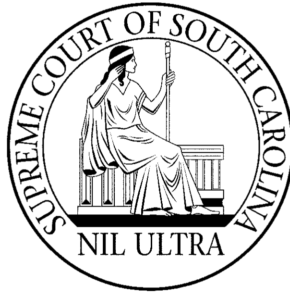

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 16, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Greenville County. Effective March 22, 2016, all filings in all common pleas cases commenced or pending in Greenville County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville - Effective March 22, 2016
Sumter	Williamsburg	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
March 10, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tyrone J. King, Appellant.

Appellate Case No. 2012-213461

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5390
Heard January 6, 2015 – Filed March 16, 2016

REMANDED

Howard Walton Anderson III, of Law Office of Howard W. Anderson III, LLC, of Clemson; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon Jr., all of Columbia; and Solicitor William B. Rogers Jr., of Bennettsville, for Respondent.

MCDONALD, J.: Tyrone J. King appeals his convictions for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree. King argues the circuit court erred in admitting prior bad acts evidence, denying his motion for a mistrial, and denying his motion for a new trial. We remand.

FACTS/PROCEDURAL BACKGROUND

On November 11, 2011, King allegedly shot and killed James Galloway (Victim) in Victim's Marlboro County home. Thereafter, King purportedly hit Karen Galloway (Wife) on the head with the handle of his gun and pointed his gun at both Wife and Reggie Cousar (Cousin). After some further scuffling, King ran out the back door of the residence. Following a foot chase, King was arrested.

During the course of the investigation, law enforcement recovered the Galloways' cordless telephone near the pick-up truck where King was apprehended, a bottle of liquor from King's pocket, and a nine-millimeter handgun with an extended clip from the wooded area behind King's residence. Law enforcement found a cartridge casing and bullet hole in the Galloways' master bedroom and recovered a cartridge casing and projectile from the living room. As a result, Marlboro County deputies conducted two videotaped interrogations of King.

In the first interrogation, which took place on November 11, 2011, King stated he went to the Galloways' home with Aloysius McLaughlin to buy alcohol. At this time, King was facing charges for kidnapping and armed robbery against McLaughlin in the Town of McColl (McColl Charges). However, King stated that he and McLaughlin were back on "good terms" and that McLaughlin shot and killed Victim. King further explained that after the shooting, he tried to calm Wife, and that he "waived" or "swung" the gun at her. King claimed he then gave the gun back to McLaughlin and ran from the Galloways' home in fear.

During the second interrogation, which took place on November 16, 2011, King claimed that he obtained the gun from an individual named "Broom." King explained that he went to the Galloway home to sell the gun, and while he was attempting to remove the clip, the gun fired and Victim was shot.

On January 31, 2012, the Marlboro County Grand Jury returned four indictments against King for (1) murder, (2) possession of a weapon during the commission of

a violent crime, (3) assault and battery of a high and aggravated nature, and (4) pointing and presenting a firearm.

The Honorable Edward B. Cottingham called the case for a jury trial on September 10, 2012. Following jury selection, King made several pretrial motions, including a motion to "exclude any evidence of the pending armed robbery charge." The State indicated the pending charge was part of its Rule 404(b), SCRE,[1] motion "to allow the prior bad act in" under the "intent, motive, or the common plan or scheme [exceptions] to show that there [was] a lack of mistake in the defendant going into [the Galloways'] home." The State clarified that the prior armed robbery was against McLaughlin and Melissa Graham, "[t]he same two individuals that [King] says were with him when he committed this murder." The circuit court stated, "I'm not likely to let that in," but agreed to allow the State to present its evidence before making a ruling. The circuit court then explained:

> [Y]ou know [I've] got to balance probative value against prejudicial [e]ffect, and in this case you've got eye witnesses as I recall from prior hearings. I'll listen to it, but [I] have some further concern about it.
>
> . . . .
>
> But I have some concerns with a Lyle[2] issue unless you are saying that you've got proof that [King] tried to rob this identical individual several weeks earlier. But I didn't hear you say [that]. You said some group of people, didn't you?
>
> . . . .

[1] Rule 404(b), SCRE ("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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

[2] *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (explaining the permissible uses of evidence of prior bad acts).

> I want to get that straight [in chambers], and then we'll get on the record with it.

King then moved to exclude or redact several portions of the interrogation videos, which were later introduced as State's Exhibits 4 and 5.

