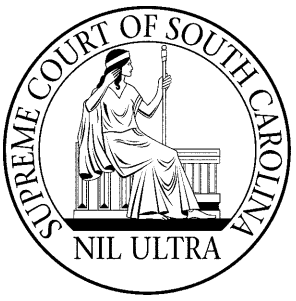

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
June 26, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Loida Colonna, Appellant,

v.

Marlboro Park Hospital, Employer, and Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2011-196407

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5117
Heard October 18, 2012 – Filed April 17, 2013
Withdrawn, Substituted and Refiled June 26, 2013

AFFIRMED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Weston Adams, III, and Helen F. Hiser, of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents.

WILLIAMS, J.: In this workers' compensation appeal, Loida Colonna (Colonna) claims the circuit court erred in affirming the Appellate Panel of the Workers' Compensation Commission (the Commission) when it: (1) held Colonna's recovery was limited to scheduled disability under section 42-9-30 of the South Carolina

Code (Supp. 2012) as opposed to total disability under section 42-9-10 of the South Carolina Code (Supp. 2012); (2) held Colonna did not suffer from any additional permanent partial disability; (3) held Colonna had reached maximum medical improvement (MMI); and (4) failed to explicitly hold Marlboro Park Hospital (Marlboro Park) responsible for lifetime maintenance of the spinal cord stimulator implanted in Colonna's back. We affirm.

FACTS/PROCEDURAL HISTORY

Colonna sustained an admittedly compensable injury to her right ankle and foot on February 21, 2004, when she slipped on a wet floor and twisted her right ankle and foot while working as a geriatric nurse for Marlboro Park. Marlboro Park accepted her claim and began providing medical treatment and compensation. However, Colonna continued to experience pain and ceased working as a result of her injury. Colonna claimed she required surgery; in response, Marlboro Park sought a determination of whether Colonna had reached MMI and was entitled to additional medical treatment.

The single commissioner held a hearing and subsequently issued an order on August 22, 2005 (2005 Order), finding Colonna sustained "a right lower extremity (ankle) injury," was entitled to additional medical treatment and temporary total disability benefits, and had not reached MMI. In addition, the single commissioner found Colonna "had some aggravation of pre-existing psychological problems because of this injury, but she . . . failed to prove her need for psychological treatment [wa]s the sole result of this accidental injury."

Because of her continuing medical issues, Colonna underwent surgery shortly after the initial hearing in May 2005. In March 2006, her attending surgeon, Dr. Mark Easley, of Duke University Medical Center, opined her condition had stabilized, assigned an impairment rating of 40% to her right lower extremity, and released her from his care. Based on Dr. Easley's report, Marlboro Park sought an order terminating temporary compensation, awarding permanent disability, and requesting a credit for overpayment of temporary compensation. In response, Colonna contended she had not reached MMI and requested additional medical treatment for her injuries.

After a hearing, the single commissioner issued an order on May 8, 2007 (2007 Order), and found Colonna reached MMI in March 2006, sustained a 50% permanent partial disability to her right lower extremity, and was entitled to all

causally-related medical treatment for her injuries. The single commissioner terminated her temporary compensation and found Marlboro Park was entitled to a credit for overpayment of temporary compensation, which would be deducted from her permanent partial disability award of 97.5 weeks. In addition, the single commissioner held the compensability of any psychological injury was not before him based on the parties' prior stipulation in the 2005 Order that Colonna had not sustained a compensable psychological injury. The Commission upheld the single commissioner's order in full, and Colonna did not appeal this order.

Thereafter, Colonna complained of continued problems with her right ankle and foot and filed a change of condition claim, seeking additional medical treatment, including a second surgery. Marlboro Park authorized the additional treatment and reinstated her temporary total disability compensation. Colonna underwent a second surgery with Dr. Easley on her right ankle. From an orthopedic standpoint, Dr. Easley concluded Colonna had reached MMI for her right ankle and foot in July 2008 and assessed a 35% impairment rating.

Colonna then sought medical treatment from Dr. Sonia Pasi, a pain management and neurology specialist, at Duke University Medical Center. Dr. Pasi diagnosed her with Reflex Sympathetic Dystrophy (RSD),[1] which caused chronic pain to Colonna's right foot and ankle, resulting from her compensable right foot and ankle injury. In August 2008, Dr. Pasi implanted a trial spinal stimulator to help alleviate her RSD. Following a successful trial period, Dr. Pasi and Dr. Peter Grossi implanted a permanent spinal cord stimulator in Colonna's back in December 2008. Dr. Pasi opined she was at MMI for her right leg and foot in March 2009.

Colonna subsequently underwent a functional capacity evaluation (FCE) in April 2009, which found she was able to work at a light physical demand level for an eight-hour day and was "most likely limited to simple, or unskilled, or at most, detailed, or semi-skilled clerical administrative and similar work activities . . . ." In conducting the FCE, the evaluator noted, "The combination of symptom

[1] Our supreme court defined RSD as follows in *Mizell v. Glover*, 351 S.C. 392, 397 n.1, 570 S.E.2d 176, 178 n.1 (2002): "Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain. It is often triggered by an accident, surgery, or other injury."

exaggeration and submaximal effort is thought to represent a voluntary effort to demonstrate a greater level of disability than is actually present."

Marlboro Park again filed a Form 21 to stop payment of temporary total disability benefits and sought a determination for permanent impairment as well as a credit for overpayment of temporary compensation. In response, Colonna alleged additional injuries to her right knee, left knee, back, neck, and right shoulder and sought a finding of compensability and additional medical treatment. In support of her claim, Colonna testified she could not exercise, suffered from constant stiffness and chronic pain in her right ankle, was unable to drive, and was receiving Social Security disability benefits because of her injury.

The single commissioner held a hearing and issued an order on March 1, 2010. In his order, he held Colonna failed to prove she sustained compensable injuries to her right knee, left knee, back, neck, or right shoulder. He further found Colonna had reached MMI for her right foot and ankle injury, and Marlboro Park was entitled to stop temporary disability benefits. He also concluded she had not suffered any additional permanent partial disability but was entitled to ongoing medical treatment as recommended by her authorized treating physician, Dr. Pasi.

The Commission upheld the single commissioner's decision, adopting the single commissioner's findings of fact and conclusions of law in full. Colonna appealed to this court, and we transferred her case to the circuit court pursuant to Rule 204, SCACR, because this case accrued prior to July 1, 2007. *See Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007) (holding that all workers' compensation cases in which the injury occurred on or after July 1, 2007, should be made directly to the Court of Appeals).

After two hearings, the circuit court upheld the Commission's decision in full. In doing so, the circuit court held the following: (1) the surgery to implant the spinal cord stimulator to treat Colonna's RSD did not constitute a separate injury to her back that would bring her within the "two-body part" rule, but her spine was, instead, "merely the site for treatment modality"; (2) the 2007 Order holding that she had not sustained a compensable psychological condition was law of the case and, because Colonna had not raised this issue to the Commission, she was barred from arguing it on appeal; (3) Colonna was limited to recovery under section 42-9-30 because she only suffered a compensable injury to a single scheduled member; (4) Colonna had not suffered any additional permanent partial disability to her right ankle/foot; (5) Colonna reached MMI for her right ankle/foot injury; and (6)

Colonna was entitled to additional medical treatment as recommended by Dr. Pasi, including lifetime maintenance and treatment of her spinal cord stimulator. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs appeals from decisions of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp. 2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. § 1-23-380(5). If the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[,]" a reviewing court may reverse or modify. *Id.* Substantial evidence is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004).

LAW/ANALYSIS

1. Permanent and Total Disability Pursuant to Section 42-9-10.

Colonna contends her work-related injury affected more than one body part; thus, she is entitled to a permanent, total disability award pursuant to section 42-9-10. Specifically, Colonna claims she satisfied the "two-body part" rule in section 42-9-10 because: (1) the implantation of the spinal cord stimulator affected her back; and (2) her right foot/ankle injury aggravated her preexisting psychological problems. We address each argument in turn.

South Carolina provides three methods to receive disability compensation: (1) total disability under section 42-9-10; (2) partial disability under South Carolina Code section 42-9-20 (Supp. 2012); and (3) scheduled disability under section 42-9-30. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). The first two methods are based on the economic model in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. *Id.*

As stated in *Singleton v. Young Lumber Company*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), "Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to section 42-9-30] . . . . To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." (emphasis added).

As reflected by the foregoing language, *Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to recovery under section 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under section 42-9-30 if he or she can show additional injuries beyond a lone scheduled injury. *See Wigfall*, 354 S.C. at 106, 580 S.E.2d at 103. The principle espoused in *Singleton* recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." *Id.* at 106-07, 580 S.E.2d at 103 (internal citation omitted). Accordingly, the question of whether Colonna is totally and permanently disabled, and thus entitled to recover under section 42-9-10, turns on whether her initial injury had a "disabling effect" on other parts of her body.

a. Back Injury

Colonna first argues her claim is within the ambit of section 42-9-10 as a matter of law because the implantation of the spinal cord stimulator affected her back. We disagree.

Colonna relies on the portion of *Singleton*, wherein the supreme court held, "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845 (emphasis added). Because her right foot/ankle injury necessitated the implantation of a spinal cord stimulator, Colonna claims her back was affected, thus triggering the "two-body part" rule.[2]

[2] In support of her argument that the implantation of a spinal cord stimulator is conclusive proof of an indirect injury to the back, Colonna cites to *Haley v. ABB, Inc.*, 621 S.E.2d 180 (N.C. Ct. App. 2003). In *Haley*, the North Carolina Court of Appeals stated that "[Haley's] back condition resulted from the implantation of the

No South Carolina case directly addresses whether the implantation of a spinal cord stimulator constitutes an indirect injury to the back. However, we find that a more thorough reading of *Singleton* and subsequent cases demonstrates that a claimant must prove not only that another body part was affected by the insertion of the treatment device, but that another body part was impaired or injured for section 42-9-10 to apply. *See id.* at 471, 114 S.E.2d at 845 ("Where the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation . . . ." (emphasis added)); *see also Wigfall*, 354 S.C. at 106, 580 S.E.2d at 103 (finding the *Singleton* court intended for "impairment" to encompass a physical deficiency and concluding a claimant is not limited to scheduled benefits under section 42-9-30 if he or she can show "additional injuries beyond a lone scheduled injury"); *Bixby v. City of Charleston*, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (analyzing whether the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual *disability* as a result" of the compensable injury (emphasis added)).

We find Colonna's argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment. We concur with the circuit court's conclusion:

> The only relationship between [Colonna's] foot and ankle injury and her spine is that the spine was merely the site for a treatment modality that would serve to improve the functioning in her right leg. The spinal cord stimulator was implanted for the sole purpose of deriving a benefit to nerve deficits in her right leg. The spinal cord

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spinal cord stimulator [to treat RSD] and was a natural and probable result of the compensable injury by accident and resulting pain." *Id.* at 185. However, we find *Haley* distinguishable because in that case, the *unsuccessful implantation* caused Haley to experience severe back pain at the site of the insertion. *Id.* at 182. As a result of the unsuccessful implantation, the court held her back condition was the natural and probable result of the work-related injury. Unlike in *Haley*, Colonna has failed to sufficiently demonstrate that her initial injury or the resulting surgery caused Colonna back pain or impairment. Thus, we find *Haley* is distinguishable from the instant case.

> stimulator was not implanted to diagnose, remedy or treat any condition in her spine. . . .
>
> . . . .
>
> . . . Implantation of a spinal cord stimulator, without evidence of causally-related symptoms, pain or ill effects in the spine, does not render the body part "affected" under the Act and therefore, there are no additional body parts, including the back, which were affected by [Colonna's] work injury or subsequent treatment for same.

Furthermore, we find substantial evidence in the record to support the circuit court's decision that Colonna did not suffer additional injury or impairment to her back as a result of the spinal cord implantation. Dr. Pasi's medical notes reflect Colonna complained of pain in her right foot, toes, ankle, knee, and leg. In addition, Dr. Pasi noted Colonna complained of pain in her left leg, back, neck, and shoulder, but only diagnosed Colonna with RSD of "the lower limb" and concluded her implantation surgery was successful. Upon examination, Dr. Pasi concluded Colonna's cervical, thoracic, and lumbar regions of her spine were all stable and her range of motion in those areas was also normal. We recognize Colonna's testimony before the single commissioner conflicted with Dr. Pasi's conclusions. Specifically, she stated, "I can't lift twenty pounds without straining and hurting my right foot and right ankle as well as my back. Since I have a spinal cord stimulator in my back[,] I can't lift twenty pounds." Colonna also testified she could only drive short distances after the implantation of the spinal cord stimulator, and her husband typically drove her everywhere. However, when faced with conflicting testimony, we are constrained by our limited standard of review. *See Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) ("Regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive."). Therefore, we defer to the Commission on this issue.

b. Preexisting Psychological Injury

Next, Colonna contends she is entitled to benefits pursuant to section 42-9-10 because her injury aggravated her preexisting psychological problems. We disagree.

Claims for psychological injury are compensable only if the claimant proves by a preponderance of evidence they are caused by physical injury or by extraordinary and unusual conditions of employment. *Pack v. State Dep't of Transp.*, 381 S.C. 526, 538, 673 S.E.2d 461, 467 (Ct. App. 2009).

In the 2005 Order, the single commissioner held, "[Colonna] has had some aggravation of pre-existing psychological problems because of this injury, but she has failed to prove her need for psychological treatment is the sole result of this accidental injury." In the 2007 Order, Colonna stipulated that "[she] did not sustain [a] compensable psychological injury per prior Order of the Commission." As a result, the single commissioner noted compensability of any psychological injury was not before him in light of the 2005 Order that found Colonna did not sustain a compensable psychological injury. Colonna never appealed this ruling; therefore, it is law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling is law of the case and should not be reconsidered by the appellate court). Accordingly, we find the compensability of any preexisting psychological problems, and thus whether those problems constitute a second injury under section 42-9-10, are not properly before this court.[3]

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[3] We note Colonna attempts to distinguish what she is now arguing on appeal from the prior rulings of the Commission and circuit court. She contends that while the parties stipulated her psychological injury was not compensable, i.e., she was not entitled to receive medical treatment, the single commissioner's statement in the 2005 Order that "she had some aggravation of pre-existing psychological problems because of this injury" conclusively proves that her injury produced a psychological injury or overlay, which would entitle her to recover under section 42-9-10. However, if Colonna's preexisting mental injury is not compensable as a matter of law, we find it cannot be an "affected" or injured member for purposes of triggering benefits under section 42-9-10.

c. Requirement to Apply Section 42-9-10

Last, Colonna contends the circuit court erred in failing to award her benefits under section 42-9-10 because she is entitled to recover under whichever statute provides the greatest benefits. We disagree.

Generally, an injured employee *may* proceed under either the general disability statutes, i.e., sections 42-9-10 and 42-9-20, or under the scheduled member statute, i.e., section 42-9-30, to maximize recovery under the South Carolina Workers' Compensation Act. *See Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994) (proceeding under the general disability sections for an injury to a scheduled member gives the claimant "the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section"). However, the scheduled recovery is exclusive only when a scheduled loss is not accompanied by additional complications affecting another part of the body. *See id.* (citing *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845).

Although Colonna *may* proceed under the general disability statutes to maximize her recovery, we find Colonna's argument that the Commission is "required" to make an award for permanent and total disability under section 42-9-10 misplaced. As the aforementioned case law demonstrates, Colonna's ability to recover under section 42-9-10 is premised on her ability to establish an additional injury or impairment to a second body part. *See id.*, 316 S.C. at 280, 450 S.E.2d at 58 (holding commission properly required employee to proceed under the scheduled member section when employee failed to prove back injury affected other body parts or contributed to an impairment beyond a single scheduled member); *cf. Simmons v. City of Charleston*, 349 S.C. 64, 76, 562 S.E.2d 47, 482 (Ct. App. 2002) (finding a firefighter was not limited to recovery under the scheduled member statute when he presented substantial evidence that he suffered additional complications to another part of his body, thus entitling firefighter to recover under the general disability statute). Because Colonna failed to sustain her burden of proof on this issue, we find the circuit court properly limited Colonna's recovery to section 42-9-30.

2. Permanent Partial Disability

In the alternative, Colonna claims she is entitled to additional permanent, partial disability benefits for her left leg and back following her admitted change of condition for the worse. We disagree.

Initially, we note that Colonna captioned her entitlement to additional permanent partial disability benefits as it relates to "her left leg and back." However, the circuit court's order addresses her entitlement to additional permanent partial disability benefits only in reference to her "right lower extremity for the compensable injury suffered to the right ankle/foot." Neither the single commissioner, the Commission, nor the circuit court addressed Colonna's entitlement to additional permanent partial disability benefits as it related to her left leg and back. Because an issue must be properly raised below before we may address it on appeal, we find this issue is not properly preserved for appellate review. *See Pratt*, 353 S.C. at 352, 577 S.E.2d at 481-82 (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the single commissioner or in a request for commission review of the single commissioner's order to be preserved for appellate review).

