add a party to a negligence action after termination of statute of limitations when plaintiff discovered additional party was an independent contractor and not employee of original defendant).

In this case, Gause named Son as a defendant with respect to the direct negligence claims. However, he also kept Father in the case. We conclude this amounted to the addition of a defendant, the action Jackson sought to proscribe in keeping with the plain language of Rule 15(c). We are mindful this produces a harsh result, although Gause's claims against Father remain viable. Nevertheless, we are compelled to affirm the findings of the circuit court.

Because the addition of a party is not contemplated by Rule 15(c), we need not address whether Son's being made a defendant was otherwise proper

[2] Chief Judge Hearn dissented in Jackson, reasoning the named defendant was not an additional party because Jackson alleged John Doe and the named defendant were the same person. 342 S.C. at 558, 537 S.E.2d at 571 (Hearn, C.J., dissenting). That reasoning does not apply to the facts of this case.

under that Rule.[3] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may find it unnecessary to discuss respondent's additional sustaining grounds when its affirmance is grounded in an issue addressed by the lower court.").

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

[3] At oral argument, Son contended he was not properly substituted for Father because he was not necessarily on notice of Gause's action within the statute of limitations. Gause argues Son had proper notice of the action because he was served with the amended complaint within the statute of limitations plus 120 days after filing of the original complaint. See Rule 3(a)(2), SCRCP (stating a civil action is commenced when the summons and complaint are filed and served with the statute of limitations, or if not served with the statute of limitations, the summons and complaint are actually served within 120 days after filing). The circuit court did not rule on this issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Walter M. Fiddie, Appellant,

v.

Dianna Fiddie, Respondent.

Appeal From Charleston
Judy L. McMahon, Family Court Judge

Opinion No. 4567
Heard March 5, 2009 – Filed June 16, 2009

AFFIRMED

William J. Clifford, of Charleston, for Appellant.

Susan T. Kinard, of Mt. Pleasant, for Respondent.

LOCKEMY, J.: In this domestic action, Walter Fiddie (Husband) appeals the family court's refusal to terminate alimony and its order increasing alimony to Diane Fiddie (Wife). Husband argues the family court misapplied certain equitable maxims. Additionally, Husband argues the family court erred

in awarding attorney's fees and costs to Wife and failing to award attorney's fees and costs to him. Finally, Husband argues the family court erred in finding Wife a credible witness and in finding the errors he made in his financial declarations were more than "simple errors." We affirm.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife were married on June 6, 1966, and had two children. After twenty-seven years of marriage, in 1994, the parties were divorced on the ground of one year's continuous separation. In its divorce order, the family court approved an agreement entered into by Husband and Wife. Under the terms of their agreement, Husband was obligated to pay Wife $250 per month in permanent alimony until her death or remarriage. A provision in their agreement provided Wife's alimony would increase to $400 when their youngest child "complet[ed] college of highest education he desire[d]." Additionally, pursuant to their agreement, Husband agreed to pay Wife "one half of any retirement, up to the date the parties are divorced, as it becomes available." In 2002, the family court increased Husband's monthly alimony to $675 after Wife petitioned the family court for an increase.

On July 19, 2005, Husband petitioned the family court to terminate his alimony obligation based on Wife's continued cohabitation with another man, Ronald Robinson. Additionally, Husband requested reasonable attorney's fees and costs. Subsequently, Husband filed an amended complaint on January 18, 2006, essentially making the same allegations. Wife answered Husband's complaint, counterclaimed for an increase in alimony, and also sought attorney's fees and costs.

At trial evidence demonstrated Wife could not afford the home she purchased and has had to live with friends and relatives. At one time she lived in a substandard house with inadequate plumbing and only a partial roof. She had financial troubles, and on occasion did not have enough money for food. Additionally, Wife's health was deteriorating, and she could not afford health insurance or prescription medication. Because of her health problems, she appeared unable to work.

After striking up a friendship with Ronald Robinson, Wife moved in with him in his North Myrtle Beach apartment from August 2004 until October 2005 "as a roommate." While living with him, Wife helped Robinson with his business, and he provided her financial support. Both insisted they were not engaged in a "romantic relationship," though they admitted having consensual sex approximately three times. Additionally, Wife maintains she would spend time with a friend at least twice a month and with her sister once a month so that she was not staying with Robinson on a full-time basis. When the present action began, Wife was living in an apartment in Charleston, and Robinson was helping pay her rent.

The family court refused to terminate Husband's alimony obligation based on his continued cohabitation allegation. The family court found the evidence presented did not prove Wife lived with Robinson for ninety consecutive days or that Robinson and Wife were involved in a romantic relationship. After finding a substantial change in Husband and Wife's circumstances, the family court increased Husband's alimony obligation to $1,200 per month. Finally, the court directed Husband pay $10,000 of Wife's attorney's fees and costs. Husband filed a motion to alter or amend judgment which the family court denied. This appeal follows.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). Although this court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). However, "[q]uestions concerning alimony rest with the sound discretion of the [family] court, whose conclusions will not be disturbed absent a showing of abuse of discretion." Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996).

LAW/ANALYSIS

I. Termination based on Cohabitation

Husband argues the family court erred in failing to terminate alimony based on Wife's cohabitation with another man. Specifically, Husband contends Wife's relationship triggered both the common law grounds for terminating alimony as well as the statutory grounds. We affirm the family court's determination that Wife did not meet the statutory grounds for termination of alimony under the continued cohabitation statute and its determination that Wife's living arrangement with Robinson was not tantamount to marriage.

A. Continued Cohabitation Statute

Under section 20-3-150 of the South Carolina Code (Supp. 2008), a supporting spouse's permanent alimony and support obligations will terminate "upon the remarriage or continued cohabitation of the supported spouse. . . ." Section 20-3-150 defines "continued cohabitation" to mean "the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days." Furthermore, the continued cohabitation statute provides: "The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement." Recently, our supreme court found "resides with," under the statute requires "the supported spouse live under the same roof as the person with whom they are romantically involved for at least ninety consecutive days." Strickland v. Strickland, 375 S.C. 76, 89, 650 S.E.2d 465, 472 (2007); see also Semken v. Semken, 379 S.C. 71, 74, 664 S.E.2d 493, 495 (Ct. App. 2008).

Therefore, the threshold question before us is whether Wife lived under the same roof as Robinson for at least ninety consecutive days in a romantic relationship. Here, the family court found uncontroverted evidence demonstrated Wife stayed with at least three people other than Robinson every month in question. Accordingly, the family court found Husband failed to prove Wife and Robinson resided together in a romantic relationship for ninety

or more consecutive days. Under the preponderance of the evidence, the family court found evidence presented did not meet the statutory guidelines for termination of Husband's alimony.

Regarding whether Wife resided with Robinson for ninety consecutive days, we defer to the family court's judgment. Testimony in the record demonstrates Wife did not want to stay with Robinson on a full-time basis and that she hated wearing out her welcome anywhere she went. Additionally, testimony from Wife's sister and friend corroborated Wife's testimony that she stayed with them for several days each month. Accordingly, because this issue seems to be a credibility determination, we give deference to the family court which heard the testimony and made a credibility determination.[1] See Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). We also find Wife did not stay with her sister and friend in an attempt to circumvent the continued cohabitation statute because evidence demonstrates she was unaware of the statute until the litigation began and thus the potential consequences of cohabitating with another.

B. Tantamount to Marriage

Husband maintains the family court erred in failing to terminate his alimony because Wife's relationship with Robinson was tantamount to marriage. We disagree and find the cases Husband relies on distinguishable from the present case.