First, King moved to exclude or redact the portions of State's Exhibit 5, in which he referred to law enforcement as "motherfu**ers" and said "[f]u** the police,"[3] arguing relevance and prejudice under Rules 401 and 403, SCRE.[4] The circuit court denied the motion, stating "It's his term. He chose to use it. I'm going to let it in." As to the redaction of the videotapes, the circuit court explained that the State "[c]annot do that because we don't have the capability. If you redact that word[,] you've got to redact whatever he said." The State informed the circuit court that the only way to redact portions of the videos would be to "fast forward through it."

King next moved to exclude or redact the portion of State's Exhibit 5 in which he discussed a "prior murder charge," arguing Rule 404(b)'s "prior bad acts" provision prohibited this discussion. The circuit court granted the motion, stating "I want that redacted . . . . make sure you [fast forward] in the right place . . . I don't want to hear anything about that." Subsequently, King moved to exclude or redact another portion of the video in which he again discussed a "prior murder charge," arguing it was inadmissible under Rules 403 and 404(b). The circuit court granted this motion, stating "I want to redact any reference to any prior conduct." However, the circuit court declined to "exclude or redact" the following portion of State's Exhibit 5:

---

[3] This issue was not appealed.

[4] *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

> Investigator: I mean if you didn't do it, why didn’t you just go out in the front yard, give the gun to the police and say hey man, Aloysius just ran out of the back door?
>
> King: They did not give me a godd**n chance. Man she steady screaming about my godd**n—I already got—I already got a murder kidnapping charge on my record. She didn't see s**t—she was in [another] room.

Defense counsel again argued that this "prior bad acts" evidence was inadmissible under Rule 404(b). Although the State informed the court that King "does not have a conviction for murder on his record," the circuit court stated, "I'm going to leave it where it is."

Thereafter, King moved pursuant to Rule 404(b) to exclude or redact the portion of State's Exhibits 4 and 5 in which he discussed the McColl Charges. The circuit court denied the motion as to State's Exhibit 5 but granted the motion as to State's Exhibit 4. In the first reference, King stated, "I already got a murder kidnapping charge on my record," as quoted above,[5] and the second reference arose during the following exchange:

> Investigator: Who is that?
>
> King: Aloysius, [the] same dude that I robbed. Me and him got back on good terms.
>
> Investigator: Aloysius?
>
> King: From McColl, that one—same dude that signed a warrant on me back in February. Me and him back on good terms.

The circuit court ruled, "I think it's appropriate based on the totality of what he's saying."

King next moved to exclude or redact the portion of the video in which he admitted "he had shot a gun" and that "he carries a gun," arguing relevance, prior bad acts,

---

[5] *See supra* p. 4.

and prejudice under Rules 401, 403, and 404(b).[6] The circuit court denied the motion, stating "there is evidence of carrying a gun in this case. I'm going to let that stay in. . . . His possession of the gun is a critical part of the State's case, and I'm going to let it in." King also moved to exclude or redact the portion of the video in which King discusses "a lawyer on his old charge." The circuit court ruled, "I'll let that part in. Let's see where he goes." Subsequently, the circuit court denied King's motion to exclude or redact the portion of State's Exhibit 5 in which King refers to himself as a criminal. The circuit court explained that "[t]his is his characterization of himself. I'm not going to redact that. . . . Well, you understand that some of his prior record is coming in . . . that alone is sufficient." Although defense counsel explained that "unless he testifies . . . none of his prior record is coming in," the circuit court stated, "I'm going to leave it in."

Additionally, King moved to exclude or redact the portion of the video in which he discusses his own stabbing during an alleged armed robbery, again arguing relevance, prior bad acts, and prejudice under Rules 401, 403, and 404(b).[7] In response, the State argued that this portion of the tape was relevant because "[King] is saying . . . that he carried a gun because he was stabbed 20 times whereas we know that the guy that stabbed him said he did so because [King] was trying to rob him." The circuit court noted that the parties discussed this particular segment in chambers and denied the motion, stating "I'm leaving that because the individual is coming in, and [King is] saying he was stabbed 20 times in self-defense. [However,] [t]here is a witness coming in [to testify] that's not true. . . . I'm letting that in based on the totality of the evidence that's here." The circuit court concluded its ruling with, "I'm not going to let the jury hear solely that he was stabbed [twenty] times without the truth coming out as to why he was stabbed." Subsequently, the circuit court ordered stricken the portion of the video in which King pulled up his shirt and said, "You see this because I been stabbed."

Lastly, King moved to exclude or redact the portion of the video in which he discussed "different members of the Marlboro County Sheriff's Department and the Marlboro County Jail with some familiarity," arguing lack of relevance and prior

---

[6] These issues were not appealed.