Even if we assume Colonna intended to reference her right ankle/foot injury, we find substantial evidence exists to support the circuit court's decision to uphold the Commission on this issue. First, Colonna had already received permanent partial disability for the injury she sustained to her right ankle and foot. The medical evidence shows that Colonna's impairment rating for her right ankle and foot decreased from 40% to 35% between her first surgery in 2005 and her second surgery in 2007, which indicates her disability could have decreased as well. Further, despite Dr. Pasi's diagnosis of RSD and acknowledgement of Colonna's complaints of chronic pain, she did not assign Colonna with an impairment rating for her RSD. Rather, once Colonna underwent the surgery to implant the spinal cord stimulator, Dr. Pasi concluded the implantation was "successful," and as of March 18, 2009, she opined Colonna was at MMI for her right leg and foot pain. In view of the foregoing, we hold Colonna failed to establish the requisite facts to entitle her to additional disability benefits. *See Smith v. Michelin Tire Corp.*, 320 S.C. 296, 298, 465 S.E.2d 96, 97 (Ct. App. 1995) ("The claimant has the burden to prove such facts as will render the injury compensable.").

3. Maximum Medical Improvement

Next, Colonna claims the circuit court erred in upholding the Commission's decision that she had attained MMI. We disagree.

"[MMI] is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C.

24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). "MMI is a factual determination left to the discretion of the [Commission]." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

Colonna conceded before the circuit court that she attained MMI for her right ankle and foot injury but claims on appeal that she has not been medically released for her alleged back injury stemming from the implantation of the spinal cord stimulator. Therefore, without a finding of MMI for her back, she asserts termination of temporary total disability benefits was premature. We disagree.

We find there is substantial evidence in the record to support the circuit court's conclusion that Colonna did not sustain a compensable back injury. Likewise, a finding of MMI for the back is unnecessary before Colonna's temporary total disability benefits could be properly terminated. The only required MMI determination was for Colonna's injury to her right ankle and foot, which we find was proper based on Dr. Easley's and Dr. Pasi's conclusions that Colonna had attained MMI.

Moreover, the only medical evidence documenting Colonna's care after her spinal cord surgery was that of Dr. Pasi. Dr. Pasi saw Colonna three times after her surgery for follow-up visits and concluded the implantation was successful. Dr. Pasi's records do not document any back pain after the surgery; to the contrary, Dr. Pasi notes that Colonna's cervical, thoracic, and lumbar regions of her spine were all stable and her range of motion in those areas was also normal.

Despite Colonna's argument to the contrary, we find the circuit court's mandate to continue medical treatment does not negate our conclusion as the Commission may continue to award additional medical treatment if it tends to lessen Colonna's period of disability despite the fact that she has reached MMI for her right ankle and foot injury. *See Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583, 514 S.E.2d 593, 598 (Ct. App. 1999) (holding "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached [MMI]"); *see also Cranford v. Hutchinson Constr.*, 399 S.C. 65, 78, 731 S.E.2d 303, 310 (Ct. App. 2012) (holding a finding of MMI was proper when treating physician's report coupled with prescription was evidence from which single commissioner could conclude the medication would help alleviate claimant's remaining symptoms, but his medical condition would not further improve); *Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App.

1987) (holding substantial evidence supported a finding of MMI despite the claimant continuing to receive physical therapy). Based on the foregoing, we affirm the circuit court's conclusion that Colonna attained MMI and was no longer entitled to temporary total benefits.

4. Lifetime Maintenance of Spinal Cord Stimulator

Last, Colonna contends the circuit court erred in failing to order Marlboro Park to provide lifetime maintenance of the spinal cord stimulator. We decline to address this issue.

The Commission's order provided that Colonna was "entitled to ongoing medical treatment for her right ankle/foot as recommended by her authorized, treating physician, Dr. Pasi." On appeal to the circuit court, the court specifically addressed the issue of lifetime maintenance to the spinal cord stimulator when it concluded, "Pursuant to section 42-15-60, [Colonna] is entitled to ongoing medical treatment for her right ankle/foot as recommended by her authorized, treating physician, Dr. Pasi, *to include lifetime maintenance of the spinal cord stimulator*." (emphasis added). Marlboro Park concedes this issue in its brief, stating, "There is no dispute over this issue. . . . This is not a contested issue and this Court need not address it." Accordingly, we decline to address this issue. *See Leatherwood v. Leatherwood*, 293 S.C. 148, 150, 359 S.E.2d 89, 90 (Ct. App. 1987) (finding parties' concessions on issues negated necessity of addressing those issues on appeal).

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

FEW, C.J., and CURETON, AJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Burton Beekman, Appellant.

Appellate Case No. 2011-196688

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5145
Heard May 8, 2013 – Filed June 26, 2013

AFFIRMED

Appellate Defender Dayne C. Phillips, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina J. Catoe, both of Columbia, for Respondent.

HUFF, J.: Appellant, Richard Burton Beekman, was convicted of criminal sexual conduct (CSC) with a minor in the first degree and lewd act upon a child. On appeal, Beekman contends the trial court erred in: (1) refusing to sever the two charges because they involved two victims, did not arise out of a single chain of circumstances, and were not provable by the same evidence; (2) admitting alleged prior bad act evidence where there was only a general similarity between the prior

bad act and the crime and the probative value was outweighed by its prejudicial effect; and (3) failing to grant a new trial where the cumulative effect of trial errors was so prejudicial as to deprive him of a fair trial. We affirm.

FACTUAL/PROCEDURAL HISTORY

Beekman was indicted for sexual crimes against his two stepchildren, Stepdaughter and Stepson. Specifically, Beekman was charged with commission of a lewd act on Stepdaughter and CSC with a minor in the first degree in regard to Stepson. Stepdaughter testified that one night, when she was twelve years old, she awoke to find Beekman touching her private area with his hand on her bare skin. Stepson, who was eight years old during the time, testified to several instances of inappropriate touching involving Beekman, and an instance where Beekman ultimately sexually penetrated him, which was the basis of the CSC charge. Following submission of the case to the jury, Beekman was found guilty of CSC with a minor in the first degree in regard to Stepson and commission of lewd act upon a child with regard to Stepdaughter. He was sentenced to thirty years for the CSC charge and was given a consecutive sentence of fifteen years for the lewd act charge. This appeal follows.

ISSUES

1. Whether the trial court erred in refusing to sever Beekman's charges where the alleged sexual abuse involved two victims, the offenses did not arise out of a single chain of circumstances and were not provable by the same evidence, and Beekman was prejudiced by its improper influential effect on the jury.

2. Whether the trial court erred in admitting alleged prior bad act evidence where the connection between the prior bad act and the crime was nothing more than a general similarity and the probative value of the evidence was outweighed by its prejudicial effect.

3. Whether the trial court erred in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Beekman of a fair trial.

LAW/ANALYSIS

I. Motion to Sever

Beekman first argues the trial court erred in denying his motion to sever his charges, asserting they involved two different victims, they did not arise out of a single chain of circumstances, they were not provable by the same evidence, and he was prejudiced by the improper consolidation of the charges. He contends the State would not be able to show a common scheme or plan in a subsequent trial under Rule 404(b), SCRE, because the connection between the prior bad act and the crime requires more than just a general similarity. Additionally, he maintains, even if the evidence of prior bad acts would have been admissible under Rule 404(b), SCRE, its prejudicial effect substantially outweighed any probative value under Rule 403, SCRE, noting in particular the lack of physical evidence. We disagree.

A motion for severance is addressed to the sound discretion of the trial judge, whose ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Caldwell*, 378 S.C. 268, 277, 662 S.E.2d 474, 479 (Ct. App. 2008). In determining whether the trial court's consolidation of charges was proper, the appellate court considers several factors. *State v. Rice*, 368 S.C. 610, 614, 629 S.E.2d 393, 394 (Ct. App. 2006).

> Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. Offenses are considered to be of the same general nature where they are interconnected.
>
> Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together.

> Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence; (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced.

Id. at 614-15, 629 S.E.2d at 395 (citations and parentheticals omitted).

Prejudice to a defendant may occur where the defendant is jointly tried on charges resulting in the admission of prior bad act evidence that would have otherwise been inadmissible. *State v. Cutro*, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005). South Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, 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; *see also State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (finding such evidence admissible to show motive, intent, the absence of mistake or accident, the existence of a common scheme or plan, or identity). Additionally, even if prior bad act evidence is found admissible under Rule 404(b), SCRE, the evidence must nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.[1] *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Our courts have considered a single chain of circumstances exists when there is "'in substance a single . . . course of conduct' or 'connected transactions'" involved. *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985); *see City of Greenville v. Chapman*, 210 S.C. 157, 161, 41 S.E.2d 865, 866-67 (1947) (affirming the trial court's determination that, while the various counts could not be deemed as arising out of the same transaction in the narrow sense of that phrase, they did arise out of a series of identical transactions, their respective dates constituting the only difference between them, and noting the phrase "the same transaction" should not be given such a restricted meaning where the warrant was founded upon what was in substance a single criminal course of conduct).

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[1] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE.

The fact that the indictments involved two different victims did not require severance of the charges. *See Cutro*, 365 S.C. at 369-75, 618 S.E.2d at 891-95 (affirming the trial court's denial of appellant's motion to sever charges involving three victims, where appellant was charged with two counts of homicide by child abuse and one count of assault and battery involving incidents all occurring at different times with different children); *State v. Jones*, 325 S.C. 310, 315, 479 S.E.2d 517, 519-20 (Ct. App. 1996) (holding consolidation was proper even though the allegations concerned two different victims, noting the offenses charged were of the same general nature involving allegations of a pattern of sexual abuse involving the two minor victims). Here, the evidence established Beekman embarked upon a series of actions aimed at the sexual abuse of his two prepubescent stepchildren over the course of an eight month period. Thus, we find the two charges against Beekman arose from, in substance, a single course of conduct or connected transactions, and decline to give such a restrictive reading of the phrase "a single chain of circumstances" as asserted by Beekman. Additionally, as noted by the trial court, there was a great overlap of evidence between the two charges, and the two charges were provable by the same evidence.

We further find Beekman was not prejudiced by the joinder, because evidence regarding his sexual abuse of each of the stepchildren would have been admissible in separate trials to show a common scheme or plan. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *Id.* at 433, 683 S.E.2d at 278. In determining whether a close degree of similarity exists, some of the factors to consider are: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. *Id.* at 433-34, 683 S.E.2d at 278. The above list of factors is not an exhaustive list, but is merely set forth for guidance, and other factors may be relevant in determining whether the similarities outweigh the dissimilarities. *Id.*

Here, there are similarities between the acts in regard to Stepdaughter and Stepson, which include Beekman's relationship as stepfather to the victims and the

occurrence of each incident of abuse in the family home. Though Stepson was eight years old and Stepdaughter was twelve years old when the abuse occurred, neither child had reached puberty and Stepdaughter was described as being very little with an immature body at that time. We recognize that Stepson reported Beekman's use of threats and coercion while Stepdaughter did not, and the type of sexual battery for which Beekman was ultimately charged was different for the two victims. However, the evidence suggests Beekman's abuse of Stepdaughter was halted by Stepdaughter before he had the opportunity to use threats or coercion and before he could progress from the inappropriate touching involved in the lewd act charge in regard to Stepdaughter to the incident of penetration involved in the CSC charge in regard to Stepson. Notably, Stepson's abuse also started with inappropriate touching. Thus, these factors do not diminish the similarity between the acts. *See id.* at 435, 683 S.E.2d at 278 (finding the fact that victim's abuse was interrupted before it could culminate in intercourse did not diminish the similarity between the incidents). Further, additional similarities are present in this case. The two children are biological siblings; the first instances of abuse involved inappropriate touching with Beekman placing his hand on the unclothed genitalia of the children; Beekman always had a news program on television while he committed the sexual abuse against the victims; and the incidents all occurred within an eight month period, with evidence suggesting the last abuse of Stepson occurred close to the time of the incident involving Stepdaughter and just prior to her disclosure. Accordingly, we find the sexual abuse of each child would have been admissible in separate trials under the common scheme or plan exception based upon the close degree of similarity between the incidents of abuse.

We further find no error in the trial court's determination that the probative value of the prior bad act evidence outweighed the danger of unfair prejudice to Beekman under Rule 403, SCRE. *See State v. Clasby*, 385 S.C. 148, 158-59, 682 S.E.2d 892, 897-98 (2009) ("Finally, we hold the probative value of this evidence substantially outweighed the danger of unfair prejudice to Clasby. Given there was no physical evidence to corroborate B.C.'s testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.").

In sum, we find the offenses charged in the separate indictments are of the same general nature involving connected transactions closely related in kind, place and

character; they arise out of a single chain of circumstances; they are provable by the same evidence; and Beekman's substantive rights have not been prejudiced. *See Cutro*, 365 S.C. at 375, 618 S.E.2d at 895 (holding joinder of indictments for homicide by child abuse of two children and one indictment for assault and battery of a third child was proper where all three offenses were similar in kind, place, and character and fit within the common scheme or plan and motive exceptions under *Lyle*).

II. Prior Bad Act Evidence

Beekman next contends the trial court erred in admitting alleged prior bad act evidence where the connection between the prior bad act and the crime was nothing more than a general similarity, and the probative value of the evidence was outweighed by its prejudicial effect. He argues his case is distinguishable from *Clasby*, because the alleged sexual misconduct in *Clasby* was directed at the *same* victim, the alleged incidents in his case did not establish a pattern of sexual abuse, and there was not a close degree of similarity between the crimes charged in his case since one involved touching the outside of a female's vagina and the other involved male anal penetration. Beekman contends the facts of his case mirror the facts of this court's opinion in *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). He further argues the probative value of the prior bad act evidence did not substantially outweigh the danger of unfair prejudice to him where there was no physical evidence to support Stepdaughter's and Stepson's allegations, Stepson's rectal exam was normal and showed no signs of penetration, and Stepson did not claim the sexual abuse until he learned of Stepdaughter's sexual abuse allegation.

In making this argument on appeal, Beekman cites only to arguments raised at trial concerning the admissibility of bad act evidence in regard to Stepson, i.e., alleged inappropriate touching of Stepson evidence. He does not reference any arguments at trial concerning admissibility of Stepdaughter's allegations as prior bad act evidence. This is likely so because Beekman did not specifically object to evidence concerning Stepdaughter's allegations on the basis that it was inadmissible as prior bad act evidence. He only made a trial objection to Stepson's allegations of inappropriate touching on the basis that it constituted prior bad act evidence. Yet Beekman's arguments on appeal of this issue all reflect a challenge to admission of prior bad act evidence relating to the two siblings, which ultimately came in as a result of joinder of the trials.

Because Beekman's only objection at trial on the basis that it was prior bad act evidence related to evidence of prior inappropriate touchings of Stepson, his argument on appeal that the substantive evidence surrounding the charges as to Stepdaughter and Stepson were inadmissible in the joint trial as they did not fall within an exception allowing prior bad act evidence is not preserved for our review.[2] *See State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (noting an issue must be raised to and ruled upon by trial court to be preserved for appellate review). Further, Beekman does not challenge on appeal the trial court's determination that the evidence concerning the alleged inappropriate touching of Stepson by Beekman was admissible. Thus, the propriety of admitting the prior bad act evidence as to Stepson is the law of the case. *See State v. Fripp*, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (noting an appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case).

At any rate, even assuming Beekman's argument is properly preserved for our review, we have already determined the evidence of allegations concerning Stepdaughter and Stepson was admissible under the common scheme or plan exception of Rule 404(b), SCRE, and *Lyle* based upon the similarities surrounding the charges. Beekman's reliance on *Tutton* does not change that analysis. *See Wallace*, 384 S.C. at 434 n.5, 683 S.E.2d at 278 n.5 (stating, in regard to the close degree of similarity required, as follows: "The Court of Appeals relied on *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), which appears to require a connection beyond a degree of similarity in the details of the crime charged and the bad act evidence. We find this interpretation to be an overly restrictive view of our

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[2] Anticipating the introduction of the forensic interview video of Stepson, Beekman objected to two portions of the video, one portion relating to Stepdaughter and another regarding prior inappropriate touchings of Stepson. In regard to Stepdaughter, Beekman argued Stepson's interview included allusions to inappropriate touching or bad acts that were done by Beekman to Stepdaughter. While Beekman used the term "bad acts," he only argued the evidence in Stepson's video regarding what transpired between Beekman and Stepdaughter should be excluded because Stepson had no independent knowledge, the evidence could only be hearsay, and it would result in bolstering. He never challenged these portions of Stepson's video regarding Stepdaughter based upon the improper admission of bad act evidence pursuant to Rule 404(b), SCRE, or *Lyle*.

case law. Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis."); *see also Clasby*, 385 S.C. at 158 n.2, 682 S.E.2d at 897 n.2 (noting this court's holding in *Tutton* "was called into question by the majority opinion in *Wallace* on the ground the analysis constituted an overly restrictive view of our case law"). Further, assuming Beekman has properly challenged on appeal the trial court's ruling concerning the admissibility of evidence of prior inappropriate touching of Stepson, we would nonetheless affirm on the merits. *Id.* at 156, 682 S.E.2d at 896 (holding the trial court properly admitted the proffered evidence of four incidents of uncharged sexual misconduct committed by Clasby on victim prior to the offenses for which Clasby was indicted and tried, where each of the incidents established a pattern of escalating abuse which ultimately culminated in Clasby's digital penetration of victim, the offense for which Clasby was tried).