Husband relies on Bryson v. Bryson, 347 S.C. 221, 224, 553 S.E.2d 493, 495 (Ct. App. 2001), where this court found ex-Wife's relationship tantamount to marriage after she lived with another man for twelve years, moved to Florida with him, purchased a home with him, and had the home titled in both their names, among other factors. Unlike Bryson, where ex-wife's relationship with another man was permanent in nature, here, Wife resided with Robinson as a

[1] Because we find Wife did not stay with Robinson on a full-time basis, we decline to comment on whether she and Robinson were in a "romantic relationship." See S.C. Code Ann. § 20-3-150 (requiring both residence with another for ninety consecutive days and a romantic relationship for a continued cohabitation finding).

temporary solution to her homelessness. From the record, it appears both understood the temporary nature of her residence with him. We also believe the present case is different from Jeanes v. Jeanes, 255 S.C. 161, 177 S.E.2d 537 (1970), where the supreme court found the ex-Wife and paramour entered into a common law marriage because the couple resided together and held themselves out to be husband and wife. Here, we believe Wife and Robinson held themselves out to be friends rather than husband and wife. Accordingly, due to the temporary nature of Wife and Robinson's living arrangement as well as their holding themselves out as friends, we find the family court did not err in refusing to terminate his alimony obligation based on Husband's argument that Wife's relationship with Robinson was tantamount to marriage.

II. Increase in Alimony/Changed Circumstances

Husband contends the family court erred in finding a change of circumstances warranted an increase in Wife's alimony. Husband admits his financial situation has improved since the parties' divorce; however, he maintains his increase in income alone should not be the basis for an alimony increase. We disagree.

Upon a change in circumstances, the family court may modify an alimony obligation. See Miles v. Miles, 355 S.C. 511, 516, 586 S.E.2d 136, 139 (Ct. App. 2003). To justify modification or termination of an alimony award, the changes in circumstances must be substantial or material. Id. at 519, 586 S.E.2d at 140. Moreover, the change in circumstances must be unanticipated. Penny v. Green, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004). "The party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change has occurred." Kelley v. Kelley, 324 S.C. 481, 486, 477 S.E.2d 727,729 (Ct. App. 1996).

"Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse.[2]"

[2] Per statute, the complete list of factors the family court can consider in setting alimony include: (1) duration of the marriage; (2) physical and emotional health

Miles, 355 S.C. at 519, 586 S.E.2d at 140. Here, the family court based this modification partly on Husband's improved financial condition. The family court noted Husband was earning $100,000 per year over his retirement annuity, while he was earning only $38,000 per year without retirement income when the parties last appeared before the court in 2002. At the time of this proceeding, Husband's income exceeded his expenses by more than $4,000. Further, the family court found Husband intentionally filed false financial declarations with the court, and but for Wife's counsel's cross-examination, his financials would have misled the court.

In addition to noting Husband's improved change of circumstances, the family court also considered Wife's current circumstances. The family court noted Wife is unemployed and suffers from multiple ailments including fibromyalgia, severe osteoporosis, osteoarthritis, migraine headaches, hypertension, and severe depression "such that she is unable to work." Additionally, the family court noted Wife has no health insurance to aid her in obtaining prescriptions and doctor's visits. Finally, the family court found Wife's insufficient income and declining health eventually led to homelessness. Therefore, the family court increased Wife's alimony to $1,200 per month.

We find Wife met her burden of proving an unforeseen change in circumstances occurred based on her declining health, her homelessness, and her inability to work. Wife's changes in her health and financial conditions are significant. Further, though normal increases in income may not be enough to warrant an increase in alimony, here, Husband's change in financial situation is material enough to warrant an increase in his alimony obligation considering he is making more than double his income from 2002. Accordingly, the family court did not abuse its discretion by increasing alimony based on Husband's

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of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses and needs of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2008).

improved financial situation together with Wife's diminished standard of living. Therefore, we affirm the family court's decision to increase Husband's alimony obligation.

III. Other Issues

Husband's other issues on appeal are abandoned because he cited no authority and makes conclusory assertions. Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (holding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority); Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

CONCLUSION

We find the family court did not err in refusing to terminate Wife's alimony under the continued cohabitation statute because evidence did not demonstrate Wife stayed with Robinson for ninety consecutive days. This issue, in large part, came down to a credibility determination, and we gave deference to the family court which heard the testimony. We also do not find Wife's relationship with Robinson was tantamount to marriage. Additionally, we affirm the family court's decision to increase Husband's alimony obligation based on unforeseen changes in both Wife and Husband's circumstances. All other issues raised to this court are abandoned on appeal. The decision of the family court is therefore

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Aletha Jean Edwards, Respondent,

v.

Samuel Earle Edwards, Appellant.

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

Opinion No. 4568
Heard February 4, 2009 – Filed June 17, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Falkner Wilkes, of Greenville, for Appellant.

Robert L. Waldrep, Jr., of Anderson, for Respondent.

LOCKEMY, J.: In this domestic action, Samuel Edwards (Husband) appeals the family court's order awarding Aletha Edwards (Wife) minimum wage income and permanent alimony. Additionally, Husband argues the family court erred in (1) finding his life estate in a produce stand was transmuted into marital property and (2) qualifying and accepting the business valuation of Wife's expert witness. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife were married on July 18, 1996, and after nine years of marriage, the couple separated. Husband and Wife had no children together. Subsequently, Wife filed for divorce on May 2, 2006, on the ground of adultery.

Husband and Wife began their relationship in North Carolina in 1992. In 1994, the parties moved their mobile home onto property owned by Husband's father located on Highway 25 in Greenville County. Husband and Wife lived in the mobile home with Wife's minor son and Husband's minor son and daughter. Husband's father died in 1995, and devised a life estate in both a seventeen acre tract and a thirty-two acre tract in Greenville County to Husband. In 1995, Husband and Wife began operating a produce stand on the seventeen acre tract of land. In 1998, Husband and Wife built a new stand to house the produce business.

On July 2, 2007, the family court granted Wife a divorce on the ground of adultery and ordered to Husband pay Wife $500 in monthly alimony, and $500 in monthly minimum wage income for twenty-five years. The family court also found Wife was entitled to a one-fourth interest in the leasehold income from a cellular tower and a one-fourth interest in a Certificate of Deposit with a current value of $20,000. Additionally, the family court ordered Husband to pay Wife $2,000 in attorneys' fees and costs. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence." Arnal v. Arnal, 363 S.C. 268, 280, 609 S.E.2d 821, 827 (Ct. App. 2005). However, "[q]uestions concerning alimony rest with the sound discretion of the [family] court, whose conclusions will not be disturbed absent a showing of abuse of discretion." Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996). "The [family] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law." Smith v. Doe, 366 S.C. 469, 474, 623 S.E.2d 370, 372 (2005).

Generally, the family court has the discretion to determine whether a witness is qualified as an expert, and whether his opinion is admissible on a fact in issue. Altman v. Griffith, 372 S.C. 388, 400, 642 S.E.2d 619, 625 (Ct. App. 2007). On appeal, the family court's ruling to exclude or admit expert testimony will not be disturbed absent a clear abuse of discretion. Id. "Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony." Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005).

LAW/ANALYSIS

I. Transmutation of produce stand

Husband argues the family court erred in awarding Wife an interest in Husband's life estate in the produce stand. We disagree.

Husband argues Wife's use of nonmarital property in support of the marriage alone is insufficient to establish transmutation. He relies on Peterkin v. Peterkin, where the court held mere use of income derived from nonmarital property in support of the marriage does not transmute it into marital property. 293 S.C. 311, 313, 360 S.E.2d 311, 313 (1987). Moreover, this court has ruled: "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of

the marriage, is not sufficient to establish transmutation." Johnson v. Johnson, 296 S.C. 289, 295-96, 372 S.E.2d 107, 111 (Ct. App. 1988).

"Transmutation is a matter of intent to be gleaned from the facts of each case." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson, 296 S.C. at 295, 372 S.E.2d at 110-11. "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." Id.

Generally, property acquired by either party by inheritance, devise, bequest or gift from a party other than the spouse is nonmarital property. S.C. Code Ann. § 20-3-630(A)(1) (Supp. 2008). "[N]onmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." Jenkins, 345 S.C. at 98, 545 S.E.2d at 537.

Here, the family court found (1) the jointly owned Certificate of Deposit ($20,000.00), (2) the income from the cellular tower lease, and (3) the life estate in the produce business were all transmuted to marital property "by their title and use in support of the marriage." Although there is no evidence the disputed property was ever jointly titled, evidence supports the family court's determination that the property was used by the parties in support of the marriage.

Profits from the produce stand along with rental income from the cellular tower provided Husband and Wife their main sources of income. Additionally, the parties intended to treat the produce stand as property of the marriage and used the income from the produce stand to provide for their

family. In turn, the parties used marital funds to build equity in the produce stand. Wife testified she and Husband used income generated by the produce stand to construct the new stand.