[7] This issue was not appealed.

bad acts under Rules 401 and 404(b).[8] The circuit court denied the motion, explaining Marlboro County does not have the "capabilities to stop and start every phrase . . . . I want to redact everything that we can that's proper. We can't start redacting every word [be]cause you don't like it."

On the morning of trial, the State moved to admit the interrogation videos into evidence as State's Exhibits 4 and 5. Defense counsel noted the videos were admitted "[p]ursuant to the redactions" and "the previous objection I've made." Defense counsel reiterated that he wanted to preserve the following two objections, both of which were denied by the circuit court: (1) the reference to the prior stabbing, and (2) any mentioning of the prior murder and kidnapping charges. Regarding the prior stabbing, the parties discussed the following:

> The Court: No, they redacted . . . [a]nything [referring] to [the] prior stabbing.
>
> [Defense Counsel]: Yes, Your Honor. There was another mention of [the prior stabbing] that was not redacted because the Court ruled not to redact [it].
>
> The Court: Where was that and what line?
>
> [Defense Counsel]: I think it was at 15:40:50
>
> . . . .
>
> [State]: [T]he time that we have [to be redacted] is 4:55:20 . . .
>
> [Defense Counsel]: Your Honor, there is another reference to the stabbing after the Miranda,[9] and it's at 15:10:50. I believe the Court ruled not to redact it yesterday.
>
> The Court: I ruled not to redact that one?
>
> [Defense Counsel]: Yes, Your Honor.

---

[8] This issue was not appealed.

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

> The Court: Well, if I ruled on it that's fine.

Likewise, the parties discussed the reference to the prior murder and kidnapping charges:

> [Defense Counsel]: I made an objection to a prior murder and kidnapping charge at [5:08:09 through 5:08:10.]
>
> . . . .
>
> [Defense Counsel]: That hasn't been redacted, Your Honor.
>
> The Court: Why?
>
> [Defense Counsel]: He mentioned that -- I believe he stated on the record that he couldn't -- that Marlboro County [is] unable to go through line by line and redact every word or every reference to anything in the statement. . . .
>
> The Court: [T]his equipment is not the best in the world. They have made every effort to do it. It's not as sophisticated as it should be, but you couldn't redact that part?
>
> [State]: . . . . That was one that at the time, and I recall that section where the Court ruled that that part could stay in. . . .
>
> The Court: If I ruled that I'm not going to beat a dead horse to death. If I ruled -- did I rule it stays?
>
> [State]: You did.

Thereafter, defense counsel again objected to the admission of the interrogation videos, explaining that "some of the reasons for not redacting certain parts is that the [video] equipment in Marlboro County is not sufficient to do so. I believe that if you were in another county[,] they would have sufficient means to do so."

The State indicated that Marlboro County has "current equipment," but the equipment is "not designed to allow for redacting and editing it so that nobody can then say that law enforcement had tampered with evidence." Defense counsel noted that other law enforcement agencies have the capability to make more precise redactions than rudimentary fast-forwarding. The circuit court responded, "Well, we don't have that other agency here. We are in the second day of the trial. We spent most [of] the time with your objections. I'm ready for the jury." To avoid any other delays associated with King's evidentiary objections to State's Exhibit 5, the circuit court finalized its rulings on admission of the video for the purposes of appellate review: "I don't want you to make your objections again as to those items. . . .You've made them and [they] are protected for the record."

The State called Wife as its first witness. She testified that in the early morning hours of November 11, 2011, her husband got up to answer a knock on the door. He returned to the bedroom, told his wife that King was at the door, and again left their bedroom. Wife testified that she heard Victim say, "Naw, man, I don't have," and then she heard a "pop." King then entered the Galloways' bedroom, pointed a gun in Wife's face, and hit her on the top of the head with the handle of the gun, causing the gun to discharge a bullet into the wall.

When King left the Galloways' bedroom, Wife called 911 and walked into the living room where she found her husband dead on the floor. King then walked into the living room with a gun to Cousin's head, took the telephone from Wife's hands, and hung it up. When the 911 operator called back, King answered and said,"[M]y home boy shot my neighbor. He came for some liquor. He shot my neighbor." King then ran out the back door "[w]ith the gun and the phone in his hand."

The State next called Cousin, who testified that he was living with the Galloways at the time of the shooting. He awoke to Wife "screaming" his name and found her in the living room where King had "a gun to her face." Cousin did not hear any shots because he was sleeping. According to Cousin, King "turned and pointed" the gun at his chest, said that "[o]ne of his boys did it," and ran out the door.