III. Cumulative Errors

Finally, Beekman argues on appeal that the trial court erred in refusing to grant him a new trial, where the cumulative effect of the errors was so prejudicial as to deprive him of a fair trial. He contends, even if this court finds the two previous errors do not require reversal, the cumulative effect of those errors in light of the State's improper comments and arguments was so prejudicial as to deprive him of a fair trial. He specifically argues, in addition to defense counsel's sustained objections,[3] three notable instances where he claims the State prejudiced his right to a fair trial.

We do not believe this issue is preserved for our review. Beekman never specifically raised the cumulative errors doctrine to the trial court, nor did he even argue that he was entitled to a new trial based upon errors made during the trial. Rather, he argued for a new trial solely on the basis that the evidence did not substantiate the verdict. *See State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct. App. 2006), *majority aff'd as modified*, 382 S.C. 205, 675 S.E.2d 740 (2009) (wherein the dissent, addressing the issue not reached by the majority based

[3] Beekman does not elaborate on the "sustained objections" to which he is referring.

upon reversal on other grounds, found Covert's argument that a cumulative effect of errors required reversal of his conviction was not preserved for appeal, even assuming the presence of errors, as the issue was neither raised to nor ruled on by the trial court); *cf. Wells v. Halyard*, 341 S.C. 234, 240, 533 S.E.2d 341, 344 (Ct. App. 2000) (holding, in medical malpractice action, issue of whether cumulative effect of alleged errors in jury instructions justified new trial was preserved for appeal where appellant made a motion for new trial asserting several errors regarding the jury instructions, objected to each alleged error separately during the charge and recharge, and objected to errors as a whole during the motion for a new trial); *see also State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (noting a defendant may not argue one ground below and another on appeal).

Even assuming the issue is preserved, we nonetheless find no merit to the argument, as we find no error on the part of the trial court. The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. *Id.*

Here, we have already found no errors in regard to the first two issues raised by Beekman on appeal. In regard to the other three specific instances he references under his cumulative error argument, we find no error on the part of the trial court, because no prejudicial evidence was admitted in one instance and no further motion was made or objection asserted on that matter, and because the alleged errors were not brought to the trial court's attention in the other two instances. *See State v. Price*, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006) (recognizing axiomatic rule that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Richardson*, 358 S.C. 586, 597, 595 S.E.2d 858, 863-64 (Ct. App. 2004) (holding issue of whether the trial court erred in permitting the solicitor

to make improper and prejudicial comments to the jury during closing arguments was not properly preserved for our review where appellant failed to make any objection during closing arguments and failed to move for a mistrial on the ground of improper argument); *State v. Benning*, 338 S.C. 59, 63-64, 524 S.E.2d 852, 855 (Ct. App. 1999) (finding the mere asking of improper questions was not prejudicial where no evidence was introduced as a result thereof).

In effect, Beekman is asking this court to apply the plain error doctrine by combing the record for unpreserved issues and arguing the cumulative effect of these unpreserved matters deprived him of a fair trial. However, our appellate courts do not apply the plain error rule. *See State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: "This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. Thus, Sheppard's argument that a judge commits an abuse of discretion by not *ex mero motu* addressing an issue at trial is not supported by our case law. Therefore, because Sheppard has not preserved this issue for review and because this Court does not apply the plain error rule, his argument fails.").

CONCLUSION

We find no error in the trial court's denial of Beekman's motion for severance. As to the issue concerning prior bad act evidence, we find the issue is not preserved, and to the extent it is intertwined with the motion for severance, the analysis of that issue is dispositive. Finally, we find the cumulative errors argument is likewise unpreserved, and even if it was properly before the court, it fails on the merits based upon our affirmance of Issues I and II and Beekman's failure to raise the issues he argues on appeal to the trial court as to the other errors he asserts.

For the foregoing reasons, Beekman's convictions are

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rashaun Sobers, Appellant.

Appellate Case No. 2010-172246

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5146
Heard June 4, 2013 – Filed June 26, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Barry Barnette, of Spartanburg, for Respondent.

LOCKEMY, J.: Rashaun Sobers appeals his conviction for murder, arguing the trial court erred in (1) excluding testimony regarding gang activity, and (2) finding Rocky Watts was not qualified as an expert in gang activity. We affirm the trial court.

FACTS/PROCEDURAL BACKGROUND

On April 21, 2009, Sobers shot and killed Sebastian Jaramillo (the victim) in Spartanburg County. Sobers was indicted for murder, and a jury trial was held in September 2010.

At trial, Phoenix Fielder testified he, Travoiris "Trey" Gentry, Shaquila "Quita" Gentry, Jayquan Hardy, Devon Davis, Ricky Smith, and the victim were at his aunt's house the day of the shooting. According to Phoenix, Devon hit the victim "in a playful way" and a short chase ensued to a nearby cul-de-sac. Phoenix, Trey, Quita, Jayquan, and Ricky jumped in Phoenix's aunt's car and drove to the cul-de-sac. Phoenix testified Devon and the victim decided to "tap box,"[1] and he used his cell phone to video record the fight. Approximately fifteen people gathered to watch the fight. Phoenix stated he saw Sobers sitting in his parked car in the cul-de-sac, but Sobers was not involved in the fight. According to Phoenix, after the fight was over Devon and the victim shook hands, and he, Ricky, Quita, Trey, and the victim got back in his aunt's car. Phoenix testified he subsequently heard gunshots and saw Sobers pointing a gun at their car. The victim was sitting in the back of the car and was shot in the head.

Phoenix's video was shown to the jury. In addition to the fight, the video showed Trey and the victim approach Sobers's car before the fight. Trey testified he asked Sobers about disrespectful comments Sobers had allegedly made about his sister. According to Trey, Sobers denied making the comments about his sister and the two shook hands and Trey walked away. Trey testified that after the fight, while the group was in the car, he saw Sobers back up his car to face their car and start shooting.

Jayquan testified he approached Sobers after the fight between Devon and the victim but before the shooting. Jayquan asked Sobers "what was up with him and Trey getting into it," and Sobers told him "there wouldn't be any fighting." Jayquan testified he then saw Sobers reach to his right and pull out a gun. Jayquan started running and testified he heard several gunshots.

Devon testified he saw Jayquan approach Sobers's car before the shooting. He stated that after Jayquan walked away from the car, he saw shots fired from Sobers's car. Quita testified she did not see or hear anyone threaten Sobers before the shooting. According to Quita, she, Trey, Ricky, Phoenix, and the victim were

[1] Phoenix described "tap boxing" as "play fighting but not with fists, hands open."

all in the car when she saw shots fired from Sobers's car. Ricky also testified he was in the car with Quita, Trey, Phoenix, and the victim when Sobers fired at their car.

Sobers testified Trey approached his car before the fight between Devon and the victim and asked about comments Sobers made about Trey's sister. According to Sobers, after Trey walked away, he assumed "it was over with" and "everything was ok." Sobers testified he fired shots after Trey approached his car a second time and attempted to engage him in a fight. According to Sobers, Trey grabbed his shirt through the driver's side window. Sobers stated the others who were watching the fight swarmed his car and opened the passenger side doors. Sobers testified he shot out of the front passenger door "because Trey had me," but he denied shooting directly at anyone. Sobers stated he was "scared they were going to kill me." Sobers admitted he lied when he told police following the shooting that Trey had a gun at the time of the shooting.

The jury found Sobers guilty of murder, and he was sentenced to life in prison. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

I. Gang Activity Evidence

Sobers argues the trial court erred in excluding evidence of gangs and gang activity at the scene of the shooting. We affirm the trial court's decision.

Pre-trial, defense counsel informed the trial court it would present evidence of gang activity involving the victim and witnesses. Defense counsel indicated it had pictures from Facebook accounts belonging to Trey and Joshua Fuller[2] that showed the victim and witnesses flashing gang signs. The State argued the evidence of

[2] Joshua was not present at the shooting.

gang activity was irrelevant and unfairly prejudicial. Defense counsel argued the evidence went "to self-defense." According to defense counsel, Sobers pulled his gun and fired after the "mob of people" who had been watching the fight between Devon and the victim surrounded his car and tried to pull him out. Defense counsel maintained Sobers acted in self-defense because "those people are gang members" who had "just beat down another little boy." Defense counsel argued Sobers believed the fight between Devon and the victim was a gang initiation. The trial court asked whether any witness statements indicated any gang-related activity at the scene of the shooting, and the State responded that none of them did.

The trial court found Sobers failed to show the relevance of any possible gang associations to the shooting. The trial court noted Sobers's fear was related to the approaching "mob," not any specific gang associations within the mob. However, the trial court left open the possibility that Sobers could offer gang evidence, if he could establish the requisite relevancy.

Sobers offered Rocky Watts, a private investigator and former Greenville County Sheriff's deputy, as an expert in gang activity.[3] Watts testified that based on the Facebook photographs, he believed the victim, as well as Quita, Ricky, and Trey, were members of a gang. He also testified that based on his experiences in law enforcement, gangs will "videotape their activities."

Trey, Ricky, Quita, and Phoenix admitted being in the photographs and making gang signs, but they all denied being in a gang. Joshua testified the individuals in the group photo were not in a gang but were "just posing" and "all being together, like we family, all of us akin." Thereafter, the State argued (1) no witnesses testified they were in a gang, and (2) assuming they were, there was no evidence of a connection between gang activity and the shooting.

After considering the evidence of gang activity presented, the trial court found:

> [W]ith respect to the testimony regarding membership by certain witnesses that have testified to be members of a gang, apparently they're all members of different gangs. But based upon what's been presented it's all the same gang if it is a gang. Nevertheless, I fail to see the connection between any membership in a gang if there is one to what occurred on April the 21st 2009. I see no

[3] The trial court found Watts was not qualified as an expert in gang activity.

> connection whatsoever. They were, if you believe the testimony of the defendant, acting as a mob. But I still fail to see if they were a member of a gang that that has any connection with what occurred on April the 21st. So based upon there being no connection established, there being no relevance to it, there does not appear - that the testimony would relate or be relevant to any issue that the jury has to decide in this case; and therefore I stand by my previous ruling that that is to be excluded.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (citation omitted).

Pursuant to Rule 401, SCRE, "'relevant evidence' means evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

On appeal, Sobers argues the gang evidence proffered was relevant to show his state of mind and his fear of being killed. The State contends the evidence presented created only a mere suspicion of gang associations of the victim and witnesses. Further, the State maintains the suggestion of gang membership does not make any fact of consequence more or less probable.

We find the trial court did not abuse its discretion in finding the evidence suggesting gang associations of the victim and witnesses was not relevant. We note that although the trial court left open the possibility Sobers could offer gang evidence if he could establish the requisite relevancy, Sobers never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity relevant.

II. Expert Witness

Sobers argues the trial court erred in finding Watts was not qualified as an expert in gang activity. Based upon our decision to affirm the trial court's exclusion of testimony regarding gang activity, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when disposition of a prior issue is dispositive).

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Jennifer M. and Venus A., Defendants,

Of whom Jennifer M. is the Appellant,

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

Appellate Case No. 2011-205406

Appeal From Fairfield County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. 5147
Heard November 14, 2012 – Filed June 26, 2013

REVERSED

Katherine Carruth Goode, of Winnsboro, for Appellant.

Calvin Leon Goodwin, of S.C. Department of Social Services, of Winnsboro, for Respondent.

HUFF, J.: Appellant, Jennifer M. (Mother), appeals an order of the family court finding Mother abused and/or neglected her child and ordering Mother's name entered into the Central Registry of Child Abuse and Neglect (Central Registry).

Mother contends the family court erred in (1) finding she abused and neglected her unborn child based upon conduct that occurred when she did not know she was pregnant and ordering her name placed upon the Central Registry, and (2) improperly admitting and considering alleged results of drug tests for which there was no foundation and which violated the rule against hearsay. We reverse.

FACTUAL/PROCEDURAL HISTORY

On June 10, 2011, the South Carolina Department of Social Services (DSS) filed a complaint for intervention against Mother. DSS filed an amended complaint for removal on July 1, 2011, after Mother and her minor child (Child) allegedly tested positive for drugs in June 2011. A probable cause hearing was held on July 7, 2011, resulting in an order filed by the family court on July 25, 2011, finding that probable cause existed for Child to have been placed in emergency protective custody and that Child was to remain in the custody of DSS. In its complaint for removal, DSS sought a finding Child was abused and/or neglected by Mother based upon Mother's alleged use of cocaine and marijuana in the presence of Child, resulting in Child testing positive for the drugs as indicated by Child's June 27, 2011 drug test and Mother's June 23, 2011 drug test. DSS also alleged abuse and neglect of Child by Mother based upon Mother's failure to obtain prenatal care and her use of drugs during her third trimester of pregnancy with Child, as indicated by Child's and Mother's positive drug tests at birth. DSS further sought placement of Mother's name on the Central Registry.

A hearing was held on DSS's complaint on July 28, 2011, at which time the following was presented: This matter came to the attention of DSS when it received an allegation Mother tested positive for certain drugs when she gave birth to Child on December 10, 2010. An investigation by DSS revealed Mother received no prenatal care before Child was born. Over Mother's objection, a DSS caseworker testified that Mother tested positive for "benzo, marijuana, [and] opiates and she had a positive methadone level" at the time of birth. Upon investigation of the matter, DSS indicated the case on January 18, 2011, for physical neglect and abuse, and a treatment plan was implemented for Mother, to include substance abuse treatment with random drug testing along with parenting classes. Though home visits revealed no problems as far as Child's care, DSS had

concerns based on Mother's failure to consistently comply with her treatment plan.[1] Over Mother's objection, the DSS caseworker testified Mother and Child were given hair strand tests during Mother's treatment, and both Mother and Child "were positive." Also over Mother's objection, a DSS investigator testified Mother and Child had a random drug test of their hair, and both tests returned positive.[2] On June 30, 2011, Child was placed into emergency protective custody and the family court found probable cause to remove Child from Mother's care.

The DSS investigator acknowledged that when she originally met with Mother at the hospital following Child's birth and questioned her concerning her pregnancy and prenatal care, while Mother admitted to drug use prior to birth of Child, Mother informed the investigator she was not aware she was pregnant until she went to the hospital with stomach pains and delivered Child. The investigator agreed that during the time she worked with her, Mother was consistent in her statement that she did not know she was pregnant. At the time of the hearing, Mother had completed her drug treatment program at Fairfield Behavioral Health Services (Fairfield Behavioral). The Clinical Counselor at Fairfield Behavioral testified Mother submitted to random drug tests on June 6 and June 16, and these tests were negative for everything except "benzo." However, Mother had provided them with a documented prescription for the drug.[3] The counselor acknowledged Fairfield Behavioral administered urine drug tests, which would show if a person is "actively" using drugs.[4] After speaking with both the DSS caseworker and investigator, Fairfield Behavioral recommended Mother attend parenting skills and rehabilitative psychological services programs. At the time of the hearing, Mother

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[1] The caseworker noted Mother attended three sessions in March, but missed three others in March, as well as all of April, but returned in May after being informed her case would be going to court.

[2] Mother noted a "continuing objection as to the references of a positive test."

[3] The court information sheet and supplemental report, submitted by DSS to the family court, notes that in regard to the circumstances surrounding Child's birth, Mother reported that she had been prescribed the drug Klonopin for her anxiety.

[4] The counselor's testimony was that if Mother used cocaine, it would last in her system for 48 to 72 hours, marijuana would last from 30 to 45 days, and alcohol would last up to 12 hours.

had two more sessions with parenting skills to be completed and had not yet attended to the psychological services program.

DSS rested its case, and Mother moved for a directed verdict on the complaint seeking a finding of abuse and neglect. Mother argued, although there had been allusions to drug tests, DSS failed to introduce any drug tests to show any substance in Child's system. Mother noted that no drug tests had been admitted into evidence because DSS had no witnesses at the hearing to substantiate that any tests were taken, that there was a proper chain of custody, that a chemist was qualified, or that there was not a mix up in the samples in delivery to the testing site. Accordingly, Mother argued, since there was no evidence concerning the drug reports, the only allegation of Mother's neglect was her failure to get prenatal care. However, the DSS caseworker acknowledged Mother did not know she was pregnant at the time. Thus, Mother contended she could not have been neglectful in failing to obtain prenatal care if she did not know she was pregnant. The family court noted, though Mother stated she did not know she was pregnant, the fact that she was pregnant indicated she was having sexual intercourse and the natural outcome of sexual intercourse is pregnancy. Because Mother admitted having used drugs and knew she was having sexual intercourse, the court denied the motion.