Husband admits the parties' main source of income came from the produce stand and rental income from the cellular tower. Husband testified the parties "lived off" the income generated by the produce stand. Wife worked seven days a week during the produce stand's thirty-two week selling season. Her responsibilities included running the cash register, purchasing inventory, and unloading produce. Wife testified she ran the daily operations of the produce stand with the help of several workers until two years before the parties separated, when she operated the business on her own. Wife did not receive any wages for her work at the produce stand. Furthermore, the building permits obtained for the construction of the produce stand named both Husband and Wife as owners of the property.

Because the parties utilized the produce stand in support of their marriage and demonstrated their intent to treat it as marital property, we find the family court did not err in determining the produce stand was transmuted into marital property, and we affirm its finding.

II. Expert testimony as to business valuation of the produce stand

Husband argues the family court erred in qualifying Wife's expert witness. We disagree.[1]

Generally, the family court has the discretion to determine whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue. Altman v. Griffith, 372 S.C. 388, 400, 642 S.E.2d 619, 625 (Ct. App. 2007). Pursuant to Rule 702, SCRE: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

[1] Based upon our disposition of this issue and the following issue, we need not address Husband's argument the family court erred in accepting the expert's valuation of the parties' business.

skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." On appeal, the family court's ruling to exclude or admit expert testimony will not be disturbed absent a clear abuse of discretion. Altman, 372 S.C. at 400, 642 S.E.2d at 625. "Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony." Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005).

In the present case, Husband objected to the expert's testimony based on surprise and lack of qualification as an expert. Husband argued Wife failed to disclose that expert testimony would be offered as to the valuation of the produce stand. The family court overruled the failure to disclose objection because "any surprise . . . should have been overcome from the standpoint that the value of this produce stand is really pivotal to the litigation to the [family] [c]ourt." Thereafter the family court qualified Wife's expert, Ken Walker, a certified real estate appraiser, concerning the valuation of the business.

Walker testified he began appraising real estate in the 1970s and has worked in real estate since that time. He is certified in South Carolina as a real estate appraiser and has taken ninety hours of classes regarding valuations of a life estate. Walker testified he has performed fifty to one hundred real estate appraisals per year for the last twenty to twenty-five years and has testified in numerous court proceedings. Walker acknowledged he had never testified in court as to the value of a life estate and had never valued a produce stand business. However, he had valued buildings or structures like the produce stand many times.

The family court did not abuse its discretion in qualifying Walker as an expert based on his specialized knowledge in valuing real estate. Further, Walker was thoroughly questioned regarding his credentials and education. Husband's basis for his objection to Walker's qualifications was that Walker had never testified as to the value of a life estate and had never valued a produce stand. However, these assertions would merely go the weight of his testimony and not its admissibility. See Peterson, 365 S.C. at 399, 618

S.E.2d at 907 ("[D]efects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony."). Therefore, we see no error in the family court's qualification of Walker as an expert.

III. Equitable division of minimum wage income

Husband argues the family court's award of $500 per month in minimum wage income for twenty-five years to Wife constitutes future support and is improper as part of the equitable division of the marital estate. We believe Wife is entitled to a portion of the produce stand's present value rather than $500 in monthly income. Therefore, we reverse and remand on this issue.

In its final order, the family court found Wife was entitled to $500 per month for twenty-five years for her services and labor at the parties' produce stand. The order further provided:

> (1) Alternatively, [Wife] is entitled to continue to use the property as a produce stand or comparable business in partnership with [Husband] on an equal basis.
>
> (2) If [Husband] should choose not to be in partnership with the [Wife], [Wife] may run it herself or develop partnership with third party(ies) with silent financing to the said business. [Wife] shall recoup all upfront costs and divide net proceeds one-fourth (1/4) with [Husband] on an annual basis. [Husband] shall be entitled to full on-going disclosure without interference in [Wife's] daily operation.

We see several problems with the family court's order. The family court does not indicate its basis for awarding Wife $500 in monthly minimum wage income. Furthermore, it is unclear from the family court's order whether or not

Wife would have to work at the produce stand in order to receive the monthly $500. The current ruling of the family court requires continued monitoring of the produce stand as a business, and it remains unclear whether the produce stand will continue to be profitable.

Instead, we believe the family court should value Wife's interest in the produce stand rather than awarding her a monthly minimum wage income. This approach eliminates future conflicts between the parties and uncertainties that could arise in running a business. Accordingly, we reverse the family court's award of $500 in monthly minimum wage income and remand the issue to the family court for a valuation. On remand, we find both parties should have an opportunity to put forth evidence, either in the form of tax returns or expert testimony, to show the produce stand's value. Once the family court assigns value to the property, in its discretion, the family court shall award Wife an appropriate portion of the produce stand's net present value as an equitable division award.

IV. Permanent alimony

Husband argues the family court failed to consider the employment history and earning potential of each spouse in awarding Wife $500 in alimony. Based on our decision to award Wife an interest in the produce stand, we remand the issue of permanent alimony to the family court for reconsideration. Josey v. Josey, 291 S.C. 26, 33, 351 S.E.2d 891, 895-96 (Ct. App. 1986) (finding the family court may consider the amount received in equitable distribution when determining an alimony award). On remand, the family court should consider the factors set forth in section 20-3-130(C) of the South Carolina Code (Supp. 2008) in making an alimony determination. Accordingly, without deciding whether to award alimony or an alimony amount we remand this issue to the trial court.

CONCLUSION

We affirm the family court's finding that the produce stand was transmuted into marital property, and its qualification of Wife's expert witness. Additionally, we remand the award of alimony to the family court

for reconsideration. On the issue of monthly minimum wage income, we reverse and remand. On remand, the family court shall value the produce stand and in its discretion, award Wife an appropriate portion of the produce stand's net present value as an equitable division award. Accordingly, the family court's decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alphonso Simmons, Appellant.

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

Opinion No. 4569
Heard April 22, 2009 – Filed June 17, 2009

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, Assistant Attorney General Christina J. Catoe, all of Columbia; and Solicitor Warren B. Giese, of Columbia, for Respondent.

GEATHERS, J.: Appellant Alphonso Simmons (Simmons) claims the circuit court erred on several grounds at his criminal trial for kidnapping, armed robbery, and grand larceny of a motor vehicle, which resulted in prejudice to Simmons and warrants a new trial. We affirm.

FACTS

On April 19, 2004, at approximately 7:00 a.m., an armed robbery occurred at the McDonald's on Decker Boulevard in Columbia, South Carolina. The employees were held at gunpoint, robbed, and locked inside the restaurant's cooler. While inside the restaurant, the robber stole personal items from the employees and approximately $1,300 from the restaurant's safe. After fleeing the McDonald's, the robber stole a 2001 Pontiac Sunfire from the parking lot. The robber then removed the tires, the custom rims, an amplifier, and a custom speaker box, and he abandoned the car in a wooded area near the location of the robbery.

Simmons was arrested in an unrelated home invasion in Kershaw County on May 24, 2004, approximately one month after the McDonald's robbery. The police impounded Simmons's vehicle, and the custom rims, speaker box, and amplifier from his vehicle were subsequently identified as those stolen from the Pontiac Sunfire. Shortly after Simmons's arrest in Kershaw County, he was transported to Richland County for questioning in connection with the McDonald's robbery.

Before the police questioned Simmons at Richland County police headquarters, Simmons was asked to give his palm print for identification purposes. Chief David Wilson, deputy chief of investigations for Richland County, testified that Simmons initially refused to give his palm print but consented after he explained the purpose behind taking the print.[1] While his palm print was being taken, Simmons indicated that he was hungry, so Chief Wilson requested a meal for Simmons.

Once Simmons gave his palm print, Chief Wilson escorted Simmons to his office. At that time, Chief Wilson read Simmons his Miranda[2] rights

[1] Chief Wilson testified at the in camera hearing that he initially went to Simmons's detention cell after he entered the building and overheard Simmons arguing with the lab officers about taking his palm print. The details of Chief Wilson's and Simmons's initial contact were excluded at trial because the circuit court ruled that the first palm print taken by the Richland County police was not admissible as it was taken prior to Simmons being served with the Richland County warrants.