Thereafter, the State called Deputy Timmy Shaw of the Marlboro County Sheriff's Department (MCSD). When Shaw approached the Galloway home, he saw someone running out of the back door. He then pursued King on foot and subsequently apprehended him. After securing King, Shaw patted him down for weapons. Although he "[d]idn't actually find any weapons," he "[d]id find a [one-

half pint] bottle of [Burnett Sparkle]" in King's pocket.[10] Shaw also found "the top part of a wireless [home] phone" underneath the pick-up truck where King was hiding. Shaw then read King his *Miranda* rights. Thereafter, Shaw "took [King] to [MCSD] and put him in [an] interrogation room."

Subsequently, the State called Investigator Shawn Felder of MCSD. Felder testified he conducted a recorded interview of King on the night of the incident. Felder further testified that although he could smell alcohol on King's breath, he did not conduct a breathalyzer test because King "did not appear to be under the influence." Once King's gunshot residue kit was complete, Felder read King his *Miranda* warnings. King did not request a lawyer and agreed to speak to Felder without representation. Due to the "poor quality" of the video, the circuit court allowed Felder to testify "as to what [King] said" before playing the video for the jury to "enable [them] to get the full context."

The State next called Aloysius McLaughlin to testify. The circuit court indicated that the State could ask McLaughlin if he was with King on the night of the incident and if they were friends. However, the circuit court strongly cautioned that any reference to the McColl Charges would result in a mistrial. McLaughlin testified that, on the night of Victim's murder, he was with his sister and his former girlfriend, Melissa Graham. He explained that he was not with King that night because they were not "cool" at the time.

Immediately thereafter, the State called Graham to confirm that she was with McLaughlin on the night of the incident. She testified that MCSD requested that she and McLaughlin go down to the station to talk about the murder investigation. Graham then testified: "[H]ow we going to help this man murder somebody [when] he just robbed us[?]" Defense counsel immediately objected, and the circuit court ordered stricken "[t]he last utterance made by this witness." The circuit court stated that Graham's reference to the robbery was "totally irrelevant to any issue in this case," and instructed the jury, "You must not and may not consider that remark in any way whatsoever."

Thereafter, King moved for a mistrial on the ground that the curative instruction "was insufficient to cure the prejudice [to] my client. . . . I don't believe any instruction, quite honestly, would be sufficient." The circuit court responded, "I've

[10] The record reflects that this is the same type of liquor that Victim sold from his home.

instructed the jury, and I respectfully decline to mistrial on something that [Graham] said that was not asked for by the Solicitor." Defense counsel subsequently withdrew the motion, noting Graham's remarks duplicated what was stated in State's Exhibit 5.

The State then called Investigator Jamie Seales of MCSD, who testified that he conducted a second recorded interview of King on November 16, 2011. Seales further testified that he reviewed the *Miranda* form with King and that King signed the form. Seales explained that he told King, "This is the same one that you signed before when the other investigator spoke to you." Seales testified that King replied, "[I don't] even remember that." Seales then explained King's summarization of the events of November 11, 2011. Thereafter, the second interrogation video was admitted into evidence as State's Exhibit 4.

Following the close of the State's case, King moved for a directed verdict as to all four indictments, which the circuit court denied. The circuit court charged the jury on murder; involuntary manslaughter; the defense of accident; assault and battery of a high and aggravated nature; assault and battery in the first, second, and third degrees; possession of a firearm during the commission of a violent crime; and pointing and presenting a firearm. The jury found King guilty of murder, assault and battery in the third degree, pointing and presenting a firearm,[11] and possession of a weapon during the commission of a violent crime. The circuit court sentenced King to life in prison on the murder conviction; five years imprisonment on the possession conviction, to run consecutively with the previous sentence; and thirty days imprisonment, suspended on time served, on the conviction for assault and battery in the third degree.

On September 24, 2012, King moved for a new trial, arguing that, contrary to the parties' understanding at the pretrial motions hearing, MCSD did have the capability to redact videotaped interrogations in one-second intervals. At an October 10, 2012 hearing, defense counsel argued that the circuit court could have excluded the references to King's prior murder, kidnapping, and armed robbery charges without impacting the other portions it found admissible because the software's instruction manuals showed that one-second redactions were possible. Nevertheless, the circuit court denied the motion from the bench for the following reasons: (1) accomplishing the redactions "would've delayed the case to at least

[11] King did not appeal his conviction for pointing and presenting, and the record on appeal does not include King's sentence on this charge.

the following week"; (2) King voluntarily made the references while trying to explain away his actions; and (3) the evidence was harmless.