Mother then took the stand and testified that she did not know she was pregnant with Child. She stated that she had two previous pregnancies and knew what it felt like to be pregnant, but her "body did not have any indications of being pregnant." Mother noted that three days before she delivered Child, she pushed a van that had run out of gas, something a pregnant woman would not attempt. She also testified, because she did not know she was pregnant, she did not prepare for a baby and did not have the things needed for a baby, and her family had to get the items together while she was in the hospital. Mother admitted that, before Child was born and without knowledge of her pregnancy, she engaged in occasional, social drug use during the time she was pregnant. On cross-examination by the Guardian ad Litem (GAL), Mother denied using any drugs since Child came into DSS's custody, other than what had been prescribed to her by a doctor.

At the close of Mother's case, the GAL recalled DSS's caseworker to the stand and sought to question her about documents previously marked as Plaintiff's Exhibit 1, but not admitted into evidence. The documents were drug tests performed on June 23 and June 27, 2011. When asked what the test results revealed, Mother objected,

arguing there was no foundation laid for admission of those results into evidence, and asserting there was no testimony to establish the qualification of the tests or chain of custody. The GAL argued the test results were admissible because Mother testified she had not used drugs since Child came into DSS custody "or [DSS's] involvement," and the evidence was being introduced, not for the truth of the matter asserted, but as an exception to hearsay for credibility purposes. Mother countered the matter was being offered for the truth of the matter asserted and the determination of credibility was not an exception to the hearsay rule. She further argued DSS failed to bring in the necessary witnesses to provide a proper foundation for admission of the evidence. The family court found the evidence was being offered, not for the truth of the matter asserted, but was being offered for credibility purposes, and overruled the objection. The caseworker then testified that Mother's test on June 23, 2011, was positive for cocaine. When asked about the test on Child, Mother interposed another objection asserting, even under the family court's ruling concerning admissibility based upon credibility, Child's test had nothing to do with Mother's statement that she had not used drugs, and such would not challenge the credibility of Mother. The family court sustained this objection by Mother. Plaintiff's Exhibit 1 was never offered into evidence.

At the close of all evidence, Mother renewed her motion for directed verdict, arguing a failure of proof of the allegations of abuse and neglect, and requesting the family court dismiss the case and make no findings of abuse and no neglect and no finding of placement of Mother's name on the Central Registry. The family court declined to so rule, finding abuse and neglect based upon Mother's admitted use of drugs during her pregnancy and the fact that, though Mother denied knowledge of the pregnancy, her pregnancy was the result of sexual intercourse. The court further found Mother's name should be entered into the Central Registry. The family court thereafter filed a written order for removal, finding the preponderance of the evidence supported the allegation Mother abused and/or neglected Child as defined in section 63-7-20 of the South Carolina Code, and the nature of the harm was physical abuse and willful and/or reckless neglect, and Mother should therefore be entered into the Central Registry.[5]

[5] This initial order did not specify the basis for finding abuse and neglect or entry of Mother's name on the Registry, i.e., whether it was for her and Child testing positive at birth regardless of Mother's knowledge of the pregnancy, or whether it was for their testing positive the following June, or whether it was based upon

On September 12, 2011, Mother filed a Rule 59(e), SCRCP motion to alter or amend challenging, among other things, the family court's findings of abuse and/or neglect and ordering Mother's name be placed on the Central Registry. In particular, Mother asserted that the preponderance of the evidence did not support a finding that she physically abused and willfully and/or recklessly neglected Child, as her conduct prior to Child's birth could not serve as the basis for such finding where she had no knowledge of the pregnancy. Mother also filed, on that day, a motion for review and return of custody. Following a hearing on the motions, the family court, by order filed November 4, 2011, denied Mother's motion to alter or amend concerning its findings of abuse and/or neglect.[6] In so doing, the court found Mother admitted to using illegal drugs during her pregnancy, and though she testified she did not know she was pregnant and therefore did not knowingly abuse or neglect Child, the court found her testimony to lack credibility. The court further found Mother "participated in activity that resulted in the creation of an embryo in her body and she knew or should have known that she could become pregnant." The family court concluded, because this was not Mother's first pregnancy, she should have been aware of the physiological changes in her body, yet she made no effort to determine if she was pregnant. The family court additionally found that Mother asserted the court had not allowed the "drug testing evidence" on Mother into the record and, therefore, she should not have been found to have abused and/or neglected Child; however, the court concluded it was in error in not allowing such evidence in the record.[7]

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both. The family court's oral ruling, however, seems to indicate the ruling was based upon Mother's admitted use of drugs during the pregnancy.

[6] The court continued Mother's motion concerning return of Child to her custody until the GAL had an opportunity to view Mother's home. Thereafter, in early December 2011, the court returned custody of Child to Mother upon agreement of DSS.

[7] It is not clear exactly what "drug testing evidence" on Mother the family court was referring to here.

ISSUES

1. Whether the family court erred in finding Mother abused and neglected her unborn child based on conduct that occurred when she did not know she was pregnant.

2. Whether the family court erred in ordering Mother entered into the Central Registry of Child Abuse and Neglect based on a finding of physical abuse and willful and/or reckless neglect.

3. Whether the family court erred in admitting hearsay testimony related to alleged results of drug tests.

4. Whether the family court erred in admitting alleged results of drug tests without a proper foundation for admission of those results.

STANDARD OF REVIEW

In appeals from the family court, an appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011). However, while this court has the authority to find facts in accordance with its own view of the preponderance of the evidence, "we recognize the superior position of the family court judge in making credibility determinations." *Id.* at 392, 709 S.E.2d at 655. Further, de novo review does not relieve an appellant of his burden to "demonstrate error in the family court's findings of fact." *Id.* "Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* at 392, 709 S.E.2d at 655 (alteration in original) (internal citation and quotation marks omitted).

LAW/ANALYSIS

A. Finding of Abuse and Neglect and Placement on Registry (Issues 1 & 2)

Mother contends the child abuse and neglect provisions of section 63-7-20 do not apply where the uncontradicted evidence shows a mother did not know she was pregnant or have any of the bodily indicators to support a conclusion that she should have known she was pregnant. Mother points to the cases of *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997) and *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003) in arguing the court should find the child abuse and neglect statutes require a knowledge element before a mother can be found to have committed abuse or neglect. Further, Mother contends the Central Registry statute imposes such an element, inasmuch as it requires the conduct be willful or reckless neglect.

Mother also argues the family court improperly imputed knowledge based solely on her having engaged in sexual intercourse, and the fact of intercourse alone, without physical symptoms or indicators of pregnancy, should not warrant a finding a mother should know she is pregnant. Additionally, Mother asserts the family court's finding in its Rule 59(e), SCRCP order concerning Mother's credibility as to her assertion that she did not know she was pregnant is unfounded. She argues the only evidence before the court was that Mother did not know she was pregnant. Finally, Mother argues DSS failed to introduce competent evidence to support the admission of drug test results.

DSS cites *State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) for the proposition that whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, construed in light of its purpose and design. DSS contends the fact that the legislature did not include the word "knowingly," or other apt words to indicate intent or motive are necessary elements for a violation of section 63-7-20 indicates the legislature intended that a person could be found in violation of the statute even if the person had no knowledge or intent his or her act is criminal. Here, it argues, Mother abused and neglected her unborn child by engaging in conduct that presented a substantial risk of harm to the unborn child by using illegal drugs knowing she had engaged in sexual relations. Thus, Mother knew engaging in such conduct could likely affect the life, health or comfort of any child conceived. DSS cites *Whitner* for the proposition that a viable fetus is a "child" for purposes of the child abuse and

endangerment statute. DSS maintains, once the family court determined Mother abused or neglected her unborn child, the court was well within its discretion in finding her name should be entered into the Central Registry. It contends, while Mother's conduct may not have been "willful," it was "reckless," as Mother's conduct of using illegal drugs during her pregnancy was in disregard of the possible harmful consequences to Child.

Section 63-7-20 of the South Carolina Code provides in pertinent part as follows:

> (4) "Child abuse or neglect" or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare:
>
> > (a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child . . . .

S.C. Code Ann. § 63-7-20(4)(a) (2010).

Section 63-7-1940 provides in part as follows:

> (A) At a hearing pursuant to Section 63-7-1650 or 63-7-1660, at which the court orders that a child be taken or retained in custody or finds that the child was abused or neglected, the court:
>
> > (1) must order that a person's name be entered in the Central Registry of Child Abuse and Neglect if the court finds that there is a preponderance of evidence that the person physically or sexually abused or wilfully or recklessly neglected the child. Placement on the Central Registry cannot be waived by any party or by the court.

S.C. Code Ann. § 63-7-1940(A)(1) (2010).

In *Whitner*, our supreme court addressed whether the word "child," as used in section 20-7-50 of the South Carolina Children's Code,[8] includes a viable fetus. 328 S.C. at 4, 492 S.E.2d at 778. There, Whitner pled guilty to criminal child neglect after her baby was born with cocaine metabolites in its system based upon Whitner's ingestion of crack cocaine during her third trimester of pregnancy. *Id.* at 4, 492 S.E.2d at 778-79. Our supreme court determined, in order for the sentencing court to have subject matter jurisdiction to accept Whitner's plea under section 20-7-50, criminal child neglect under that statute would have to include "an expectant Mother's use of crack cocaine after the fetus is viable." *Id.* at 5, 492 S.E.2d at 779. The majority ultimately concluded section 20-7-50 was "applicable to an expectant mother's illegal drug use after the fetus is viable." *Id.* at 15, 492 S.E.2d at 784. The majority further found, because it is common knowledge that use of cocaine during pregnancy can harm a viable unborn child, Whitner could not claim she lacked fair notice that her behavior of ingesting crack cocaine during her third trimester of pregnancy was proscribed by section 20-7-50. *Id.* at 15-16, 492 S.E.2d at 784-85.

In *McKnight*, our supreme court addressed the issue of whether sufficient evidence of McKnight's criminal intent to commit homicide by child abuse was presented to survive a directed verdict motion, where McKnight asserted no evidence was presented that she knew the risk that her cocaine use could result in the still birth of her child. 352 S.C. at 644, 576 S.E.2d at 172-73. Recognizing the court noted in *Whitner* that, although the precise effects of maternal crack use during pregnancy are somewhat unclear, it was "well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child," and this common knowledge put Whitner on notice that her conduct in utilizing cocaine during pregnancy constituted child endangerment. *Id.* at 645, 576 S.E.2d at 173. In McKnight's case, it was undisputed that she took cocaine on numerous occasions while she was pregnant, and McKnight admitted to the DSS investigator that *she knew she was pregnant* and that she had been using cocaine when she could get it. *Id.* at 645-46, 576 S.E.2d at 173. The court then held, "Given the fact that it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine *knowing she was pregnant* was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life." *Id.* at 646, 576 S.E.2d at 173 (emphasis added).

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[8] Section 20-7-50 was the predecessor to current code section 63-5-70, which proscribes unlawful conduct toward a child. S.C. Code Ann. § 63-5-70 (2010).

In *Jenkins*, the defendant was convicted of the misdemeanor crime of unlawful neglect of a child, in violation of section 16-3-1030 [9] of the South Carolina Code, after she left her eight year-old and five year-old sleeping alone in the house for an hour, and the two children died in a fire during that time. 278 S.C. at 220-21, 294 S.E.2d at 45. In addressing whether the statute required proof of criminal negligence, as opposed to simple negligence, our supreme court noted that the legislature may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and the knowledge or ignorance of the act's criminal character is immaterial on the question of guilt. *Id.* at 221-22, 294 S.E.2d at 45. The court must look to the language of the statute, construed in light of its purpose and design, to determine whether knowledge and intent are necessary elements of a statutory crime. *Id.* at 222 , 294 S.E.2d at 45. Noting the statute in question was enacted to provide protection for those persons whose tender years or helplessness rendered them incapable of self-protection, the court concluded the legislature's failure to include "knowingly" or other apt words to indicate criminal intent or motive evidenced "the legislature intended that one who simply, *without knowledge or intent that his act is criminal*, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates § 16-3-1030 of the Code." *Id.* at 222, 294 S.E.2d at 45-46. (emphasis added).

Here, there is little doubt that Mother engaged in acts or omissions which presented a substantial risk of physical injury to Child based upon her admission of drug use prior to Child's birth, and such acts could qualify as child abuse or neglect. *See Whitner*, 492 S.E.2d at 15, 492 S.E.2d at 784 (holding child neglect under the criminal child neglect statute would include an expectant mother's illegal drug use after the fetus is viable). Further, Mother could be susceptible to a finding of abuse and/or neglect under section 63-7-20, regardless of whether she had intent to harm Child through her drug use, or knowledge of the possible harm to Child from her drug use. *See McKnight*, 352 S.C. at 645, 576 S.E.2d at 173 (finding, even if no evidence was presented that McKnight knew the risk that her cocaine use could result in the still birth of her child, common knowledge that such

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[9] This statute was repealed and similar provisions appeared in section 20-7-50. *Id.* at 220 n.1, 294 S.E.2d at 45 n.1. As we previously noted, section 20-7-50 is the predecessor to current code section 63-5-70.

use can cause serious harm to a viable unborn child is sufficient to put one on notice that conduct in utilizing cocaine during pregnancy constitutes child endangerment); *Jenkins*, 278 S.C. at 222, 294 S.E.2d at 45-46 (holding the legislature's failure to include "knowingly" or other apt words to indicate criminal intent or motive evidenced the legislature's intent that one who, without knowledge or intent that his act is criminal, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates the criminal statute proscribing unlawful neglect of a child). However, we do not believe Mother can be found to have abused and/or neglected Child pursuant to section 63-7-20 where there is no evidence Mother knew or should have known that she was pregnant with a viable fetus at the time of her drug use. Though knowledge that her actions could harm Child is not necessary for a finding of abuse and/or neglect, this is not the same as knowledge that a child who could be harmed actually exists.

It is well settled that in interpreting a statute, the court's primary function is to ascertain legislative intent, and, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *Whitner*, 328 S.C. at 6, 492 S.E.2d at 779. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (quoting *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993)). Further, our courts will reject any interpretation which would lead to a result so absurd that the legislature could not have intended it. *Id.*; *see also S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995) (noting our courts will interpret statutes so as to promote legislative intent and escape absurd results).

Section 63-1-20 of the South Carolina Code states "[i]t shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families." S.C. Code Ann. § 63-1-20(C) (2010). It is difficult to see how a finding of abuse or neglect or inclusion of a person's name on the Central Registry for ingestion of harmful drugs during pregnancy will promote the prevention of

children's problems *where the mother is not aware of the pregnancy* at the time of her drug use.

Further, we believe our case law supports this interpretation of the statute. Though *Whitner* and *Jenkins* both involved interpretation of legislative intent of criminal statutes, the policy behind these statutes clearly involved the protection of children and prevention of harm to them. Thus, we find inconsequential the fact that these cases involved statutes providing punishment for criminal conduct, and find no merit to DSS's attempt to distinguish *McKnight* on this basis.

In *McKnight*, our supreme court specifically noted it was undisputed that McKnight took cocaine on numerous occasions while she was pregnant, and McKnight admitted to the DSS investigator that *she knew she was pregnant* and that she had been using cocaine when she could get it. The court then held, given that it is public knowledge that usage of cocaine during pregnancy is potentially fatal, the fact that McKnight took cocaine *knowing she was pregnant* was sufficient evidence of McKnight's criminal intent to commit homicide by child abuse to submit the matter to the jury.

Here, the only evidence presented was that Mother did not know she was pregnant until she gave birth to Child. Though the family court, in its order denying Mother's motion to amend, made a finding that Mother's testimony in this regard lacked credibility, we believe this finding is against the preponderance of the evidence. Mother adamantly denied knowing she was pregnant with Child until Child's birth. She testified that she had two previous pregnancies and knew what it felt like to be pregnant, but her "body did not have any indications of being pregnant" with Child, that three days prior to delivering Child she engaged in physical activity a pregnant woman would not attempt, and she had no items at home that a pregnant woman would normally obtain in anticipation of the birth of a child. Further, the DSS investigator who met with Mother at the hospital following Child's birth testified Mother informed her that she was not aware she was pregnant until she went to the hospital with stomach pains and delivered Child. This investigator also agreed that, during the time she worked with her, Mother was consistent in her statement that she did not know she was pregnant. Additionally, the court information sheet/supplemental reports submitted by DSS to the family court in conjunction with its filings indicate Mother reported during the investigation that she did not receive prenatal care because she did not know she was pregnant, she presented to the hospital emergency room in severe pain

after pain medication she had received from a friend did not relieve her pain, and while in the restroom of the hospital, she gave birth to Child. At no time did DSS present any evidence Mother knew, or should have known, she was pregnant before the birth of Child. Nor did DSS ever argue to the family court that Mother knew or should have known she was pregnant prior to the birth, or maintain Mother was not credible in this respect. Accordingly, we hold this finding by the family court is against the greater weight or preponderance of the evidence.