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

from a standard form. Simmons was not handcuffed or restrained in any way while in Chief Wilson's office. Chief Wilson then questioned Simmons on whether he understood his rights. Simmons stated he understood them as he was "familiar with the system." Simmons did not sign a waiver of rights form, but Chief Wilson testified that in his opinion, Simmons's actions demonstrated a knowing and voluntary waiver of his rights. Investigator Steven Faust, who was present when Chief Wilson read Simmons his Miranda rights, corroborated Chief Wilson's testimony.

Shortly thereafter, Simmons's meal arrived. While eating his meal, but before discussing the McDonald's robbery, Simmons requested that he be allowed to call his father, mother, and brother. Chief Wilson was unable to contact Simmons's mother, but Simmons spoke with his father and brother over the phone, who then came to police headquarters and spoke with Simmons for approximately thirty minutes outside of the police's presence. Chief Wilson testified that he did not talk with Simmons specifically about the McDonald's robbery until after Simmons met with his family, as Simmons stated he would tell the police everything after meeting with his family.

After speaking with his father and brother, Simmons discussed the robbery with Chief Wilson and Captain James Smith. At some point, Captain Smith asked whether Simmons had viewed the videotape from the McDonald's robbery, at which time Simmons requested to view the videotape. Before Simmons made any admissions, Captain Smith told Simmons the quality of the surveillance tape was "pretty good." While viewing a close-up frame of the robber's face, Captain Smith testified that Simmons said, "Those are pretty good." Captain Smith then asked Simmons where the clothing was located that he was wearing in the video, and Simmons stated the clothing should be in his car. Chief Wilson also testified that Simmons identified himself as the robber in the video. Following this admission, Simmons confessed to stealing the money from McDonald's but claimed it was much less than the $1,300 allegedly stolen from the store's safe. Simmons was not willing to reduce his confession to writing. Chief Wilson stated the interrogation lasted approximately five hours, which did not include the time Simmons was in the holding cell.

The police served warrants on Simmons for the McDonald's robbery around 7:30 p.m. that evening, at which time Sergeant Barnes arrived to transport Simmons back to the Kershaw County detention center and to

deliver a second meal to him. En route to the detention center, Sergeant Barnes stated that Simmons initiated conversation by asking whether Sergeant Barnes would be taking him to jail. Sergeant Barnes replied in the affirmative and stated that it had been a long day. Sergeant Barnes then testified that he told Simmons the police were tired of chasing him and that while Simmons had given the police a good chase, "he messed up when he stole the rims and stereo." Sergeant Barnes also stated that in response to his statements, Simmons nodded his head in agreement, smiled, and said, "It was fun while it lasted."

Prior to Simmons's arrest on May 24, 2004 in Kershaw County, Sergeant Scott McDonald presented several McDonald's employees with photographic line-ups in an attempt to identify the robber. Simmons's photo was not in any of the prior line-ups, and none of the witnesses made any positive identifications in the prior line-ups. The day Simmons was arrested in Kershaw and became a suspect in the McDonald's robbery, Sergeant McDonald returned to the McDonald's with a new photographic line-up containing Simmons's picture. Simmons's picture was the second photograph in a six-picture photo array. Sergeant McDonald separately presented the line-up to four employees with specific instructions not to discuss the matter with anyone. Two employees, L'Marshalett Moore and Sophia Thomas, positively identified Simmons as the robber in the photographic line-up and testified to the same at trial. Both Ms. Thomas and Ms. Moore testified unequivocally that they did not discuss their identifications with anyone else, including each other. Later that evening, based on the photographic identifications, the recovered car rims, and videotape footage from the McDonald's robbery, the Richland County police issued a warrant for Simmons's arrest.

Simmons was subsequently tried and convicted by a Richland County jury of eight counts of kidnapping, five counts of armed robbery, and one count of grand larceny of a motor vehicle. Simmons received a concurrent twenty-year sentence on each kidnapping charge and a concurrent ten-year sentence on each armed robbery charge as well as a concurrent ten-year sentence on the grand larceny charge. The latter charges of armed robbery and grand larceny were to run concurrent to each other, but consecutive to the kidnapping charges, for a total of thirty years confinement. This appeal followed.

ISSUES ON APPEAL

(1) Did the circuit court's admission of limited testimony regarding the Kershaw County incident violate Rules 404(b) and 403, SCRE?

(2) Did the circuit court err in determining that Simmons's admissions to the police while in custody were freely and voluntarily made?

(3) Did the circuit court err in permitting two eyewitnesses to testify in court that they positively identified Simmons in a photographic line-up and a third eyewitness to testify that Simmons "looked like" the robber? Further, was it reversible error for the circuit court to deny Simmons's motion for a mistrial when the third witness once referred the robber as "the defendant" in her testimony?

(4) Did the circuit court err in permitting an investigating officer to testify when the officer entered the courtroom during another witness's testimony, despite the court's sequestration order?

(5) Did the circuit court err in requiring Simmons to give a second palm print at trial when the court previously ruled that the State had improperly obtained the first palm print during Simmons's custody in Richland County?

(6) Did the circuit court err in charging the jury to find Simmons not guilty if they found there was a "real possibility" that he was innocent?

STANDARD OF REVIEW

In criminal cases, this Court will review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This Court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, this Court is limited to determining whether the circuit court abused its discretion. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). This Court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

LAW/ANALYSIS

I. Admissibility of Kershaw County Incident

Simmons claims that the circuit court erred in permitting any testimony regarding the Kershaw County incident into evidence because the testimony violated Rules 404(b) and 403, SCRE. We disagree.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity therewith; however, such evidence 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. The evidence admitted "must logically relate to the crime with which the defendant has been charged." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000).

When the defendant has not been convicted of the prior crime, evidence of the bad act must be clear and convincing.[3] Id. If bad act evidence is clear and convincing and falls within the Rule 404(b) exception, it must nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

A. Kershaw County Arrest and Stolen Rims

Prior to the introduction of any testimony pertaining to the Kershaw County arrest, the circuit court conducted a pre-trial hearing regarding its admissibility under Rule 404, SCRE. The circuit court ruled that the State could not question the police on the details of the home invasion and the

[3] Clear and convincing evidence is more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

pursuit and capture of Simmons, or on the fact that he was bleeding and wounded at the time of his apprehension. The circuit court, however, found evidence of the stolen rims on Simmons's vehicle was admissible for purposes of linking Simmons with the McDonald's robbery.

Over Simmons's objection at trial, Lieutenant Kirk Corley testified that he apprehended Simmons off of a dry creek bed in the woods on the evening of April 25, 2004.[4] Corley stated the police took Simmons into custody and subsequently impounded his vehicle, which was discovered in close proximity to where the police apprehended him. When questioned as to whether there were any distinguishable items on the vehicle, Corley responded that the car had "fairly new shiny rims." The State presented additional testimony to establish that two swabs of dried blood were removed from the recovered rims and transported to SLED for DNA analysis, which were then positively matched to DNA samples taken from Simmons.

The circuit court did not err in admitting the objected-to testimony because it clearly linked Simmons to the McDonald's robbery, which is permissible under Rule 404(b), SCRE. Here, the evidence of the arrest in Kershaw was limited in scope to demonstrate how the police obtained custody of Simmons's vehicle, particularly the stolen rims, which was necessary to connect Simmons to the McDonald's robbery. See Lyle, 125 S.C. at 417, 118 S.E. at 807 ("If [evidence of another crime] is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."). The evidence and witness testimony positively showed that the rims on Simmons's vehicle were those stolen from the Pontiac Sunfire in the McDonald's parking lot. Consequently, the manner by which the police lawfully obtained custody of these rims from Simmons's vehicle was logically related to the instant case. See State v. Stokes, 381 S.C. 390, 405, 673 S.E.2d 434, 441 (2009) (finding evidence of a subsequent shooting to establish defendant's identity was admissible under 404(b), SCRE, as the evidence from the shooting was logically related to the instant case). This evidence clearly aids in establishing the identity of the person who committed the robbery at the McDonald's. Further, the circuit court limited the prejudicial impact of the testimony when it ruled that the State could not question the police on the details of the home invasion, its pursuit of

[4] Lieutenant Corley misspoke because the apprehension actually occurred on May 24, 2004.