The circuit court formalized its denial of the motion for a new trial by order dated November 8, 2012, and filed on November 12, 2012. The written order made no reference to the reasons offered at the October 10, 2012 hearing. Instead, the circuit court stated that "[b]oth parties were given an opportunity to redact the videos and/or agree to the redacted times when played before the court, following [pretrial] motions on August 27th, 2012. The Court then ruled upon admissibility of the video statements on September 10th, before the trial began."

ISSUES

I. Did the circuit court err in failing to conduct an on-the-record Rule 404(b) analysis when it excluded some, but not all, references to King's prior bad acts?

II. Did the circuit court err in denying King's motion for a mistrial?

III. Did the circuit court err in denying King's motion for a new trial?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010) (quoting *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001)). Thus, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "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. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)); *see also State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001) ("The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis mandated by the evidence rules and case law."). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Black*, 400 S.C. at 16, 732 S.E.2d at 884 (quoting *State v. Jennings*, 394 S.C. 473,

477–78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." *Id.* at 16–17, 732 S.E.2d at 884.

ANALYSIS

I. Bad Acts Evidence

King argues the circuit court erred in failing to conduct the required Rule 404(b) analysis prior to admitting prior bad acts evidence. We agree.

A. Preservation

Initially, we address whether King's argument regarding prior bad acts evidence is properly preserved for appellate review. The State asserts:

> [M]uch of King's argument regarding the admission of certain comments King made during his first interview (State's Exhibit [5]) is not preserved for appellate review . . . [because] he did not specifically request that the [circuit] court assess whether the State was proving those prior bad acts with clear and convincing evidence. King further did not request [that] the [circuit] court engage in an on the record prejudice analysis as required by Rule 403, SCRE.

On reply, King argues that he was not required to do anything more than object under Rule 404(b) and that "the State bears the burden of demonstrating that [the bad acts] evidence falls within an exception."

In *State v. Martucci*, this court concluded that because "Martucci did not argue at trial that the State failed to show the prior bad acts by clear and convincing evidence," the issue could not be considered on appeal. 380 S.C. 232, 256–57, 669 S.E.2d 598, 611 (Ct. App. 2008); *see also State v. Luckabaugh*, 327 S.C. 495, 499, 489 S.E.2d 657, 659 (Ct. App.1997) (concluding that the issue was not preserved because the defendant failed to object to the testimony as less than clear and convincing); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). A party must state "the specific ground of objection, if the specific ground was not apparent from the context." Rule 103(a)(1), SCRE. However, "[a]

party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial [court]." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996).

The record reveals that the parties discussed the State's 404(b) motion in chambers, and defense counsel moved on several occasions to exclude or redact portions of State's Exhibits 4 and 5, arguing inadmissibility under Rules 401, 403, and 404(b). Moreover, the circuit court specifically stated, after the multiple objections, "I don't want you to make your objections again as to those items. You've made them and are protected for the record."

Still, to the extent the circuit court conducted an improper Rule 404(b) analysis, it was King's duty to raise those arguments to the circuit court. *See State v. Smith*, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (explaining that it is the defendant's duty to raise arguments regarding an improper Rule 404(b) or Rule 403 analysis to the trial judge), *rev'd on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013). However, unlike the defendant in *Smith*, King is not arguing that the circuit court conducted an improper Rule 404(b) or Rule 403 analysis. Instead, King contends that the circuit court failed to conduct any analysis *at all*. As King's argument was sufficiently specific, apparent from the context, and clear, we find it preserved for appellate review.

B. Merits

"The process of analyzing [prior] bad act evidence begins with Rule 401, SCRE." *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009); *see also* Rule 401, SCRE (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If the circuit court determines the prior bad acts evidence is relevant, it "must then determine whether the bad act evidence fits within an exception of Rule 404(b)." *Wallace*, 384 S.C. at 433, 683 S.E.2d at 277.

"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." Rule 404(b), SCRE. Such evidence "may, however, be admissible to show motive, identity, the

existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.*

> To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.

State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) (citations omitted).

"Once bad act evidence is found admissible under Rule 404(b), the [circuit] court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. at 435, 683 S.E.2d at 278 (footnote omitted); *see also* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) (quoting *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)). "Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *Id.* at 404–05, 673 S.E.2d 441.

Here, although the circuit court initially failed to analyze the relevance of the prior bad acts evidence, it subsequently recognized that the McColl Charges were "totally irrelevant to any issue in this case" when it ordered stricken Graham's testimony about the McColl Charges. Moreover, despite the fact that the State informed the court that King "does not have a conviction for murder on his record," the circuit court failed to analyze the relevance of the reference to a "prior murder charge," and stated, "I'm going to leave it where it is."