We likewise give no credence to the family court's determination that Mother's participation in sexual activity alone was sufficient to show she knew or should have known she "could become pregnant." The circumstances surrounding Mother becoming pregnant were not explored at all during the hearing.[10] Thus, we do not believe that the family court's reasoning that Mother became pregnant, and, therefore, must have engaged in sexual activity, is sufficient to show she knew or should have known she was pregnant. Nor do we believe the fact that Mother "could become pregnant" is adequate to expose her to a finding of abuse and/or neglect of a child. Additionally, we find no support for the family court's conclusion that, because it was not Mother's first pregnancy, she should have been aware of the physiological changes occurring in her body, but she made no effort to determine if she was pregnant. [11]

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[10] For example, no evidence was presented concerning Mother's possible use of contraceptives, whether she had reason to believe she would not become pregnant as the result of any sexual encounter at that time, or whether she had experienced any false negative pregnancy tests thereafter. A likely explanation for this is that DSS did not contest Mother's assertion that she was unaware of the pregnancy, or attempt to show that Mother should have known or suspected that she was pregnant prior to the birth of Child.

[11] Despite the family court's apparent personal belief that a woman who has been through a previous pregnancy would have been aware of physiological changes in her body, it is common knowledge that women can carry a pregnancy full term with no idea that they were pregnant. Discovery Fit & Health even has a show about such situations. http://health.discovery.com/tv/i-didnt-know-i-was-pregnant/. This website includes a list of ten reasons a woman might not know she was pregnant until she was in labor. http://health.howstuffworks.com/pregnancy-and-parenting/pregnancy/issues/10-reasons-you-might-not-know-you-are-pregnant.htm. Mother's testimony that she had been previously pregnant and knew

Interpreting section 63-7-20 so as to promote legislative intent and escape absurd results, and resolving any ambiguity in favor of a just, equitable, and beneficial operation of the law, we believe the family court erred in finding Mother abused and neglected Child where the evidence shows Mother did not know or have reason to know she was pregnant at the time of the conduct upon which the alleged abuse and/or neglect was based. Under the family court's ruling in this matter, every woman who engages in sexual intercourse and becomes pregnant as a result could be found to have abused and neglected her unborn child based upon any conduct potentially harmful to the unborn child, even though the woman had no knowledge of her pregnancy. We agree with Mother that her conduct, prior to the birth of Child, should not serve as a basis for a finding of abuse or neglect where the evidence shows she had no knowledge and there is no evidence she had reason to know of the pregnancy at the time of the conduct. Based upon the above reasons, we likewise find the family court erred in ordering Mother's placement on the Central Registry pursuant to section 63-7-1940.

B. Admission of Evidence Relating to Drug Tests (Issues 3 & 4)

Mother next contends the family court erred in admitting any evidence related to drug tests conducted at the time of birth and in June 2011, and such evidence could not be considered on the question of whether DSS met its burden of proof. She argues the family court erred in admitting hearsay testimony related to alleged results of drug tests, as well as in admitting alleged results of drug tests without a proper foundation for admission of those results. In regard to evidence concerning the alleged test results at the time of birth, Mother notes DSS did not offer the written report of the drug tests into evidence and failed to offer any evidence concerning the circumstances surrounding the results of those tests. As to the June 2011 alleged drug tests, Mother argues DSS had the two written reports marked for identification, but DSS never sought to admit the reports into evidence and, again, failed to offer any evidence concerning the circumstances surrounding those test results. Mother maintains DSS did not even attempt to lay a proper foundation for

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the symptoms of pregnancy yet her body did not show these indications supports that she did not know she was pregnant. As noted, the credibility of this testimony was not challenged by DSS. Further, as previously noted, there was no evidence presented concerning whether Mother made any effort to determine if she was pregnant before the birth.

any of the drug test evidence, and that she was deprived of the opportunity to challenge the reliability of the drug test evidence. Accordingly, Mother argues all of the drug test evidence was inadmissible and none of it should be considered in reviewing her challenge to the sufficiency of the evidence for a finding of abuse or neglect and for entry on the Central Registry.

DSS does not argue in its brief against Mother's assertion that the drug test evidence was inadmissible. Rather, it argues, though "the family court may have erred in admission of drug test evidence," Mother was not prejudiced by the admission of such evidence. DSS notes the caseworker testified Mother had freely admitted to her illegal drug use prior to Child's birth, and Mother, in her own testimony, admitted to her use of illegal drugs prior to the birth. Thus, DSS maintains there was sufficient evidence regarding Mother's use of illegal drugs during her pregnancy for the court to make a finding of abuse or neglect and for the court to order entry of Mother's name on the Central Registry. In its brief, DSS maintains Mother's admission of her illegal drug use was the basis for the family court's findings in this regard.

We have already determined that Mother's conduct prior to the birth of Child could not serve as a basis for a finding of abuse or neglect or placement on the Central Registry where the evidence shows Mother had no knowledge or reason to know of the pregnancy at the time of the conduct. Thus, accepting DSS's assertion in its brief that the trial court's ruling was based upon Mother's admitted drug use while pregnant, the drug test evidence on Mother and Child at the time of Child's birth is inconsequential and cannot serve as a basis for the family court's finding. Accordingly, we need not reach the issue concerning the admission of drug test evidence.

At oral argument, however, DSS backed away from the stance it took in its brief that the family court's decision was based upon Mother's use of drugs while pregnant. Nonetheless, we find no properly admitted evidence to support a finding of abuse or neglect from any of the subsequent June 2011 testing.

Testimony concerning the June 2011 test result on Child was not admitted, and the family court did not thereafter reverse its ruling concerning the inadmissibility of evidence on Child's June 2011 test result. Thus, the only evidence ultimately

admitted by the family court concerning the June 2011 drug test results related solely to Mother.[12]

To the extent the family court may have relied on evidence concerning Mother's June 2011 drug test results to make its finding of abuse or neglect and ordering Mother's name be placed on the Central Registry, a thorough review of the record convinces us there was no properly admitted evidence to support such a determination.[13] Further, even if properly admitted, the evidence of Mother's June

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[12] Even if it could be argued the trial court admitted, or intended to admit, the June 2011 drug test evidence on Child, we find such admission would have been improper against Mother's timely and consistent objections based on hearsay and foundation. DSS made no attempt to lay any foundation whatsoever for the admission of testimony on the results of these tests. There is no evidence the witnesses had any personal knowledge that would qualify them to testify as to the results or validity of the drug tests, nor is there any indication that such tests results were admissible under any exception to the hearsay rule, such as a business records exception. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Rule 803(6), SCRE (often cited as the business records exception, providing the following is not excluded by the hearsay rule: "Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . ."); *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987) (holding, even where evidence may be admissible under an exception to the hearsay rule, such will not absolve the offering party from the usual requirements of authentication).

[13] As to admission of evidence concerning the drug testing of Mother's hair in June 2011, the family court erred in determining it was admissible based on the judge's finding it went to Mother's credibility. Regardless of DSS's motive in seeking

2011 drug test results would be irrelevant to abuse and neglect of Child, as there was no evidence that such drug use by Mother at that time resulted in any abuse or neglect of Child.

CONCLUSION

We hold the family court erred in finding Mother abused and neglected her unborn Child based upon conduct occurring while Mother did not know or have reason to know she was pregnant. Further, the only evidence admitted by the family court subsequent to Child's birth concerning drug tests related only to Mother; this evidence was improperly admitted based upon Mother's hearsay and foundation objections; and, even if properly admitted, there was no evidence any subsequent drug use by Mother caused abuse or neglect of Child. Accordingly, the family

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admission of the evidence, if the evidence was being admitted to prove that Mother lied about her subsequent drug use, it was being admitted to prove the truth of the matter asserted. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). Further, we do not believe Mother's June 2011 test result necessarily serves to impeach Mother. On cross-examination, Mother was asked if she "[had] used drugs since [Child] has come into [DSS's] custody" to which Mother responded she had only used what had been prescribed by a doctor. Child did not go into DSS's custody until after Child was placed into emergency protective custody on June 30, 2011, after the June drug test. Mother did not, as was argued to the family court, claim she had not used drugs since DSS's involvement with Child, as she was only asked about drug use subsequent to Child being placed in DSS custody. Lastly, the family court addressed the admissibility of evidence of Mother's drug test result on the basis of hearsay, finding that it went to Mother's credibility, but it did not address the objection made by Mother as to the lack of foundation for the evidence and failure of DSS to present evidence concerning the validity of the test results. *See Rich*, 293 S.C. at 173, 359 S.E.2d at 281 (holding, even where evidence may be admissible under an exception to the hearsay rule, such will not absolve the offering party from the usual requirements of authentication).

court's finding of abuse and neglect and ordering placement of Mother's name on the Central Registry is

REVERSED.

GEATHERS, J., concurs. THOMAS, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Henry Jermaine Dukes, Appellant.

Appellate Case No. 2011-196667

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 5148
Heard April 3, 2013 – Filed June 26, 2013

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter III, all of Columbia; and Solicitor Jimmy A. Richardson II, of Conway, for Respondent.

FEW, C.J.: A jury found Henry Dukes guilty of murder for the shooting death of Andrico Gowans. Dukes argues the trial court erred in refusing to suppress an eyewitness's identification of Dukes for two reasons: (1) the pretrial hearing did

not comport with due process because the detective who conducted the identification procedure was unavailable to testify; and (2) the identification procedure was impermissibly suggestive and created a substantial likelihood of misidentification. We affirm.

I. Facts and Procedural History

On the morning of November 2, 2007, Cornelius Ford witnessed Gowans' murder. That afternoon, Ford met with Detective Sean Addison at the Conway Police Department and identified Dukes as the shooter.

Before trial, Dukes asked the court to suppress Ford's out-of-court identification because the identification procedure used was impermissibly suggestive. The trial court conducted a hearing, where the State called Ford to testify to what happened when he made the identification. Ford told the court he went to the police station with his father after the shooting to give a statement. After Ford gave a description of the shooter, Addison suggested Ford look at photographs, "like a photo book," to see if he could identify the person who shot Gowans. When Addison got up from the table to get the photo book, Ford saw other photographs in a file Addison had on the table. Ford identified Dukes from one of the photographs he saw in Addison's file. Ford testified Addison did not present the photos to him or instruct him to choose one.

The State then called Ford's father, Rasheed Muhammad, who was present when Ford made the identification. Muhammad told the court Addison offered to show a book of photographs to Ford, but before that occurred, "[photographs] were put on the table." From those photographs, Ford identified Dukes. Muhammad testified Addison did not suggest which photograph Ford should select.

Dukes presented no witnesses but read an excerpt of Addison's investigative report, in which Addison wrote "the photos were presented to . . . Ford one at a time."[1] Dukes asserted that because Addison's report contradicted Ford's recollection of what happened, "the State [could] not meet its burden" of showing the

[1] Addison's investigative report was not entered into evidence.

identification procedure was not impermissibly suggestive without Addison's testimony.[2]

The trial court ruled it was not "necessary for the court to hear [Addison's] testimony," and denied Dukes' motion, stating:

> It does not appear, even taking into consideration the report of [Addison], that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner. . . . The seeing of the photographs was either done accidently through the looking at a file or in the process that the Court finds was not suggestive in any manner . . . .

At trial, Ford and Muhammad testified to Ford's out-of-court identification of Dukes. Ford also gave an in-court identification. The jury found Dukes guilty of murder, and the court sentenced him to forty-seven years in prison.

II. Identification Evidence

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); *see also Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401, 410 (1972) ("While the phrase ['a very substantial likelihood of irreparable misidentification'] was coined as a standard for determining whether an in-court identification would be admissible . . . , with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.").

[2] Addison was unavailable because he was serving on active military duty in Afghanistan at the time of trial.

Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *Biggers*, 409 U.S. at 198-99, 93 S. Ct. at 381-82, 34 L. Ed. 2d at 410-11; *see also Perry v. New Hampshire*, 132 S. Ct. 716, 721 n.1, 181 L. Ed. 2d 694, 703 n.1 (2012) (stating "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure"); *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (stating the standard for impermissible suggestiveness as whether the police procedures were "unnecessary and unduly suggestive"); *Traylor*, 360 S.C. at 81, 600 S.E.2d at 526 (stating the standard as whether the police procedures were "unduly suggestive"). If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. *See United States v. Sanders*, 708 F.3d 976, 984 (7th Cir. 2013) (citing *Perry* for the proposition that "courts will only consider the second prong if a challenged procedure does not pass muster under the first"). If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382, 34 L. Ed. 2d at 411).

A. The Sufficiency of the Hearing

Dukes argues the suppression hearing conducted by the trial court did not comport with due process because "the State could not meet its burden" of showing the identification procedure was not impermissibly suggestive without Detective Addison's testimony. We hold Addison's absence from the hearing did not violate Dukes' due process rights.

Procedural due process requires "adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008). It does not, however, require any particular form of procedure. *See S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (stating "due process is flexible and calls for such procedural protections as the

particular situation demands" (citation and quotation marks omitted)). Due process also does not require all witnesses to testify. *See United States v. Morsley*, 454 F. App'x 191, 193 (4th Cir. 2011) (stating the constitution "does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses" (citation omitted)). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Wilson*, 352 S.C. at 452, 574 S.E.2d at 734.

Dukes argues he was denied due process because the key witness, the investigating officer, was unavailable to testify. We disagree and hold the trial court afforded Dukes all that due process required in this particular situation. The trial court gave Dukes notice of the hearing and the opportunity to be present. The court also gave him the opportunity to cross-examine the State's witnesses, offer his own evidence, and argue his position. Dukes argued the specific reasons Addison's testimony was essential, but the trial court determined otherwise, specifically stating, "I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case." Thus, the trial court was able to determine from the testimony of the State's witnesses that nothing the police did was suggestive. Finally, this appeal is Dukes' opportunity for judicial review. We find the hearing did not violate Dukes' due process rights.

In *Liverman*, our supreme court addressed the sufficiency of a suppression hearing for identification evidence. The specific issue the court addressed was whether a trial court must conduct a "full" inquiry into the reliability of the evidence when the police procedure is impermissibly suggestive, but the eyewitness knew the accused before the identification procedure was conducted. *See* 398 S.C. at 134, 727 S.E.2d at 423 ("The case before us involves the intersection of a suggestive police show-up identification procedure and an eyewitness who knows the accused."). Relying on *Perry*, the court held that "pretrial judicial review [is necessary] when an identification is infected by improper police influence." 398 S.C. at 140, 727 S.E.2d at 427. Thus, the court held a suppression hearing is required to determine the reliability of the suggestive identification even though the eyewitness previously knew the defendant. *Id.* On the facts before it, the *Liverman* court "decline[d] to hold that the pretrial hearing fully comported with due process requirements" but found that any error was harmless. 398 S.C. at 141, 727 S.E.2d at 427.

To explain our holding that the hearing in this case did comport with due process, it is important to note how this case is different from *Liverman*. The police procedure in *Liverman* was the classic show-up lineup, 398 S.C. at 133-35, 727 S.E.2d at 423-24, which our courts have held are impermissibly suggestive in most circumstances. *See State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (stating "[s]ingle person show-ups are particularly disfavored in the law," and holding on facts very similar to *Liverman* that "it is patent the show-up procedure used was unduly suggestive"). *Liverman* arose, therefore, under the second prong of *Biggers*—reliability. We decide this appeal under the first prong—suggestiveness. Under *Perry* and *Liverman*, judicial inquiry into reliability is required *every* time the police orchestrate a suggestive identification procedure. Under *Perry* and cases like *Sanders*, however, judicial inquiry into reliability is never required unless (1) the police (2) orchestrated an identification procedure (3) that was impermissibly suggestive. *Perry* and *Sanders* remove this case from the ambit of *Liverman* because the trial court here found there was no impermissibly suggestive police conduct.

This does not mean, however, that Dukes was not entitled to a hearing that provided all the elements of due process. It does mean that the sufficiency of the hearing is governed by traditional concepts of procedural due process, not by the due-process-based duty of the court to inquire into the reliability of evidence upon which *Liverman* was decided. *Liverman*, 398 S.C. at 140, 727 S.E.2d at 427 (noting *Perry* "reemphasized the [due-process-based] necessity of pretrial judicial review when an identification is infected by improper police influence"). In this case, the trial court was not able to determine exactly what Addison did. However, the court was able to determine that either Ford saw the photographs accidentally or Addison showed them to him one at a time. The court then determined that neither of those alternatives involved suggestive police conduct. Our holding that Addison's absence from the hearing did not deprive Dukes of due process, especially given the alternative nature of the trial court's ruling, is dependent on the fact that the issue here is suggestiveness—not reliability. We do not address whether a key witness's presence would have been necessary for the court to fulfill its duty to inquire into reliability if the court had determined the police conduct was unnecessarily suggestive. *See* 398 S.C. at 140, 727 S.E.2d at 427 ("'The fallibility of eyewitness evidence does not, *without the taint of improper state conduct*, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.'" (quoting *Perry*, 132 S. Ct. at 728, 181 L. Ed. 2d at 711)).

B. The Suggestiveness of the Identification Procedure

Dukes also argues the trial court erred in finding the out-of-court identification procedure used by the police was not unnecessarily suggestive. He initially frames his argument in terms of the burden of proof, contending that because Addison was unavailable to testify, the State could not meet its burden.