Simmons into the woods, his capture, or the fact that he was seriously bleeding and required hospitalization after his arrest. As such, the circuit court's admission of this testimony did not violate Rule 404(b), SCRE.

B. Blood Evidence

Simmons objected at the pre-trial hearing to the State introducing evidence of his blood on the rims, arguing he bled after the Kershaw County case and not in connection with the McDonald's robbery. The circuit court overruled this objection, finding that the fact the stolen rims were on Simmons's vehicle and that his blood was on the rims were probative of whether Simmons committed the McDonald's robbery.

Simmons contends that the prejudicial value of the blood evidence from the stolen rims outweighs its probative value because it suggests that he is a dangerous criminal and was involved in a bloody unrelated crime in Kershaw County. However, we find the circuit court properly limited the scope of the testimony to prevent Simmons from being unduly prejudiced. The jury was never instructed that Simmons was bleeding when he was arrested or that the blood on the rims was a result of the Kershaw County home invasion, so it could plausibly accept the State's theory that Simmons's blood was on the rims because he cut himself when trying to install them on the tires. See Cammer v. Atl. Coast Line R. Co., 214 S.C. 71, 81, 51 S.E.2d 174, 178 (1948) (holding that the tasks of resolving contradictions in evidence, determining witnesses credibility, and deciding what testimony to accept when resolving a case are all left to the jury as fact-finder).

Furthermore, while the blood evidence was prejudicial, it was not unduly so, as it was probative in identifying Simmons as the perpetrator in the McDonald's robbery. See Dickerson, 341 S.C. at 400, 535 S.E.2d at 123 ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); See Stokes, 381 S.C. at 406, 673 S.E.2d at 442 (finding that evidence of a gun in another crime was probative of identity under Rule 404(b), SCRE, and while it was prejudicial, it was not "unduly prejudicial," as the weapon from other crime linked defendant to gun in instant case). The evidence was not offered to show Simmons's bad character, but rather, it was introduced to connect Simmons to the rims on the Pontiac Sunfire that were stolen from the McDonald's parking lot. Id. (finding evidence of weapon from subsequent shooting was admissible under Rules 404(b) and 403, despite defendant's contention that it implied "he might be a violent person

who may possess a gun," as the weapon connected him to the prior crime). Consequently, the circuit court did not err in admitting the limited testimony regarding the blood evidence from the stolen rims.

II. Voluntariness of Statements during Custody

Simmons next maintains that his statements to the police while in custody were not freely and voluntarily given because they were the product of police coercion. We disagree.

To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007). During this hearing, the circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given voluntarily. Id. at 382, 652 S.E.2d at 450. If the statement is found to have been given voluntarily, it is then submitted to the jury where its voluntariness must be established beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). On appeal, the circuit court's decision as to the voluntariness of the statement will not be reversed unless so erroneous as to demonstrate an abuse of discretion. Miller, 375 S.C. at 378, 652 S.E.2d at 448.

Simmons claims that the police's coercive and threatening actions in conjunction with the promise of food and leniency improperly induced him to make incriminatory statements. To the contrary, the totality of circumstances surrounding his statements demonstrates Simmons made a knowing and voluntary waiver of his rights. Chief Wilson testified that before Simmons was questioned on any details pertaining to the robbery, he read Simmons his Miranda rights from a standard form, which included Simmons's right to counsel. Chief Wilson stated that Simmons verbally agreed to waive his rights, but he was not asked to sign a waiver of rights form. Although the police did not require Simmons to sign a waiver of rights form, this does not necessarily negate the voluntary nature of Simmons's statements. Cf. State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979) (signing of a waiver of rights form is not conclusive as the State must still prove a knowing and voluntary waiver). After Chief Wilson read Simmons his rights, Simmons stated that "he was familiar with how the system worked," which indicates he

was aware of his constitutional rights.[5] While Simmons argues he repeatedly requested counsel during this time, both Chief Wilson and Captain Smith testified to the contrary. The circuit court ruled that while Simmons may have told his father and brother that he wanted counsel, no evidence or testimony existed to substantiate this assertion, and Simmons failed to establish that his request for counsel was relayed to the police. Based on the evidence, the circuit court properly exercised its discretion in finding the officers' testimony more credible than that of Simmons in making its voluntariness determination.

Simmons's contention that he was induced by the promise of food is unpersuasive as not even Simmons disputes that he ate *before* discussing the details of the McDonald's robbery. At trial, Chief Wilson testified that Simmons complained of hunger while giving his palm print, so he promptly requested food for Simmons. Further, the four-hour time frame between the initial meal and his subsequent incriminatory statements was not so great as to reasonably lead to the conclusion that hunger played a role in making the statements. Chief Wilson and Sergeant Barnes stated that the police complied with Simmons's subsequent requests for food and drink. Additionally, while Simmons was eating, he requested to speak with his family before discussing the robbery with the police. Chief Wilson agreed and permitted Simmons to speak with his family members on the phone, who then came to police headquarters and spoke privately with Simmons for approximately thirty minutes. It was not until *after* Simmons spoke with his family that he viewed the McDonald's robbery videotape and identified himself as the perpetrator.

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[5] Simmons argues that Chief Wilson's statement should have been excluded because it was not introduced at the Jackson v. Denno hearing, and the statement inferred that he had a prior criminal history. Chief Wilson's statement was not prejudicial to Simmons as it was not the focus of his testimony, and the State never attempted to introduce any prior criminal convictions to emphasize why Simmons would have knowledge of the "system." See State v. Robinson, 238 S.C. 140, 151, 119 S.E.2d 671, 675-76 (1961) (finding reference to defendant's past conduct was not prejudicial because even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime) (overruled on other grounds).

Simmons also argues that he was induced into making incriminatory statements by the solicitor's promise of leniency and by coercive police tactics. A statement may not be "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence." Miller, 375 S.C. at 386, 652 S.E.2d at 452 (internal citation omitted). A statement "induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." Id. (internal citation omitted).

The circumstances surrounding Simmons's statement fail to establish that his statements were induced by any promises of leniency or by coercive police activity. Before Simmons viewed the videotape, and while his family was still present, deputy solicitor John Meadors entered Chief Wilson's office and advised Simmons and his family that if Simmons cooperated, "it would be considered at sentencing." This was not improper. See id., 375 S.C. at 387, 652 S.E.2d at 453 (finding that police officers' and assistant attorney general's statements to defendant that it was in "his best interests to cooperate" were not improper where no one made any direct or implied promises of leniency). Chief Wilson denied promising Simmons anything at any point during their conversations. Chief Wilson and Captain Smith stated no one threatened or coerced Simmons into speaking with the police. Further, when Simmons later identified himself as the robber, he was sitting in Captain Smith's office where he was not restrained or handcuffed in any manner. Moreover, the police provided Simmons with an opportunity to not only call but also privately consult with his family prior to discussing the robbery. Cf. State v. Franklin, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989) (acknowledging that a statement induced by the police by preying upon a defendant's concern for or desire to contact his family must be excluded from evidence as involuntary). While Simmons argues the police's response to his initial refusal to give his palm print intimidated him into later making incriminatory statements, the intervening events, including the reading of his Miranda rights and consultation with his family, and the lapse of time prevented any prior confrontation from reasonably influencing his decision to speak with police.[6]

[6] Simmons additionally contends that the circuit court erred in admitting his conversation with Sergeant Barnes while being transported to the detention center, specifically Simmons's statement that the "chase" was "fun while it lasted." At the in camera hearing, the circuit court redacted several statements from Sergeant Barnes's testimony but found that since Barnes's