While we acknowledge that the circuit court is given broad discretion in ruling on questions concerning the relevancy of evidence,[12] the circuit court here provided

[12] *See State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000) ("The [circuit] judge is given broad discretion in ruling on questions concerning the relevancy of

no indication that it properly considered Rules 401, 403, or 404(b). Even if these prior bad acts fell within a 404(b) exception, the circuit court failed to determine whether the prior bad act evidence was clear and convincing, and failed to conduct an on-the-record Rule 403 balancing test. *See State v. Spears*, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct. App. 2013) ("find[ing] the [circuit] court erred by failing to conduct an on-the-record Rule 403 balancing test."), *cert. denied* (Sept. 11, 2014).

Generally, the proper remedy for failing to conduct such an analysis is to remand this issue to the circuit court to conduct the necessary analysis. *See, e.g.*, *State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (concluding that when the circuit court failed to include an on-the-record Rule 609 balancing test, the appellate court "should have remanded the question to the trial court" rather than conduct the balancing test, reasoning that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision"); *State v. Howard*, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct. App. 2009) (finding the circuit court erred in failing to conduct a proper Rule 609(b) balancing test because it "provided no analysis of the prejudicial impact of admitting [the defendant's] prior convictions," and remanding for an on-the-record balancing test).

In *State v. Spears*, this court "decline[d] to conduct a de novo Rule 403 balancing test" and remanded the issue to the circuit court because it failed to perform a Rule 403 balancing test in admitting evidence of a prior conviction at trial. 403 S.C. 247, 258–59, 742 S.E.2d 878, 883 (Ct. App. 2013). Noting the potential prejudice to the defendant in that case, the court stated "the jury could have determined Spears was guilty on an improper basis by relying on the . . . testimony as propensity evidence." *Id.* at 258, 742 S.E.2d at 884. The court was "unable to say that the admission of the prior bad act testimony was harmless error" and found it "appropriate to remand for an on-the-record Rule 403 balancing test." *Id.* at 259, 742 S.E.2d at 884.

Here, we find the circuit court erred in failing to conduct a Rule 404(b) analysis before admitting prior bad acts evidence regarding King's "prior murder charge" and the McColl Charges. Thus, we remand to allow the circuit court the opportunity to conduct the necessary analyses.

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evidence, and his decision will be reversed only if there is a clear abuse of discretion.").

II. Motion for a Mistrial

King argues the circuit court erred in denying his motion for a mistrial when a witness for the State referenced King's prior charge for armed robbery shortly after the circuit court cautioned that any reference to the McColl Charges would result in a mistrial.

Initially, we question whether King's argument is properly preserved for appellate review, as King withdrew his motion regarding Graham's testimony about the robbery, stating, "I believe it's already in evidence so I don't really have any grounds for a mistrial at this point." King argues that this issue is preserved because he did not withdraw the motion until after the circuit court denied it on the ground that the improper testimony was "not sufficient to cause a mistrial in this case." However, where an objection is expressly withdrawn, it cannot be raised on appeal. *See Rosamond Enter., Inc. v. McGranahan*, 278 S.C. 512, 513, 299 S.E.2d 337, 338 (1983) (per curiam) ("Any objection to that testimony cannot be raised for the first time on review, nor can it be heard on appeal when it is not properly raised by an exception.").

Moreover, King argues on appeal that the circuit court erred in failing to consider the factors for granting a mistrial as outlined in *State v. Thompson*, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) ("Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, the other testimony in the case, and perhaps other matters."). A review of the record reveals that King did not make this argument before the circuit court. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). He instead argued that the circuit court's curative instruction was insufficient to cure the harm created by Graham's testimony. *See State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (explaining that a party "may not argue one ground below and another on appeal"). Accordingly, we find King's argument as to the denial of his motion for a mistrial unpreserved.

III. Motion for a New Trial

King argues the circuit court erred in denying his motion for a new trial when it became clear that the State could have redacted precise portions of the videotaped interrogations. Because the circuit court failed to conduct an on-the-record

balancing test, we find it would be premature for us to rule upon whether the court erred in denying King's motion for a new trial. Based upon our precedents, as well as a thorough review of the record, we find the proper remedy is to remand with instructions for the circuit court to conduct an on-the-record balancing test to determine whether King would be prejudiced by the introduction of certain prior bad acts evidence. *See, e.g.*, *Colf*, 337 S.C. at 629, 525 S.E.2d at 249; *State v. Spears*, 403 S.C. at 258–59, 742 S.E.2d at 883–84; *State v. Howard*, 384 S.C. at 223, 682 S.E.2d at 48.