We decline to resolve this issue in terms of whether the trial court properly applied the burden of proof. First, our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us,[3] has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive. *See United States v. Saunders*, 501 F.3d 384, 389 (4th Cir. 2007) ("[T]he defendant must show that the photo identification procedure was impermissibly suggestive.").[4] Second, it appears the trial court did place the

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[3] *State v. Ford Motor Co.*, 208 S.C. 379, 390, 38 S.E.2d 242, 247 (1946) (stating "federal [cases] . . . are controlling of the meaning and effect of the Federal Constitution").

[4] *Accord Perry*, 132 S. Ct. at 733, 181 L. Ed. 2d at 176 (Sotomayor, J., dissenting) ("[T]he defendant has the burden of showing that the eyewitness identification was derived through impermissibly suggestive means." (citation and internal quotation marks omitted)); *United States v. Martin*, 391 F.3d 949, 952 (8th Cir. 2004) ("[The defendant] must first establish that the photographic spreads shown to [the witnesses] were impermissibly suggestive." (quotations omitted)); *United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003) ("[T]he defendant has the burden of proving that the identification procedure was impermissibly suggestive."); *English v. Cody*, 241 F.3d 1279, 1282 (10th Cir. 2001) ("[A] defendant has the initial burden of proving that the identification procedure was impermissibly suggestive."); *United States v. Hill*, 967 F.2d 226, 230 (6th Cir. 1992) ("[A] defendant bears the burden of proving the identification procedure was impermissibly suggestive."); *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002) ("[A] court must determine whether the photo array was impermissibly suggestive, which the defendant has the burden of proving."); *State v. Fullwood*, 476 A.2d 550, 554 (Conn. 1984) ("A defendant . . . bears the initial burden of proving that the identification resulted from an unconstitutional procedure."); *State v. Araki*, 923

burden of proof on the State. At the beginning of the hearing, Dukes' counsel stated, "The State can't prove its burden and it's suggestive." The State then put up its evidence. Under these circumstances, the question of whether the burden of proof was properly applied makes no difference because the trial court applied it in the manner most beneficial to Dukes.

Therefore, we review the trial court's ruling—that the procedure used was not suggestive—to determine whether it is supported by the evidence. Ford and Muhammad testified to how Ford identified Dukes and particularly to Addison's conduct during the procedure. Dukes presented no witnesses but described the contents of Addison's investigative report, which contradicted Ford and Muhammad's testimony. Dukes argues this evidentiary discrepancy demonstrates there is insufficient evidence for the court to determine whether the procedure was impermissibly suggestive. We disagree. While Addison's testimony would have

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P.2d 891, 901 (Haw. 1996) (stating the defendant has the burden to prove the pretrial identification procedure was "impermissibly suggestive" (citation omitted)); *State v. Kelly*, 752 A.2d 188, 192 (Me. 2000) ("Initially the defendant must prove . . . the identification procedure was suggestive."); *Commonwealth v. Correia*, 407 N.E.2d 1216, 1225 (Mass. 1980) (stating the defendant has the burden of proving the procedures were "unnecessarily suggestive"); *State v. LaRose*, 497 A.2d 1224, 1229 (N.H. 1985) (stating the defendant has the initial burden of proving "the identification procedure was impermissibly or unnecessarily suggestive"); *State v. Norrid*, 611 N.W.2d 866, 871 (N.D. 2000) ("The defendant has the burden of proving the identification procedure is impermissibly suggestive . . . ."); *State v. Mosley*, 307 N.W.2d 200, 210 (Wis. 1981) ("The first inquiry is whether the out-of-court photographic identification was impermissibly suggestive, as to which the defendant has the burden."); 22A C.J.S. *Criminal Law* § 1104 (2006) ("[T]he defendant has the initial burden to show an improper or unreliable procedure or identification . . . ."). *C.f. People v. Jackson*, 780 N.E.2d 162, 165 (N.Y. 2002) ("Although the [State] ha[s] the initial burden of establishing the reasonableness of the police conduct in a pretrial identification procedure, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive."). *But see Commonwealth v. Moore*, 633 A.2d 1119, 1125 (Pa. 1993) (placing on the State "the burden of establishing that any identification testimony to be offered at trial is free from taint of initial illegality," though not clearly on constitutional grounds).

been helpful, the court found the testimony of Ford and Muhammad sufficient for it to determine the procedure was not suggestive. In doing so, the court considered the discrepancy in the evidence:

> It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner.

Notwithstanding the existence of contradictory evidence, the trial court had the responsibility to determine whether the identification procedure was suggestive. We find evidence to support the trial court's decision, and thus the court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. *See Liverman*, 398 S.C. at 138, 727 S.E.2d at 425 (stating "the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion").

Because we affirm the court's ruling that the identification procedure was not impermissibly suggestive, we need not consider the trial court's determination of the second prong of *Biggers*. *See Sanders*, 708 F.3d at 984.

III. Conclusion

The trial court's ruling is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marshall McGaha, Appellant.

Appellate Case No. 2011-197266

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5149
Heard May 8, 2013 – Filed June 26, 2013

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Respondent.

FEW, C.J.: Marshall McGaha was tried for sexually abusing two young children. A jury convicted him of criminal sexual conduct with a minor in the first degree and lewd act upon a child as to each victim. On appeal, he argues the trial court erred in trying the charges related to both victims in the same trial. We affirm.

I. Facts and Procedural History

The two victims are sisters, Dana and Elaina.[1] They lived with their grandmother, along with their great-grandmother, their older sister, and McGaha. The grandmother allowed McGaha, who was not a member of the family, to live in their home.

Dana testified that on multiple occasions, McGaha picked her up at night out of the bed she shared with her grandmother and took her to his bed in the play room, where he touched her "private" with his "wiener." He also put her hand on his "wiener," and, in her words, "put his wiener in my mouth and started peeing." He would then wipe off Dana's mouth with a sock. McGaha told her not to tell anyone.

Elaina also testified that on multiple occasions, McGaha picked her up at night out of the bed she shared with her great-grandmother and took her to the play room. While there, he would touch her "pocketbook"[2] with his hands. McGaha also made Elaina put her hands on his "front part" and hold it. After Elaina was unable to speak in response to several questions about "what would happen when he made you hold it," she testified, "He touched me with his front part in my mouth" and "made me suck it." She said McGaha "peed" in her mouth, and she would spit it out. McGaha told her not to tell anyone.

One weekend the children were visiting Jessica, a thirty-year-old relative whom they call their aunt. They approached Jessica together, and each one told her what McGaha had been doing to them in the play room. Jessica immediately drove them home and called the police. Investigator Heather Hubert and several other officers responded to the call. Hubert spoke with both children, their sister, their grandmother, their great-grandmother, and Jessica. Both children told Hubert what McGaha had done to them in the play room. Dana, who was eight, said she had

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[1] These are not the victims' real names. To protect the victims' privacy, we are using names that have the same number of syllables and, like their real names, rhyme with each other.

[2] The assistant solicitor had Elaina mark on a diagram of the body of a girl Elaina's age to demonstrate to the jury what she meant by "pocketbook."

been assaulted since age seven. Elaina, who was seven, said she had been assaulted since age six. During a search of the home, officer Doug Smith found a pair of girl's underwear between the pillows on McGaha's bed.

The State charged McGaha with four crimes in four separate indictments—criminal sexual conduct and lewd act as to each victim. The State made a motion to try the four charges together, and McGaha asked for separate trials as to each victim. In a pre-trial hearing, the trial court granted the State's motion.

At trial, the State presented testimony from Dana, Elaina, the grandmother, Jessica, Smith, Hubert, and a pediatrician who physically examined the children for signs of sexual abuse. The jury also heard testimony from a forensic interviewer who interviewed each of them, and the State played video recordings of the interviews for the jury. McGaha testified he never touched the victims. He stated he had Hepatitis B and if he had molested them, he would have infected them.

The jury found McGaha guilty of all charges. The trial court sentenced him to life in prison on each criminal sexual conduct conviction and fifteen years, consecutive, on each lewd act conviction.[3]

II. Whether the Trial Court Erred in Trying the Charges Together

Our supreme court has held that a trial court may try separate charges together "where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no [substantive] right of the defendant has been prejudiced." *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d

[3] McGaha was convicted of criminal sexual conduct with a minor in the first degree under South Carolina Code subsection 16-3-655(A)(1) (Supp. 2012), which required he "must be imprisoned for a mandatory minimum of twenty-five years . . . or must be imprisoned for life." S.C. Code Ann. § 16-3-655(D)(1) (Supp. 2012) (formerly § 16-3-655(C)(1)). At the time of McGaha's crimes, lewd act upon a child carried no minimum sentence and a maximum of fifteen years. S.C. Code Ann. § 16-15-140 (2003) (repealed 2012). The crime that was lewd act is now classified as criminal sexual conduct with a minor in the third degree. S.C. Code Ann. § 16-3-655(C) (Supp. 2012).

267, 272 (2002);[4] *see also State v. Cutro*, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (describing the fourth element as "the defendant's substantive rights are not prejudiced"). The trial court has discretion in deciding whether to try charges together, and its decision will be reversed only if there is no evidence to support it or it is controlled by an error of law. *Harris*, 351 S.C. at 652, 572 S.E.2d at 272; *State v. Rice*, 368 S.C. 610, 613, 629 S.E.2d 393, 394-95 (Ct. App. 2006).

In this case, the trial court applied the test from *Harris* and made individual findings as to each element. Where appropriate, the trial court explained the factual basis for the finding. We find the trial court applied the law correctly, and there is a factual basis in the record to support each finding. Therefore, the trial court acted within its discretion to try the charges together.

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[4] In other cases, the supreme court has articulated the test differently. *See State v. Cutro*, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) ("[W]hen offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced." (footnote omitted)); *accord State v. Smith*, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996). In both *Cutro* and *Smith*, however, the supreme court's decision turned only on the fourth element from *Harris*—whether the joint trial prejudiced the defendant. It was unnecessary in those cases, therefore, for the court to consider the first three elements. In other cases, our appellate courts have reviewed trial courts' decisions to try charges together using the test as stated in *Harris*. *See, e.g.*, *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996); *City of Greenville v. Chapman*, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947); *State v. Harry*, 321 S.C. 273, 278, 468 S.E.2d 76, 79 (Ct. App. 1996); *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985). Both versions of the test have a common origin in *Chapman*. *Compare Cutro*, 365 S.C. at 374, 618 S.E.2d at 894 (citing *McCrary v. State*, 249 S.C. 14, 152 S.E.2d 235 (1967), for the test); *Smith*, 322 S.C. at 109, 470 S.E.2d at 365 (same); *and McCrary*, 249 S.C. at 36, 152 S.E.2d at 246 (citing *Chapman*), *with Harris*, 351 S.C. at 652, 572 S.E.2d at 272 (citing *Tucker*); *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265 (citing *Tate*); and *Tate*, 286 S.C. at 464, 334 S.E.2d at 290 (citing *Chapman*).

A. Single Chain of Circumstances

The trial court properly began its analysis of this element by describing the chain of circumstances—"a series of connected transactions that allege and involve sexual abuse of the victims who had the same relationship to the defendant. . . . [T]he place where the abuse occurred was the same . . . ." The evidence supports the trial court's finding that the charges all arose from the circumstances the court described. McGaha gained access to the children because the grandmother allowed him to live in their play room. McGaha used this access on multiple occasions to take each child from her bed to the play room, where he molested her. Dana was eight and Elaina was seven when the abuse ended. The time periods of the abuse overlapped almost precisely—McGaha abused Dana between March 2009 and August 2010 and Elaina between May 2009 and August 2010. Their similar ages and the similar duration of the abuse supports the trial court's emphasis on its finding that they "had the same relationship to" McGaha. The molestation of each child during the same time period and in the same location, accomplished through the same access to them, established a sufficiently connected chain of circumstances to satisfy this element.

B. Proven by the Same Evidence

The trial court found the charges would be proven "by the same evidence through the same witnesses." The record supports the trial court's finding.

The jury heard from several witnesses who provided testimony and other evidence that proved the charges as to both children. The grandmother testified she had custody of them for "about five years" at the time of trial, which occurred one year after the abuse ended. She testified she had known McGaha "between five and six years" and explained she allowed him to live in her home because he was a friend of her daughter and had nowhere else to stay. She also testified McGaha "was a pretty big help around the house," and at first, he got along "wonderful" with the children. She explained, "He took them places. He done things with them."

Jessica testified about her relationship with the children and its role in their disclosing the sexual abuse to her. She described them as "very, very sick kids" because they suffer from a disease that makes them "very slow mentally." She explained that every six weeks, she takes them to Augusta, Georgia, to see a specialist. Her testimony indicated she is very close to them. She began her

description of the weekend they told her what McGaha had been doing to them by describing a conversation she had with them:

> I . . . went and picked them up on a Friday. I get them every chance that I can. And I was giving each of them an individual bath, having a woman-to-woman talk with them, because I feel like that's part of my responsibility. And, as I was bathing and caring for them and giving them a heart-to-heart talk, I just threw in this statement, "y'all are little girls, and if anybody ever does anything to you, whether it be a girl or a boy, you need to tell somebody. They may tell you not to say nothing, but you need to tell somebody."

Jessica then testified, "The very next morning, the two of them came to me . . . on my front porch." She then described what they told her about McGaha abusing them. She testified she "immediately" packed them up, took them home, and called the police. When the police arrived at their house, McGaha was asleep. Jessica testified that when he woke up "about two hours later, . . . [h]e tried to go out the back door." Jessica heard McGaha say as he was trying to leave, "Oh, shoot. The police is here. I've got to get out of here."

Other witnesses also gave testimony that proved the charges related to both children. Officer Smith testified that during his investigation of the house, he found a pair of girl's underwear between the pillows of McGaha's bed. The underwear was admitted into evidence at trial. Investigator Hubert testified she interviewed the children and some of their family members, and after the children told her they had been sexually assaulted, she obtained a warrant for McGaha's arrest and arranged for physical examinations and forensic interviews. The pediatrician testified she performed "head to toe" physical examinations of both Dana and Elaina and tested them for sexually transmitted diseases, and the test results were negative. The pediatrician also testified during the State's rebuttal, in response to McGaha's testimony that he would have given the children Hepatitis B if he had molested them, that because the children were up-to-date on their vaccinations they had "almost no risk at all" of getting the disease. Finally, to establish the foundation for admitting the forensic interviews into evidence, the forensic interviewer testified about what forensic interviewing is, her training in it, and the procedures she followed when she interviewed the children.

Thus, a substantial portion of the testimony the State presented at trial to prove the crimes against one child was the same evidence it would have used to prove the crimes against the other. Even though some of the evidence related to only one child, we find the evidence described above supports the trial court's determination that the separate charges would be proven by the same evidence. *See State v. Caldwell*, 378 S.C. 268, 278, 662 S.E.2d 474, 479-80 (Ct. App. 2008) (finding the same-evidence element met because, although the charges involved three separate children, which therefore required the State to present some individual evidence as to each of the charges, "much of the evidence produced at trial pertained to [all] of the separate charges").

C. Same General Nature

The trial court correctly found that charges for criminal sexual conduct with a minor in the first degree and lewd act upon a child are of the same general nature. *See State v. Grace*, 350 S.C. 19, 23-24, 564 S.E.2d 331, 333 (Ct. App. 2002) (finding three charges of criminal sexual conduct with a minor and one charge of lewd act upon a child were of the same general nature because they "were all sexual misconduct crimes"); *State v. Deal*, 319 S.C. 49, 50-51, 52, 459 S.E.2d 93, 94, 95 (Ct. App. 1995) (finding charges of first-degree criminal sexual assault, second-degree criminal sexual conduct, assault with intent to commit criminal sexual assault, assault and battery of a high and aggravated nature, and exposing another to HIV were of the same general nature). The issue McGaha raises, however, is not whether charges of criminal sexual conduct and lewd act can be tried together. Rather, he argues the cases for the two separate victims were not of the same general nature. In this respect, the charges in the two cases are not merely of the same general nature—they are identical.

D. Prejudice

McGaha argues his substantive rights were prejudiced in a joint trial because evidence of the multiple charges improperly showed his propensity to commit similar crimes. The trial court found no substantive rights would be prejudiced. We agree.