Further, in determining whether Simmons voluntarily made the statements, the circuit court properly considered the credibility of the witnesses, as it must. See Miller, 375 S.C. at 387, 652 S.E.2d at 453 (finding that in a Jackson v. Denno hearing, the circuit court has the opportunity to listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh the evidence accordingly). Simmons contradictorily argues on appeal that he was coerced into making incriminatory statements, yet he also testified in camera that he never identified himself as the robber in the McDonald's videotape; he never watched the videotape; he was never read his Miranda rights; he never waived his rights; and his requests for counsel were denied. All of Simmons's assertions directly conflict with the police's testimony. As such, the circuit court did not abuse its discretion in giving greater weight to the officers' testimony in its voluntariness determination based on Simmons's inconsistent testimony of what transpired while in custody. See id. (upholding the circuit court's determination of voluntariness despite defense attorney's statement that defendant was coerced into making a statement by a promise of a lenient sentence when three law enforcement officials and an assistant attorney general denied any promise of leniency). Consequently, it was proper to allow the jury to ultimately decide the voluntariness of Simmons's statements as the State proved by a preponderance of the evidence that his statements were not induced by any

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statements were produced in discovery, the State would be allowed to pursue this line of questioning unless Simmons could establish unfair prejudice. Based upon the facts and circumstances of the case, we find Simmons's statement to Barnes was voluntarily given and thus admissible at trial. See State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 871 (1972) ("[T]he question of whether Miranda warnings, having been once given, should be repeated at later stages of the interrogation must be determined upon the basis of the facts and circumstances surrounding each case."). Simmons had first waived his Miranda rights approximately four hours beforehand and had not told police since that time that he wanted to remain silent. We believe the relatively short lapse of time between the initial Miranda warnings and his subsequent incriminatory statement was not too attenuated to require Sergeant Barnes to reread Simmons's rights to him. See State v. Bailey, 714 S.W.2d 590 (Mo. App. 1986) (finding that questioning after a break was not a second interrogation so as to require a fresh set of Miranda warnings because mere lapse of time does not require exclusion of subsequent incriminatory statements).

promises of leniency. See State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (finding that once the circuit court determines that the statement is admissible, it is up to the jury to ultimately determine whether the statement was voluntarily made).

III. Eyewitness Testimony

Simmons claims that the circuit court erred in permitting three employees who witnessed the robbery to testify about Simmons's identity because their identifications were tainted and unreliable. We disagree.

The admission of evidence is within the sound discretion of the circuit court. State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). Accordingly, a circuit court's decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error. State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007).

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." Manson v. Brathwaite, 432 U.S. 98, 116 (1977). An identification may be reliable under the totality of circumstances even when a suggestive procedure has been used. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784 (Ct. App. 2003) (internal citation omitted). To determine whether an identification is reliable, it is necessary to consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. Id. at 504, 589 S.E. 2d at 785.

a. L'Marshalett Moore and Sophia Thomas

Simmons argues the circuit court erred in admitting L'Marshalett Moore's and Sophia Thomas's in-court identifications because the out-of-court photographic line-ups were unduly suggestive and unreliable. We disagree.

At trial, Ms. Moore testified that when she encountered Simmons, she was able to get a good look at his face and described him as being tall and brown-skinned with a slim face and small ears. She also stated that she was very close to Simmons during the robbery because he held a gun to her face and that she had an opportunity to look at his face for approximately three or four minutes in the store where the lighting was "bright." Ms. Moore testified that at one point she had a "perfect view" of Simmons's face. When questioned, Ms. Moore stated that she again observed Simmons's face after he forced her and other employees into the restaurant's cooler and that the lights were on in the cooler during this time.

Additionally, Ms. Thomas also testified that when she encountered Simmons on the morning of the robbery, he pointed the gun directly at her face, took her purse, and forced her into the restaurant's cooler. In identifying Simmons, she stated that she was in a well-lit area within a few feet of him at the time that she got a "good look" at his face. She further stated nothing obstructed her view of Simmons's face, she could clearly see a "front view" of his face, and she was able to look at him for several seconds. Ms. Thomas described Simmons to police as a skinny, black male who was approximately her height.

After the robbery, the police presented several McDonald's employees, including Ms. Moore and Ms. Thomas, with two sets of photo line-ups. Simmons's picture was not present in either of these line-ups, and neither Ms. Moore nor Ms. Thomas identified anyone in either instance.[7] It was not until the third photo line-up, which contained Simmons's picture, that Ms.

[7] Simmons argues that the circuit court erroneously admitted testimony from police officers who stated that certain eyewitnesses were shown lineups but were unable to identify Simmons as the robber. Simmons contends this testimony constituted inadmissible hearsay as it amounted to improper bolstering under Rule 801, SCRE, and it violated Crawford v. Washington, 541 U.S. 36 (2004). Even if the police testimony was hearsay, the testimony was harmless error that could not have reasonably affected the outcome of the trial as none of the witnesses identified Simmons as the perpetrator. Consequently, Simmons's conviction should not be set aside on this ground because he was not prejudiced by the admission of this testimony. State v. Knight, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) ("[A] conviction will not be reversed for nonprejudicial error in the admission of evidence.").

Moore and Ms. Thomas made a positive identification. Both witnesses testified that they did not discuss the line-up with anyone and that no one told them whom to pick. Ms. Moore stated she identified Simmons because of his ears, whereas Ms. Thomas testified she identified him because of his face.

Based on the totality of the circumstances, we find the in-court identifications were admissible. Despite Simmons's contention that his ears were smaller than those of the other individuals in the line-up, his photograph does not stand out in such a way as to render the line-up unduly suggestive. See State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696-99 (2007) (finding photo line-up was admissible, despite defendant's assertion that it was unduly suggestive due to variations in the background colors on certain photos in the line-up); State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (Ct. App. 1996) (upholding in-court eyewitness identification of defendant based on totality of circumstances, despite defendant's objection to the dark background in photo line-up and defendant's claim that he was the only individual in line-up with a medium length afro-style haircut); State v. Roberts, 522 S.E.2d 130, 133 (N.C. App. 1999) (finding photo line-up was not unduly suggestive, despite defendant being the only individual in the line-up with freckles and a light complexion as "defendant's own unique physical appearance was what rendered him conspicuous in the lineup, not any suggestive police procedures"). Both eyewitness identifications were properly based on their own memories of Simmons's face, which were reconfirmed upon viewing Simmons's photo in the line-up. See State v. Davis, 309 S.C. 326, 339, 422 S.E.2d 133, 142 (1992) (finding that photo line-up was not tainted even though victim had opportunity to look at sketch of suspect prior to making identification because the victim had her own visual sketch of suspect based on her memory of his face and clothing) (overruled on other grounds).

Were we to conclude for the sake of argument that the photographic line-up was unduly suggestive because of Simmons's ears, the State still presented sufficient evidence to establish that both Ms. Moore and Ms. Thomas made reliable identifications. See State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999) ("Reliability is the linchpin in determining the admissibility of identification testimony."). First, both witnesses testified that they had an opportunity to directly view Simmons's face during the robbery in a well-lit area. Second, because of their close

proximity to Simmons in addition to the fact that he was holding a gun directly in their face, the witnesses undoubtedly possessed a heightened degree of attention. Third, both witnesses' descriptions of Simmons were accurate. While Ms. Moore may have focused on Simmons's ears in recollecting his identity and Ms. Thomas was unsure whether Simmons had facial hair on his chin on the day of the robbery, this does not discredit their identifications as they were accurate "on the whole." See State v. Mansfield, 343 S.C. 66, 79-80, 538 S.E.2d 257, 264 (Ct. App. 2000) (finding eye witness identification "on the whole was accurate" even though the witness described the perpetrator as having plaits in his hair and wearing tennis shoes while the defendant actually had an afro and wore boots).