If, upon remand, the circuit court determines the probative value of the prior murder and kidnapping charge, or the McColl Charges, is substantially outweighed by the danger of unfair prejudice to King, then the court should order a new trial. If, on the other hand, the circuit court finds the probative value of the evidence in question is not substantially outweighed by the danger of unfair prejudice, then the conviction shall be affirmed subject to the right of appellate review.

CONCLUSION

We hold the circuit court's denial of King's motion for a mistrial is not preserved for appellate review. With respect to the evidentiary issues raised in King's motion to exclude or redact prior bad acts evidence and in King's motion for a new trial, we remand this matter to the circuit court so that it may conduct the necessary on-the-record balancing tests. Accordingly, this matter is

REMANDED.

WILLIAMS, J., concurs.

GEATHERS, J., dissenting: I would affirm King's conviction because the non-*Lyle*[13] evidence of King's guilt was overwhelming. Victim's grandson saw King point the gun at Victim immediately prior to the gun's discharge. After shooting Victim, King pistol-whipped Wife, pointed the gun at Cousin's chest, and hung up

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[13] *See State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (holding evidence of the defendant's other crimes or wrongs is generally not admissible to prove his propensity to commit the charged offense, but may be admissible to show motive, identity, common scheme or plan, absence of mistake or accident, or intent).

the telephone Wife was using to speak to a 911 operator. When the 911 operator called back, King told the operator one of his homeboys shot Victim. When King learned police had arrived at the home, he fled the home and attempted to hide from police. King initially told police that McLaughlin shot Victim; only in his second statement to police did he allege that he shot Victim by accident.

Therefore, any possible error in admitting the *Lyle* evidence was harmless beyond a reasonable doubt. *See State v. Gillian*, 373 S.C. 601, 609–10, 646 S.E.2d 872, 876 (2007) (finding that the admission of the specifics of the defendant's prior bad act in violation of Rule 403, SCRE, was harmless because the defendant's guilt was proven by other competent evidence "such that no other rational conclusion can be reached"); *State v. Keenon*, 356 S.C. 457, 459, 590 S.E.2d 34, 35 (2003) (holding the trial court erred in allowing the State to present evidence of multiple prior convictions "without first weighing the prejudicial effect against the probative value" but finding the error harmless "because of the overwhelming evidence of petitioner's guilt"); *State v. Brooks*, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (holding whether the improper introduction of prior bad acts is harmless requires the appellate court to review "the other evidence admitted at trial to determine whether the defendant's 'guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached'" (quoting *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993))); *State v. Adams*, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)), *cert. denied*, (2004); *id.* (concluding even if the admission of evidence of an initial burglary of the victim's house violated *Lyle*, it did not affect the evidence that supported the defendant's guilt in the subsequent burglary).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peggy D. Conits, Respondent,

v.

Spiro E. Conits, Appellant.

Appellate Case No. 2014-000941

Appeal From Greenville County
David G. Guyton, Family Court Judge

Opinion No. 5391
Heard December 8, 2015 – Filed March 16, 2016

AFFIRMED

David Alan Wilson, of The Law Offices of David A. Wilson, LLC, and Kenneth C. Porter, of Porter & Rosenfeld, both of Greenville, for Appellant.

Timothy E. Madden and Miles Edward Coleman, both of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent.

SHORT, J.: In this family court action between Peggy D. Conits (Wife) and Spiro E. Conits (Husband), Husband appeals the final order, arguing the court erred in (1) including a nonexistent asset in the marital estate; (2) finding Husband's note payable to his brother was nonmarital property; (3) finding certain property was transmuted into marital property; (4) finding property encumbered by mortgages

during the marriage was marital property; (5) apportioning the marital estate; (6) exercising jurisdiction over nonmarital property; and (7) awarding Wife attorney's fees. We affirm.

FACTS

Wife and Husband were married in Sparta, Greece, on November 3, 1985. At the time, Husband was thirty-three years old and Wife was twenty-one years old and studying music. Wife explained the parties intended to move to the United States, where they would work for Husband's restaurant, Carolina Fine Foods, and raise a family. At the time, Carolina Fine Foods was located at 633 S.E. Main Street in Simpsonville, South Carolina. The parties moved to Greenville in February 1986. Wife testified Husband owned four restaurants during the marriage, some of which were owned with Husband's brother.

Wife testified the parties had three children, all of whom were educated in private schools and were over eighteen years old at the time of the final hearing. Wife explained she had never held a paying job, although she worked without pay as needed at the family restaurants. Wife also explained she had no outside income and was a traditional stay-at-home mom throughout the marriage.