In cases where the defendant argues prejudice from the admission of evidence of the other charges tried in the same case, our courts have analyzed whether

evidence of one or more charges would be admissible in a trial involving only the other charge.[5] In this case, part of the State's argument for trying the charges together was that in separate trials, evidence of McGaha's molestation of the other child would be admissible under Rule 404(b), SCRE, as proof of a common scheme or plan. For the evidence to be admissible in separate trials for the purpose of showing a common scheme or plan, the State would have to establish a logical connection between the crimes by showing a "close degree of similarity." *State v. Wallace*, 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009); *see also* 384 S.C. at 434 n.5, 683 S.E.2d at 278 n.5 (stating the requirement of a connection between the crime charged and the evidence of the other crime "is simply a requirement that the two be factually similar"). In making such a similarity determination, a court should consider "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; [] (5) the manner of the

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[5] *See Cutro*, 365 S.C. at 376, 618 S.E.2d at 895 (finding defendant tried for two counts of homicide by child abuse and one count of assault and battery was not prejudiced because the evidence met the motive and common scheme or plan exceptions in Rule 404(b), SCRE); *Smith*, 322 S.C. at 110, 470 S.E.2d at 366 (finding defendant charged with homicide by child abuse and assault and battery of a high and aggravated nature (ABHAN) was prejudiced by joint trial because evidence of the ABHAN would not have been admissible in the homicide trial); *Deal*, 319 S.C. at 52-53, 459 S.E.2d at 95-96 (finding defendant was not prejudiced by trying charge of exposing another to HIV together with charges of criminal sexual conduct and assault and battery because evidence defendant had HIV was admissible as to the other charges). Federal courts have analyzed such arguments the same way. *See, e.g., United States v. Lane*, 474 U.S. 438, 450, 106 S. Ct. 725, 732, 88 L. Ed. 2d 814, 826 (1986) (finding defendants were not prejudiced by trial of one charge together with several other charges, in part because evidence of the one charge "would likely have been admissible" in a trial of the other charges under Rule 404(b), FRE); *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976) (stating "[o]ne inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another" and "where evidence of one crime is admissible at a separate trial for another, it follows that a defendant will not suffer any additional prejudice if the two offenses are tried together").

occurrence, for example, the type of sexual battery," and other factors that may be relevant in the case. 384 S.C. at 433-34, 683 S.E.2d at 278.

The record demonstrates that evidence of McGaha's crimes against each victim would be admissible in a separate trial as to the other. As we discussed above, McGaha used his access to the children, gained by living in their play room, to commit each crime. In addition, the children are approximately a year apart in age, and because they were abused in the same time frame, they were roughly the same age when the abuse occurred. Each child described similar acts that occurred in the same place: McGaha picked them up out of bed, took them into the play room, made them touch his penis with their hands, put his penis in their mouths, and ejaculated in their mouths. Dana testified McGaha would wipe off her mouth with a sock, and in her forensic interview, Elaina said McGaha would wipe off her mouth with the covers of his bed. Finally, they both testified McGaha told them not to tell anyone. This evidence establishes that McGaha's abuse of each child would likely be admitted into evidence in a separate trial of the other case.

III. Conclusion

The trial court did not abuse its discretion in granting the State's motion for a joint trial on all four charges. Therefore, the decision of the trial court is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Christopher Murray, Appellant.

Appellate Case No. 2011-192046

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5150
Heard May 7, 2013 – Filed June 26, 2013

AFFIRMED

Appellate Defender Breen Richard Stevens, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor William Walter Wilkins III, of Greenville, for Respondent.

FEW, C.J.: A jury found Christopher Murray guilty of murder for the shooting death of James Gibson. Murray argues the trial court erred by not charging the jury on the lesser-included offense of involuntary manslaughter. We affirm the

trial court's decision not to charge involuntary manslaughter because there is no evidence the shooting was unintentional.

I. Factual and Procedural History

On the evening of January 18, 2010, Murray and his girlfriend Faye Brissey drove to Gibson's residence. According to Faye's testimony, she remained in the car while Murray walked to Gibson's front door and knocked. When Gibson opened the door, Murray went inside. "Not even a second" after he entered, Faye heard three gun shots fired "back to back."[1] Murray fled the residence, got back into the car with Faye, and sped away. He told Faye a fight occurred inside the residence and that he killed Gibson.

The State introduced a written statement from Faye's cousin, Matt Brissey, who did not witness the incident but based the statement on what Murray told him afterward:

> [Murray] knocked on the door and [Gibson] opened the door and hit [Murray] in the mouth.[2] And [Murray] jerked the door open and tried to kick [Gibson]. [Gibson] grabbed [Murray]'s foot and pulled him in, and then they started wrestling in the living room. And [the] first shot hit the wall, and then the second one hit the ceiling, and the third one he put the gun . . . to his chest and shot him.

Matt also testified, and during his testimony stated Murray told him "there was a struggle, that he was trying to shoot [Gibson]. He shot one in his wall, one [in] the couch and . . . he rolled [Gibson] on his back when they was wrestling and shot him in his chest." An investigation by police confirmed there was a bullet hole in the living room floor beneath the couch and another in the wall near the ceiling.

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[1] Gibson's neighbor corroborated Faye's story and testified the gun shots "were in correct measurement from each other. They were exact. . . . Not like firecrackers . . . [that] go off at different intervals. They were exactly pop, pop, pop."

[2] Matt testified at trial that Gibson did not strike Murray, but instead the door hit Murray in the mouth when Gibson opened it.

Murray did not testify at trial, but his videotaped interview with two police detectives was shown to the jury. In this interview, Murray stated that after Gibson attacked him in the doorway, a fight took place inside the residence. Murray claimed the gun was on his waist when he arrived, and he did not "remember taking the gun off [his] waist." He stated, "The only thing I can think of that might have happened right now is when I was tussling, it fell out." Murray went on to explain,

> I think the gun fell and that's how I got it in my hand. So it probably went off once or twice accidental. And that's whenever I pulled it on [Gibson].

The video showed one of the detectives prompting Murray to "show [him] what happened." Murray then acted out the fight with one of the detectives, who, following Murray's direction, portrayed the actions of Gibson. The demonstration showed Murray and Gibson standing, with Gibson "leaned over [Murray]," and Murray bent under Gibson's body with his head against Gibson's chest. At that point in the demonstration, Murray said, "I think [the gun] dropped on the floor . . . while he was over me." Murray demonstrated the gun falling to the floor between them, and then explained, "I went down and got it to keep him from getting to it." Murray gave no indication that Gibson also reached for the gun. As Murray stood up from the demonstration to speak directly to the detective, he said "and from there it went off probably two times . . . . It just went off, and that's whenever I pulled it up." Murray then demonstrated the manner in which he "pulled [the gun] up" to Gibson's chest and explained, "[Gibson] was still on me." When the detective told Murray to "put [the gun] wherever you think it was" when he shot Gibson, Murray held his hand in the shape of a gun—pointed at the detective's chest—and said, "somewhere between his waist and up in here," demonstrating Gibson's upper chest.

Murray asked the court to instruct the jury on self-defense and voluntary manslaughter—which the court charged—and also involuntary manslaughter. Murray argued the shooting was not intentional because the gun fired during a struggle over the weapon, and the gunshots were accidental because they were "all over the place." In denying the request to charge involuntary manslaughter, the court stated, "I don't remember any testimony -- there was testimony, as I can remember, about a struggle going on, but I never really heard anything about a

fight over a weapon." The jury found Murray guilty of murder, and the court sentenced him to forty years in prison.

II. Involuntary Manslaughter

Involuntary manslaughter is the unintentional killing of another without malice while (1) engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) engaged in a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). To warrant a jury charge on involuntary manslaughter, there must be some evidence the killing was unintentional. *See Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (stating "involuntary manslaughter is at its core an unintentional killing"); *State v. Gibson*, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) (stating "the essence of involuntary manslaughter is the involuntary nature of the killing"). In this case, the evidence conclusively demonstrates Murray killed Gibson intentionally.

In his interview, Murray claimed the gun "probably went off once or twice accidental." On appeal, he argues this is supported by the random location of the bullet holes—one in the floor beneath the couch and another in the wall near the ceiling. Even if the first two shots were unintentional, however, there is no evidence Murray did not intend to fire the third shot. In fact, Murray stated in his interview that after he grabbed the gun and the first two shots discharged, he "pulled [the gun] on [Gibson]" and fired the third shot, which hit Gibson "[a]nywhere from his waist up to about his solarplex." Murray's statements to Matt also demonstrate Murray intentionally fired the third shot: "[The] first shot hit the wall, and then the second one hit the ceiling, and the third one [I] put the gun . . . to his chest and shot him." Thus, even if a jury could reasonably conclude Murray accidentally fired the first two shots, there is no evidence the third shot, resulting from Murray "put[ting] the gun . . . to [Gibson's] chest" and shooting, was unintentional. Because there is no evidence the killing was unintentional, the trial court correctly refused to charge involuntary manslaughter. *See State v. Tucker*, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996) (holding involuntary manslaughter charge improper because "[e]ven if the first shooting was unintentional, the same cannot be said of the second"); *State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585 (1982) (holding involuntary manslaughter charge not warranted "when at least

one of the two shots was fired deliberately"), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Murray argues, however, there is evidence Gibson was accidentally shot during a struggle for control of the gun. Murray cites *State v. Light*, 378 S.C. 641, 664 S.E.2d 465 (2008), and *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (2008) for the proposition that "evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." 378 S.C. at 125, 662 S.E.2d at 412. Like this case, however, *Light* and *Tisdale* turn on the existence or non-existence of evidence of an unintentional killing. In those cases, and in other cases like them, our courts held a struggle over a gun warrants a charge on involuntary manslaughter because, on the facts before them, the finding that such a struggle occurred is evidence the shooting was unintentional. *See Light*, 378 S.C. at 646, 648-49, 664 S.E.2d at 467, 468-69 (holding involuntary manslaughter charge appropriate where defendant attempted to take gun from victim, and gun "went off" immediately after defendant "jerked it away from [the victim]"); *Tisdale*, 378 S.C. at 124, 126, 662 S.E.2d at 412 (holding involuntary manslaughter charge warranted where defendant and victim fought for gun, and it "went off" while still in victim's hands). For example, in *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 486 (Ct. App. 2010), the victim pulled a gun on the defendant. In response, the defendant pushed the victim, causing the gun to fall to the ground. *Id.* Both men reached for the gun, but the defendant grabbed it first and picked it up. *Id.* When he did, the gun fired, killing the victim. *Id.* The defendant claimed he did not "even remember the gun" at the time it discharged. *Id.* This court held the defendant was entitled to a charge of involuntary manslaughter because on those facts the struggle for control of the gun was evidence that the defendant did not intentionally pull the trigger. *Id.*

In this case, however, there is no evidence the struggle was for control of the gun. Murray's gun was in his waistband when he arrived, but there is no evidence Gibson knew Murray had it. Although Murray stated he "got [the gun] to keep [Gibson] from getting to it," there is no evidence Gibson knew the gun had fallen, much less that Gibson also tried to grab it. This case is distinguishable from *Light*, *Tisdale*, and *Brayboy*, therefore, because the facts provide no basis upon which a jury could find the third shot was unintentionally fired during a struggle over the gun. In addition, Murray admitted he "pulled [the gun] on

[Gibson]" and fired the third shot intentionally.[3] On these facts, we hold the trial court correctly refused to charge involuntary manslaughter.

III. Conclusion

For the reasons set forth above, the trial court's refusal to charge involuntary manslaughter is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

[3] *See also Douglas*, 332 S.C. at 74, 504 S.E.2d at 310-11 (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd); *State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366-67 (1996) (holding defendant not entitled to charge on involuntary manslaughter because defendant admitted intentionally shooting the gun recklessly in self-defense); *Gibson*, 390 S.C. at 358, 701 S.E.2d at 772 (holding trial court properly refused to charge on involuntary manslaughter because defendant admitted he intentionally fired his weapon); *State v. Morris*, 307 S.C. 480, 484, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (holding involuntary manslaughter charge not warranted because evidence showed an intentional shooting).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daisy Wallace Simpson, Appellant/Respondent,

v.

William Robert Simpson, individually and as shareholder/member of Simpson Farms, L.L.C. and William R. Simpson, Jr., as shareholder/member of Simpson Farms, L.L.C., Respondents/Appellants.

Appellate Case No. 2011-196348

Appeal From Clarendon County
Gordon B. Jenkinson, Family Court Judge

Opinion No. 5151
Heard December 12, 2012 – Filed June 26, 2013

REVERSED AND REMANDED

James T. McLaren and C. Dixon Lee, both of McLaren & Lee; and Carrie Ann Warner, of Warner, Payne, & Black, L.L.P., all of Columbia, for Appellant/Respondent.

Reid B. Smith, of Bird & Smith, P.A., of Columbia, for Respondents/Appellants.

GEATHERS, J.: This is a cross-appeal from the family court's order that modified the division of property in the parties' decree of divorce. Daisy Wallace Simpson (Wife) argues the family court committed error by modifying the division

of property in the decree and failing to award her attorney's fees and expenses. William R. Simpson, Sr. (Husband) and William R. Simpson, Jr. (Son) also appeal, arguing the family court erred in: (1) modifying the decree because it did not have subject matter jurisdiction; (2) disregarding the law of the case; (3) finding the decree was ambiguous and, consequently, modifying the decree in an effort to ascertain the intent of the trial judge; (4) modifying the decree when Husband, Son, and the LLC had complied with the terms of the decree; (5) its reapportionment of the marital property; and (6) failing to make specific findings of fact and conclusions of law. Husband and Son also contend that Wife is judicially estopped from demanding a cash sum award or that the LLC transfer real estate to her. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 1968. During the course of the marriage, Husband became a successful farmer and real estate investor. In April 2000, Husband and Son signed a limited liability company operating agreement and Husband began to transfer substantial property acquired during the marriage into Simpson Farms, L.L.C. (the LLC). One month later, Wife became aware of these transfers of property into the LLC.

In March 2003, Wife filed an action for divorce, naming Husband, Son, and the LLC as parties. In her complaint, Wife requested, among other relief, an equitable division of the marital assets, including the property that Husband transferred into the LLC. Most of the trial concerned the identity and value of Husband's vast property holdings.

On December 31, 2004, Husband and Wife were divorced by decree of the family court (the Final Decree). In the Final Decree, the family court found that each of Husband's individually owned property holdings was marital property. The family court further found "the transfer of marital property into the LLC was effective as to Son, and Husband should be charged with only 50% of the value of the property held by the LLC." Additionally, the family court identified and valued the marital property that Husband owned individually and as a member of the LLC.

Based on its identification of the marital assets, the family court awarded Wife 34% of the marital estate, valued at $784,055. In order to effect the equitable division, the family court ordered Husband to transfer to Wife each of the seven

properties it found Husband owned individually.[1] By a subsequent order, the family court awarded Wife $85,000 in attorney's fees and costs. Husband appealed the equitable division of the marital property in the Final Decree. Wife appealed the order regarding attorney's fees and costs. Neither Son nor the LLC appealed.

This matter initially came before this court in *Simpson v. Simpson*, Unpublished Opinion No. 2007-UP-147 (S.C. Ct. App. filed April 4, 2007), *cert. denied*, Feb. 21, 2008 (*Simpson I*). Therein, Husband argued the family court erred in awarding to Wife certain pieces of real property that were owned by the LLC. *Simpson I.* This court found that Husband's argument was not preserved for appellate review.[2] *Id.* Additionally, this court stated that, even if the issue had been preserved, Husband failed to present credible evidence to support his contention that the property had been transferred to the LLC. *Id.* Accordingly, this court held, "the property awarded to [Wife] was individually owned by [Husband], and was *not* property owned by the LLC." *Id.* (emphasis added). As to Wife's appeal, this court remanded the issues of attorney's fees and costs to the family court. *Id.* Husband subsequently filed a Petition for Writ of Certiorari with our supreme court, which was denied on February 21, 2008.

Following *Simpson I*, Wife filed a contempt action, alleging Husband and Son were in contempt for failing to transfer the funds and properties awarded to her in the Final Decree.[3] Thereafter, several contempt hearings were held before another

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[1] The Final Decree did not order Son or the LLC to take part in the transfer of property to Wife.

[2] In *Simpson I*, this court held that the issue was not preserved because Husband did not raise it to the family court and the family court dismissed his subsequent Rule 59(e) motion. This court also noted that Husband failed to raise the issue in his Rule 59(e) motion.

[3] Prior to the hearing on Wife's motion, Van Mark Stone and Paul Terry Stone (collectively, the Stones) filed a *lis pendens* on the House and 16 acres. The Stones subsequently brought a declaratory judgment action against the LLC, Husband, Son, and Wife. The Stones' action sought to quiet title to a 3.5 acre portion of the House and 16 acres, including the house and three acres surrounding the house. The parties eventually settled the quiet title action with the Stones. As a part of the settlement, Wife signed a consent order, acknowledging that Husband did not own the house and surrounding three acres.

family court judge.[4] Throughout the hearings, Husband and Son maintained that Husband did not have the legal ability to transfer complete interest in three of the seven properties awarded to Wife in the decree—the 161.1 acre tract, the 133.2 acre tract, and the House and 16 acres (collectively, the subject properties)—because the properties were titled in the name of the LLC.[5] Additionally, Son testified that as a member of the LLC he would not consent to transferring the subject properties to Wife.

After the contempt hearings, the family court issued a contempt order on May 28, 2010, finding Husband was not in contempt because the LLC was the titled owner of the subject properties. Consequently, the family court denied Wife's request for attorney's fees regarding the contempt action. On June 7, 2010, Wife filed a motion to reconsider, arguing the family court erred in finding Husband was not the titled owner of the subject properties. Wife further argued the contempt order would result in her receiving less than her percentage share of the marital assets. In response to Wife's motion, the family court issued an order on March 18, 2011, reapportioning the marital property. Subsequently, Husband and Son individually filed motions for reconsideration with the family court, which were both denied. This cross-appeal followed.