Fourth, both witnesses were certain when they identified Simmons. At trial, Ms. Moore stated that she was "positive" that the person she identified in the line-up as the robber was Simmons, and Ms. Thomas testified that she had "no doubt" in her mind that Simmons was the robber after viewing the photographic line-up. See Washington, 323 S.C. at 112, 473 S.E.2d at 482 (upholding in-court eyewitness identification when eyewitness testified that defendant "best resembled" the robber); State v. Patrick, 318 S.C. 352, 357, 457 S.E.2d 632, 635-36 (Ct. App. 1995) (finding no abuse of discretion in admission of identification when the victim was with the perpetrator under “well-lighted conditions,” the victim testified she looked at him carefully, and she observed another trial involving the defendant and immediately knew the defendant “was the one”). Finally, the lapse of one month between the crime and the photographic line-up was not so great that either witness's identification would be unreliable, particularly given the foregoing factors that indicate the reliability of the identifications. See State v. McCord, 349 S.C. 477, 482-83, 562 S.E.2d 689, 692 (Ct. App. 2002) (upholding admission of victim's in-court identification several years after sexual assault and citing Commonwealth v. Wilson, 649 A.2d 435, 445 (1994), wherein the court found no error in admission of in-court identification occurring six and one-half years after the alleged crime). Based on the totality of circumstances, the circuit court did not err in allowing the in-court identifications.

b. Dawn Richmond

Simmons next asserts that the circuit court erred in permitting Dawn Richmond to testify regarding the photographic line-up and in refusing to

declare a mistrial when she once referenced the robber as the "defendant" when recalling comments the robber made to her during the robbery. We disagree.

Ms. Richmond testified at the in camera hearing she could not give police a definite answer as to whether the robber was in the line-up, but the second photograph in the line-up, which was Simmons's picture, "looked like" the robber. Ms. Richmond also testified that the store was well-lit and that even though she only saw his face for a few seconds, she got a good look at it. When she later attended the bond hearing for the robbery, Ms. Richmond stated that she saw Simmons, and while no one told her he was the robber, there was no doubt in her mind at that point that he robbed the McDonald's. The circuit court did not allow her to make an in-court identification, finding her identification at the bond hearing was unduly suggestive and would not serve as a proper basis for an in-court identification.

At trial, she testified that after looking at the six photographs in the line-up, she selected the second photograph because it looked like the robber, although she was not 100% certain. Ms. Richmond also stated that if she had seen a side view of the robber, she could have positively identified him. When asked why she did not look at him directly, she replied that "the defendant" told her not to look at him. Simmons did not make a timely objection in response to her statement. It was not until after Ms. Richmond finished testifying that Simmons objected to her referencing him as "the defendant" and requested a mistrial on that ground. The circuit court denied Simmons's motion for a mistrial, finding Ms. Richmond's statement was "an inadvertent reference" that did not warrant declaring a mistrial. The court, however, agreed to give a curative instruction to the jury.

Ms. Richmond's observations during the course of the robbery were properly admitted at trial. Despite the fact that Ms. Richmond lacked absolute certainty in identifying Simmons as the robber, our courts have upheld identifications by an eyewitness who was not absolutely certain of the perpetrator's identity. In State v. Washington, 323 S.C. 106, 111, 473 S.E.2d 479, 481 (Ct. App. 1996), this Court held that an eyewitness's signed statement that the defendant "best resembled" the person who attempted to rob the eyewitness was admissible as an out-of-court identification. Further, the eyewitness's in-court identification was admissible, despite his testimony on direct that there was "no question" defendant was the robber. Id. at 112,

473 S.E.2d at 482. This Court found the eyewitness's in-court identification was reliable because "the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification . . . ." Id. In a similar vein, Ms. Richmond testified that when she was presented with the photographic line-up, she pointed to Simmons's photograph and said he looked like the robber but because of the angle of the picture, she was not 100% certain. Even if her identification was not reliable enough to be the basis for an in-court identification, the jury was capable of weighing her statements according to the degree of certainty or uncertainty she possessed when identifying the robber in the photographic line-up.

In any event, Ms. Richmond's testimony was harmless because it was cumulative to other overwhelming evidence that established Simmons's guilt. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence is harmless when the evidence is merely cumulative to other evidence). The other eyewitness testimony in conjunction with the stolen rims, videotape surveillance, DNA and palm print evidence, and Simmons's own statements while in custody conclusively prove his guilt, regardless of Ms. Richmond's testimony. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (holding that an insubstantial error not affecting the result of the trial is harmless when a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached).

Simmons also claims that the circuit court erred in denying his motion for a mistrial in response to Ms. Richmond referencing the robber as "the defendant" during her testimony. This issue is not preserved for our review. State v. Vanderbilt, 287 S.C. 597, 598, 340 S.E.2d 543, 544 (1986) (finding an issue which is not properly preserved cannot be raised for the first time on appeal). Simmons failed to make a contemporaneous objection, which is required to preserve an issue for appellate review. See State v. Torrence, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (stating a contemporaneous objection is required to properly preserve an error for appellate review); State v. Rice, 375 S.C. 302, 419, 652 S.E.2d 409, 323 (Ct. App. 2007) (holding that for an objection to be timely, it must be made at the time that evidence is offered).[8]

[8] Regardless of the timeliness of defense counsel's objection, the circuit court gave a curative instruction, which cured any potential error. See State v.

IV. Violation of Sequestration Order

Simmons claims that the circuit court erred by allowing Captain Smith to testify at trial because he violated the court's sequestration order. We disagree.

The circuit court may order the sequestration of witnesses upon its own motion or by motion of any party. See Rule 615, SCRE. A party is not entitled to have witnesses sequestered as a matter of right. State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). Rather, the decision to sequester witnesses is left to the sound discretion of the circuit court. State v. LaBarge, 275 S.C. 168, 171, 268 S.E.2d 278, 280 (1980); see also State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998) (allowing the State to recall a reply witness who was present in the courtroom during a portion of the trial). Whether to exempt a witness from a sequestration order is within the circuit court's discretion. Tisdale, 338 S.C. at 616, 527 S.E.2d at 394.

During the Jackson v. Denno hearing, Simmons's counsel moved to sequester all testifying witnesses, and the circuit court granted this request. Shortly thereafter, Simmons's counsel objected to Captain Smith's presence in the courtroom during Chief Wilson's in camera testimony. The State responded that Captain Smith was the chief investigating officer, and his presence was essential to the presentation of the State's case. The circuit court ruled that while Captain Smith could be present during the trial, he would need to step out during Chief Wilson's testimony, at which time Captain Smith left the courtroom.

Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) ("Generally, a curative instruction is deemed to have cured any alleged error."). Further, Simmons did not object to any insufficiencies in the circuit court's curative instruction. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (finding an issue is not preserved for appellate review if the objecting party accepts the court's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

Later, Captain Smith, who was to testify after Simmons at the pre-trial hearing, entered the courtroom during Simmons's testimony. Simmons's counsel again objected to Captain Smith's presence, and, in response, the State noted that Captain Smith was not present for Chief Wilson's testimony. The circuit court responded that because Smith had been "back and forth," it did not know what Smith heard while in the courtroom; however, Smith would still be allowed to testify. When questioned by Simmons's counsel, Smith stated he entered the courtroom during Simmons's testimony, but only because he was "sent for" to testify.

The circuit court did not abuse its discretion in permitting Smith to testify, despite Captain Smith's presence in the courtroom during other witnesses' in camera testimony. First, no evidence was presented to establish that Smith knowingly and intentionally entered the courtroom in an effort to violate the order. While Smith was present for the beginning of Chief Wilson's in camera testimony, Smith promptly left the courtroom after the court instructed him to leave. Furthermore, Captain Smith was only present for the small portion of Chief Wilson's in camera testimony to which he was not a witness during Simmons's initial interrogation, so any of Chief Wilson's statements that Captain Smith may have heard could not have influenced his subsequent testimony. While Captain Smith admitted to being present during Simmons's testimony, Captain Smith testified that he entered the courtroom only because he was "sent for" as he was the next witness to testify. Moreover, Captain Smith affirmed that his in camera testimony reflected and summarized his notes from Simmons's interrogation, and Simmons does not attempt to highlight any inconsistencies between Captain Smith's notes and his testimony as a result of Captain Smith's presence during Chief Wilson's and Simmons's in camera testimony. Therefore, the circuit court did not abuse its discretion in permitting Captain Smith to testify at trial.

V. Admissibility of Second Palm Print

Simmons also asserts that the circuit court erred in requiring Simmons to give a second palm print at trial when the court previously ruled that the police had improperly obtained the first palm print during Simmons's custody in Richland County. We disagree.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. A court order that allows the government to procure evidence from a person's body

constitutes a search and seizure under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767-70 (1966); State v. Register, 308 S.C. 534, 537, 419 S.E.2d 771, 772 (1992). The Fourth Amendment protects against intrusions into the human body for the taking of evidence absent a warrant unless there are exigent circumstances, such as the imminent destruction of evidence. Schmerber, 384 U.S. at 770; see also State v. Dupree, 319 S.C. 454, 460, 462 S.E.2d 279, 282-83 (1995) (applying Schmerber analysis to search of suspect's mouth).

Section 17-13-140 of the South Carolina Code (2003) provides for the involuntary submission of nontestimonial identification evidence. In re Snyder, 308 S.C. 192, 196, 417 S.E.2d 572, 574 (1992); Register, 308 S.C. at 537, 419 S.E.2d at 772. When the State seeks nontestimonial identification evidence from arrested or unarrested suspects, constitutional requirements mandate that the State prove it has probable cause before the circuit court will permit the acquisition of such evidence. Baccus, 67 S.C. at 54, 625 S.E.2d at 223. Following these constitutional requirements, section 17-13-140 requires a sworn affidavit for a search warrant to be issued. Id. at 54, 625 S.E.2d at 223. Under section 17-13-140, a court order may stand in place of a search warrant for purposes of procuring nontestimonial evidence. Id. at 55 n.3, 625 S.E.2d at 223 n.3 (reiterating that as previously held in Snyder and Register, a court order may be issued under section 17-13-140 instead of a search warrant). Like a search warrant, a court order requiring a person to produce nontestimonial evidence should only be issued upon a finding of probable cause, which is supported by oath or affirmation. Id. at 54-55, 625 S.E.2d at 223

To establish probable cause, the State must establish the following three elements: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. Id. at 54, 625 S.E.2d at 223; see also Register, 308 S.C. at 538, 419 S.E.2d at 773. Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. Register, 308 S.C. at 538, 419 S.E.2d at 773. The circuit court is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures. Id.

Simmons objected at the pre-trial hearing to the admission of the palm print that was taken when he was initially detained in Richland County, arguing it was taken by force, without a warrant, and without exigent circumstances. In response, the State argued that a search warrant was unnecessary because Simmons consented to give his palm print. Despite the State's argument, the circuit court found that the State failed to establish probable cause existed to take Simmons's palm print, particularly when he had neither been served with a search warrant nor placed under arrest in Richland County. As a result, the circuit court excluded the first palm print.

The State immediately moved for a Schmerber[9] hearing. In response, Simmons argued the State's attempt to take Simmons's palm print was untimely because the State was essentially investigating its case during the course of trial as the jury was already impaneled, but the circuit court allowed arguments on the issue. After hearing arguments from both sides, the circuit court found the State presented probable cause to take Simmons's palm print.

Regardless of the admissibility of the first palm print, the court's order requiring Simmons to submit to the second palm print was proper as the State established probable cause for the acquisition of the palm print evidence by satisfying the three-prong test for acquiring nontestimonial identification evidence. See Register, 308 S.C. at 538, 419 S.E.2d at 773. First, based on other inculpatory evidence and testimony, probable cause existed to show Simmons committed the McDonald's robbery. Second, Simmons's palm print was needed to determine whether his palm print matched the palm print lifted from the stolen Pontiac Sunfire; thus, it was necessary, material, and relevant evidence. Last, the method used to procure his palm print was safe and reliable, and it was the least intrusive means of obtaining this evidence. Also, as is required for a court order to procure nontestimonial evidence, the witnesses were under oath while giving testimony to establish probable cause pursuant to the United States and South Carolina constitutions. See U.S. Const. amend. IV; S.C. Const. art. I, § 10; see also Baccus, 367 S.C. at 54,

[9] Pursuant to Schmerber v. California, 384 U.S. 757 (1966), the circuit court may issue an order that allows the State to procure evidence from a person's body if the State can establish probable cause for the acquisition of such evidence.

625 S.E.2d at 223. As such, the circuit court's order requiring Simmons to submit to a second palm print was proper.[10]

Simmons additionally argues that regardless of whether probable cause existed, the circuit court erred in allowing the State to continue to investigate its case in the middle of trial. The crux of Simmons's argument appears to be that introduction of this evidence created unfair surprise that ultimately prejudiced him. However, as the circuit court noted, Simmons failed to establish that he was unfairly surprised when the initial palm print was taken over two years prior to trial and had been produced early in the discovery process. Because Simmons had notice prior to trial that the State possessed this inculpatory evidence, it was reasonable to believe that this evidence might be used in the State's case against him if it were found admissible.

Furthermore, while the jury had been impaneled, it had not been sworn in when the court made its ruling, so Simmons's claim that this ruling permitted the State to investigate its case in the *middle* of trial is inaccurate. Even if the trial had begun, there is authority from other states which condones the taking of a defendant's prints during trial. See Carter v. State, 485 So. 2d 1292, 1295 (Fla. Dist. Ct. App. 1986) (finding that the circuit court properly may order the State to take a defendant's fingerprints during trial without violating the defendant's constitutional rights when the court requires that notice be given to the defendant and that the fingerprints be taken at a reasonable time and place); Sloane v. State, 507 S.W.2d 747, 749 n.1 (Tex. Crim. App. 1974) (finding defendant's fingerprint that was taken

[10] While not controlling authority, we find the case of State v. Ostroski, 518 A.2d 915 (Conn. 1986), to be instructive. In that case, the State had illegally obtained a palm print and a blood sample from the defendant, both of which were inadmissible at trial because of fourth amendment violations. Id. at 542. Citing to Bynum v. U.S., 274 F.2d 767 (D.C. Cir. 1960), the court found that the inadmissibility of the initial palm print and blood sample did not preclude the State from acquiring, through an untainted source, a second palm print and blood sample. Id. The court allowed the second palm print and blood sample to be introduced at trial because the State established probable cause for acquiring the nontestimonial evidence pursuant to Schmerber v. California, 384 U.S. 757 (1966). The court also supported its reliability determination by noting that the evidence could not have been practically obtained from another source, and it was material in determining whether the defendant committed the crime. Id. at 552-53.

during trial was properly admitted into evidence); Martin v. State, 463 S.W.2d 449, 451 (Tex. Crim. App. 1971) (holding that taking defendant's fingerprints, over objection, just prior to jury selection was not error). As a result, the circuit court did not commit error in admitting the second palm print into evidence.

VI. Jury Charge

Simmons avers that the circuit court erred in its reasonable doubt instruction when it told the jury they could not acquit Simmons unless there was a "real possibility" that he was not guilty. He contends the instruction lessened the State's burden of proving his guilt beyond a reasonable doubt. We disagree.

In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (internal quotations and citations omitted). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Id. at 495-96, 514 S.E.2d at 574 (internal quotations and citations omitted). To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006).

The circuit court gave the following jury instruction, in relevant part:

> If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crimes charged, you must find the defendant guilty. If on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find the defendant not guilty.

This charge was not in error. The Supreme Court approved an almost identical reasonable doubt instruction in State v. McHoney, 344 S.C. 85, 98,

544 S.E.2d 30, 36-37 (2001), and in State v. Darby, 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996).

The Supreme Court in McHoney approved the following jury instruction:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . . If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find him guilty. *If on the other hand you think there is a real possibility that he is not guilty, you must give him the benefit of that doubt and find him not guilty.*

344 S.C. at 98, 544 S.E.2d at 36 (emphasis in original). Citing to Darby, the Supreme Court reiterated that "[c]ourts specifically addressing whether the 'real possibility' language lessens the government's burden of proof have held it does not in the context of the preceding language requiring that the juror be 'firmly convinced' of the defendant's guilt." Id. at 98, 544 S.E.2d at 36-37 (internal citation omitted).

As in McHoney and Darby, nothing in the circuit court's reasonable doubt instruction suggests that Simmons bears the burden of proof. See id. at 98, 544 S.E.2d at 36; Darby, 324 S.C. at 116, 477 S.E.2d at 711. Moreover, the Supreme Court approved of the "real possibility" language in State v. Needs, 333 S.C. 134, 155 n.12, 508 S.E.2d 857, 868 n.12 (1998), and this Court also approved this language in State v. Lowery, 332 S.C. 261, 265, 503 S.E.2d 794, 796-97 (Ct. App. 1998). As such, Simmons's claim of error on this ground is without merit.

CONCLUSION

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.