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[4] At the second contempt hearing, Husband informed the family court that he had tendered quitclaim deeds to Wife conveying his individual interest for each of the seven properties. He also stated that Wife had rejected the quitclaim deeds and insisted that Husband provide her with general warranty deeds to the properties. Wife later testified that she rejected all of the quitclaim deeds, except one, because they gave her less than her percentage share of the marital assets. She explained that she accepted the quitclaim for the 6.7 acre tract, in order to satisfy the parties' daughter, Charley Simpson (Daughter). She testified that she had accepted the quitclaim deed because the family court had inadvertently included the 6.7 acre tract as one of the properties awarded to her in the Final Decree. Wife's testimony is consistent with the Final Decree, which recognized that Husband and Wife had agreed that Daughter was to receive a house, not clearly identified in the evidence, as a gift on her twenty-first birthday.

[5] Husband and Son did not challenge the family court's finding that the other four properties awarded to Wife in the Final Decree were actually titled in Husband's individual name.

STANDARD OF REVIEW

In appeals from the family court, appellate courts review factual and legal issues *de novo*. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651-52 (2011). "However, we recognize this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses." *Wilburn v. Wilburn*, Op. No. 27222 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 20 at 22). "Additionally, the de novo standard does not relieve the appellant of the burden of identifying error in the family court's findings." *Id.* "Accordingly, the decision of the family court will be upheld unless the Court finds that a preponderance of the evidence weighs against the family court's decision." *Id.*

LAW/ANALYSIS

I. Modification of the Decree

Wife, Husband, and Son argue the family court lacked subject matter jurisdiction to modify the division of property set forth in the Final Decree. We agree.

Generally, the family court has the authority to modify any order issued by the court. S.C. Code Ann. § 63-3-530(A)(25)(2010) (stating the family court has exclusive jurisdiction to modify or vacate any order issued by the court). However, "the law in South Carolina is exceedingly clear that the family court *does not* have the authority to modify court ordered property divisions." *Green v. Green*, 327 S.C. 577, 581, 491 S.E.2d 260, 262 (Ct. App. 1997) (emphasis added) (citations omitted); *see* Roy T. Stuckey, *Marital Litigation in South Carolina* 375 (4th ed. 2010) (discussing exceptions to the family court's exclusive jurisdiction to modify an order issued by it). Section 20-3-620(C) of the South Carolina Code (Supp. 2012) provides, "The [family] court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal." As this court explained in *Swentor v. Swentor*, 336 S.C. 472, 480 n.2, 520 S.E.2d 330, 334 n.2 (Ct. App. 1999):

> While an agreement concerning alimony or child support may be modified and enforced by the family court unless

> the agreement clearly provides otherwise, *an agreement regarding equitable apportionment claims is final and may not be modified by the parties or the court*, although it may be enforced by the family court unless the agreement provides otherwise.

(emphasis added) (citations omitted).

Following *Simpson I*, Husband and Son used the contempt hearings as an opportunity to relitigate the issue of ownership of the subject properties. Throughout the contempt hearings, Husband and Son maintained that they should not be held in contempt because the subject properties were titled in the name of the LLC, rather than in Husband's individual name. The family court judge ultimately accepted Husband and Son's contention and issued a contempt order on May 28, 2010, finding the subject properties were titled in the name of the LLC. Based on this finding, the family court concluded that Husband, as a member of the LLC, did not have a transferrable interest in the real estate belonging to the LLC pursuant to South Carolina Code section 33-44-501(a).[6] As a result, the family court determined that it could not specifically enforce the provision in the Final Decree ordering Husband, individually, to transfer full ownership in the subject properties to Wife. In an effort to resolve this issue, the family court issued an order on March 18, 2011, removing Son's fifty-percent interest in each of the subject properties from the marital estate and reapportioning the marital property.

In this instance, both the May 28, 2010 contempt order and the March 18, 2011 order on Wife's motion for reconsideration, in effect, modified the division of property in the Final Decree. Notably, in taking this course of action, the family court acknowledged that its rulings were in contravention of the property provisions in the Final Decree which this court upheld in *Simpson I* and upon which our supreme court denied certiorari. Nonetheless, the family court found its

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[6] Generally, "a limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (2006 & Supp. 2012). "A member is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.C. Code Ann. § 33-44-501(a) (2006 & Supp. 2012); *see also* Comment to S.C. Code Ann. § 33-44-501 ("Members have no property interest in property owned by a limited liability company.").

equitable powers provided it the authority to reinterpret the decree and to reapportion the marital property.

We find the family court lacked subject matter jurisdiction to modify the property provisions in the Final Decree. This court has previously held that it is beyond the equitable powers of the family court to reopen and modify court ordered property divisions. *See Green*, 327 S.C. at 581, 491 S.E.2d at 262 (holding the family court erred by concluding it was within its equitable powers to reopen and modify portions of a property settlement agreement incorporated into a divorce decree). Furthermore, *Simpson I* affirmed the identification and apportionment of the marital property in the Final Decree. The sole issue remanded to the family court was the issue of attorney's fees. *See* S.C. Code Ann. § 20-3-620(C) ("The [family] court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal."); *Hayes v. Hayes*, 312 S.C. 141, 144, 439 S.E.2d 305, 307 (Ct. App. 1993) (holding the family court lacked subject matter jurisdiction to consider wife's subsequent action for equitable distribution of husband's retirement benefits). Accordingly, in the present case, it was error for the family court to modify the property provisions in the Final Decree.[7]

We also find the family court erred in allowing Husband and Son to relitigate the issue of ownership of the subject properties at the contempt hearings. First, Husband and Son's argument that Husband, individually, could not comply with the Final Decree because the subject properties were titled in the name of the LLC, was barred by the doctrine of res judicata. *See Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) ("*Res judicata* precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action"); *Richardson v. Richardson*, 309 S.C. 31, 35, 419 S.E.2d 806, 808 (Ct. App. 1992) (upholding the family court's ruling that the "issue of alimony was *res judicata* and could not be relitigated and it was the court's duty to effect compliance with the agreement as best as possible" when husband contended

[7] Because it was error for the family court to modify the property provisions in the Final Decree, we need not address Husband's and Son's additional arguments regarding the modification of the Final Decree and the reapportionment of the marital estate. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

he could not comply with the parties' settlement agreement requiring him to satisfy his alimony obligation by transferring the marital home to wife because the home was owned by his mother). Second, the law of the case doctrine precluded Husband and Son from relitigating this issue. In *Simpson I*, this court explicitly found "the property awarded to [Wife] was individually owned by [Husband], and *was not property owned by the LLC*." (emphasis added). Thus, *Simpson I* expressly rejected Husband's argument concerning the LLC's ownership of the subject properties. Moreover, our supreme court implicitly approved the ownership determinations in the Final Decree by denying Husband's petition for certiorari. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)) (stating that under the law of the case doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court"). Furthermore, Son, who has been a party to this action since it commenced in 2003, did not appeal the family court's determination that Husband individually owned the subject properties. *See Doran v. Doran*, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986) (stating that no objection can be made to an appealable order from which no appeal was taken); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (stating an unappealed ruling, right or wrong, is the law of the case and requires affirmance). Therefore, Husband and Son were not entitled to take a second bite at the apple by defending themselves in the contempt proceedings on the ground that the subject properties were titled in the name of the LLC.

II. Findings of Fact and Conclusions of Law

Husband and Son argue the family court erred by not setting forth specific findings of fact or conclusions of law it reached in its March 18, 2011 order, reversing its May 28, 2010 contempt order. Having found the modifications to the decree made in both orders were error, we need not address Husband and Son's argument. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

III. Judicial Estoppel

Husband and Son contend that because Wife had previously maintained in all judicial forums that the subject properties belonged to Husband, she is precluded

by judicial estoppel from demanding a cash sum award or that the LLC transfer real estate to her. We disagree.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). In *Cothran*, our supreme court held that the following elements are necessary for the doctrine of judicial estoppel to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. 357 S.C. at 215-16, 592 S.E.2d at 632.

We find the evidence in this matter fails to satisfy the fourth element of judicial estoppel. The fourth necessary element of judicial estoppel is satisfied when a litigant asserts an inconsistent position as a part of an intentional effort to mislead the court. *Id.* at 216, 592 S.E2d at 632. Here, there is no evidence Wife sought to intentionally mislead the family court. To the contrary, in *Simpson I*, this court found that Wife's expert "had a difficult time determining what property had been acquired and sold by Husband due to the lack of income or expense records maintained by Husband or [Son]." Additionally, this court found that Husband effectively stonewalled Wife's expert's efforts to identify Husband's property holdings because "he failed to provide a list of his property." *Simpson I.* This court noted that Wife's expert "had to look in several counties to determine what Husband owned" and "spent 1,248 hours attempting to identify all of the property owned by Husband." *Id.* Moreover, within the Final Decree, the family court stressed its own difficulty in determining what property Husband owned. Given the difficult circumstances Wife faced in determining the exact nature of Husband's property holdings, we find judicial estoppel does not apply because there was no intentional effort by Wife to mislead the court.

IV. Enforcement of the Decree

The crux of this dispute is how Wife's equitable apportionment award should be enforced. Due to the prolonged nature of this dispute and the family court's

admitted difficulty in enforcing the Final Decree, we address the appropriate method of making Wife whole again.

Although the family court lacked subject matter jurisdiction to modify the property provisions in the Final Decree, it did have the equitable authority to enforce the Final Decree. *See Swentor*, 336 S.C. at 480 n.2, 520 S.E.2d at 334 n.2 (stating that although an order regarding the distribution of marital property is not modifiable, it may be enforced by the family court). Therefore, even if the Final Decree mistakenly declared the subject properties to be titled in Husband's name, it was the duty of the family court to interpret the intent of the property provisions in the Final Decree and effect compliance as best as possible. *See Richardson*, 309 S.C. at 36, 419 S.E.2d at 809 (citing *Means v. Means*, 277 S.C. 428, 288 S.E.2d 811 (1982)) (stating the duty of the trial judge in an action for civil contempt is to determine an appropriate method of making the aggrieved party whole again when the prior order cannot be specifically enforced as written).

"The primary purpose of an action for civil contempt is to exact compliance" and in doing such, "the court must interpret what the decree mandated, considering the purpose and object of the underlying litigation." *Id.* at 35-36, 419 S.E.2d at 809. In this instance, the Final Decree clearly identifies the subject properties as marital property titled in Husband's individual name. Additionally, the Final Decree orders Husband to transfer to Wife full ownership in each of the subject properties as a part of her equitable apportionment award. Therefore, we interpret the decree as mandating that Wife receive full ownership in the subject properties.

Given the clear mandate in the Final Decree that Wife is entitled to full ownership in the subject properties, it was the duty of the family court to effectuate the division of marital property as written in the Final Decree. Furthermore, in *Simpson I*, this court found that there was no credible evidence to support Husband and Son's argument that the family court mistakenly declared the subject properties to be titled in Husband's name. Therefore, irrespective of the alleged mistake in the Final Decree, the family court had subject matter jurisdiction to determine the subject properties were marital property and to apportion the subject properties to Wife.

Our supreme court has held that the family court has subject matter jurisdiction to equitably apportion property owned by a third party. *In re Sexton*, 298 S.C. 359, 361, 380 S.E.2d 832, 834 (1989); *see generally* Roy T. Stuckey, *Marital Litigation*

in South Carolina 276 (4th ed. 2010) (discussing the family court's authority to equitably apportion property owned by a third party). Section 20-3-630(A) of the South Carolina Code (Supp. 2012) defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . *regardless of how legal title is held*." (emphasis added). "This section specifically provides for the possibility that marital property could be titled in a third party." *In re Sexton*, 298 S.C. at 361, 380 S.E.2d at 834. When property is alleged to be marital property, but is owned by a third party, the family court has the authority to join all persons with a possible interest in the property as parties to the action and to determine if the property constitutes marital property. *Id.* at 361-62, 380 S.E.2d at 834. "If the property is found to be marital property, the [family court] has the authority to apportion it among the parties." *Id.*

This court previously dealt with the issue of distributing marital property owned by a third party in *Richardson v. Richardson*, 309 S.C. 31, 419 S.E.2d 806 (Ct. App. 1992). There, the family court adopted the parties' settlement agreement, which required husband and husband's mother to transfer the marital home to wife as a part of wife's alimony award. *Id.* at 33, 419 S.E.2d at 807. Wife brought a rule to show cause motion against husband and husband's mother, alleging they had not complied with the alimony provisions of the divorce decree. *Id.* at 34, 419 S.E.2d at 808. In his return, husband argued that he did not own an interest in the marital home and was legally unable to comply with the decree. *Id.* The family court found that it had no jurisdiction over husband's mother because she was not a party to the divorce proceedings. *Id.* The family court concluded that husband was not in contempt because he was not the titled owner of the property and was unable to comply with the divorce decree. *Id.* at 35, 419 S.E.2d at 808. In order to make wife whole, the family court determined the value of the marital residence and ordered husband to pay to wife lump sum alimony in that amount. *Id.* This court upheld the decision of the family court, finding "the family court's interpretation to be logical and fair and the best possible solution in making the wife whole." *Id.* at 36, 419 S.E.2d at 808.

We find that the facts of the present case are distinguishable from *Richardson*. In this instance, Husband, Son, and the LLC were all joined as parties to the divorce action. In the Final Decree, the family court concluded that fifty-percent of property titled in the name of the LLC property was marital property. The family court also found that all the property titled in Husband's individual name was

marital property. As to the subject properties, the family court classified each one as marital property titled in Husband's individual name. Neither Husband, Son, or the LLC properly challenged this classification. *See Simpson I.* Moreover, this court affirmed the family's court determination that the subject properties were marital property titled in Husband's individual name. *Id.* Because the LLC was joined as a party to the divorce action and the family court determined the subject properties were marital property, the family court had the authority to award full ownership in the subject properties to Wife, regardless of how legal title was held. *See In re Sexton*, 298 S.C. at 361-62, 380 S.E.2d at 834 (stating that if the family court determines that property owned by a third party is marital property, and the third party has been joined in the action, then the family court has the authority to determine the parties' equitable rights therein); *Hough v. Hough*, 312 S.C. 344, 351, 440 S.E.2d 387, 391 (Ct. App. 1994) (rejecting husband's mother's argument that marital home titled in her name was not marital property and affirming the award of the marital home to husband).

Pursuant to the Final Decree, Wife was entitled to have full ownership in the subject properties. As outlined above, the family court had subject matter jurisdiction to award full ownership interest in the subject properties to Wife. Furthermore, the family court reiterated throughout the Final Decree that there was no clear identification and valuation of the marital property due, in large part, to Husband and Son's resistance to any effort to disclose the exact nature of their holdings. Therefore, it would be inappropriate and inequitable to allow Husband and Son to benefit, by avoiding transfer of the subject properties to Wife, from an error created by their own conduct. *See Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct. App. 1986) ("A party cannot complain of an error which his own conduct has induced.").

We find equity and fairness require the family court to carry the terms of the Final Decree into effect by requiring Husband, Son, and the LLC to join in the execution of the deeds to the subject properties to Wife. *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (stating that "[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible"); *cf. Buckley v. Shealy*, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (stating the family court was authorized to convert to money judgment a note that the husband had been ordered, but failed, to assign to wife in divorce proceedings). Therefore, we reverse the family court's orders modifying the ownership determinations and division of property in the decree and remand

this case to the family court to enforce the property provisions in the Final Decree by ordering Husband, Son, and the LLC to join in the execution of the deeds to the subject properties to Wife.

V. Attorney's Fees

Wife argues that the family court abused its discretion by failing to award her compensatory attorney's fees and expenses for her efforts to enforce the terms of the Final Decree. We agree.

It is well settled that an award of attorney's fees is within the sound discretion of the trial judge and will only be disturbed on appeal upon a showing of an abuse of discretion. *Abate v. Abate*, 377 S.C. 548, 555, 660 S.E.2d 515, 519 (Ct. App. 2008). Courts may award attorney's fees under a compensatory contempt theory. *Id.* at 555 n.4, 660 S.E.2d at 519 n.4. The court may award compensatory contempt damages to the moving party for the costs he or she incurs in forcing the non-complying party to obey the court's orders. *See Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding."); *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees.").

Wife has spent over five years seeking to enforce the property provisions in the Final Decree. The family court held that Husband was not in contempt because the subject properties were titled in the name of the LLC and, therefore, Husband did not have the legal ability to comply with the terms of the decree. As discussed previously, the finding that the LLC was the titled owner of the subject properties was erroneous. *See Feldman v. Feldman*, 380 S.C. 538, 546, 670 S.E.2d 669, 673 (Ct. App. 2008) ("An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings that are without evidentiary support."). Therefore, we remand the issue of attorney's fees for further consideration in light of this decision.

VI. Conclusion

We reverse the family court's modifications to the property provisions of the Final Decree and remand for enforcement of the Final Decree as instructed in this decision.

REVERSED AND REMANDED.

HUFF and THOMAS, JJ., concur.