Wife testified Husband owned property on Hawkins Road in Traveler's Rest at the time they were married. The property was mortgaged at the time, and throughout the marriage, numerous loans mortgaged by the property were taken and paid off. Wife testified a similar pattern happened with some of the parties' other properties. As to the property at 633 S.E. Main Street, Simpsonville, Wife testified Husband already owned and worked at the property at the time of their marriage. She testified it was mortgaged when they married, the parties paid the loan during the marriage, and the parties executed mortgages and paid other loans on the property. According to Wife, the parties also paid off a mortgage on a mountain house in Greece. Wife testified to the value of other assets, such as the historical house in Greece, and testified the parties' properties were used for loans, which were taken and paid off throughout the marriage. Husband testified he purchased the historical house prior to the marriage and financed it.

Husband's father, Elias Conits (Father), testified in his deposition that he received 1,000 Euros a month from a pension, and over the years, he had given Husband and Husband's brother each 400,000 Euros. He also testified his gifts were derived

from his olive and orange tree production. Father admitted Husband had money in Greece that he did not take to America. Husband admitted he always had "a little money over there."

Husband testified he moved to the United States in 1968. He originally worked for his uncle at a restaurant and went to high school and then a technical college. Shortly thereafter, he and a cousin leased property and opened a liquor store. In 1970 or 1971, Husband began his restaurant business in Greenville with the purchase of Carolina Fine Foods Restaurant, Augusta Road. He later purchased the land on which the restaurant sat, sold the business, and leased the real estate to a new restaurant owner. With the proceeds from the sale of the business, Husband purchased another business in Traveler's Rest, which he later sold, keeping the real estate. Husband repeated this process multiple times until, at the time of the divorce, he owned eighteen properties in the upstate, including several that housed Carolina Fine Foods. Many of the properties were jointly owned by Husband and his brother. Husband also testified to the numerous purchases and financing transactions, explaining at trial that "when [he bought] something [he didn't] want to sell it." Finally, Husband admitted the money used to support the family throughout the marriage came from the restaurants and the parties' rental properties. He also conceded the money in the Greek bank account was used in support of the marriage.

Husband testified the value of the marital home was $395,000, although his loan application to the bank in September 2011 listed a market value of $500,000. Husband admitted he omitted Carolina Fine Foods, LLC, the bank account in Greece, and the Bank of Traveler's Rest bank account from his 2009 financial declaration.

Wife filed this divorce action in August 2009, seeking, *inter alia*, equitable apportionment, attorney's fees, and temporary support. A two-day trial was held June 25 and 26, 2012. On July 25, 2012, George Conits (the brother), Husband's brother who resides in Greece, filed a complaint in the Greenville County Court of Common Pleas, seeking a declaratory judgment and constructive trust regarding vacant land on Highway 14, which Wife claimed was marital property. Attached to the complaint was the deed to the property, which indicated Husband was the sole owner. The brother also filed a motion to dismiss in family court as to the Highway 14 property.

In its August 14, 2012 order, the family court granted Wife a divorce and ordered 84.07 acres in Laurens to be sold. By order dated March 11, 2013, the family court denied the brother's motion to dismiss. The brother filed a motion to reconsider. In an order filed October 11, 2013, the family court equitably distributed the parties' marital estate. The parties each moved for reconsideration. The court issued a final amended order, filed April 14, 2014, denying Husband and the brother's motions to reconsider.

The court valued the marital estate at $5.9 million and awarded 50 percent (or $2.972 million) to each party.[1] The court identified and valued numerous properties, including the following properties in dispute on appeal: family farm in Greece; 25 Hawkins Road; 633 S.E. Main Street; historical house and four-story building in Greece; and vacant land on Highway 14, Spartanburg County. The court also ordered Husband to pay Wife's attorney's fees and costs. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. *Moore v. Moore*, 414 S.C. 490, 497, 779 S.E.2d 533, 536 (2015). "[T]his broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses." *DiMarco v. DiMarco*, 399 S.C. 295, 299, 731 S.E.2d 617, 619 (Ct. App. 2012) (citing *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001)). An appellate court will affirm the decision of the family court unless the decision is controlled by an error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by the appellate court. *Id.*

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[1] The parties stipulated to ownership of two vehicles by the children, marital assets of approximately $290,000, and a nonmarital asset owned by Husband. All other assets were disputed, either as to whether they were marital or as to their values.

LAW/ANALYSIS

I. Nonexistent Asset

Husband argues the family court erred in finding a family farm in Greece was marital property because the asset does not exist. We find Husband failed to preserve this issue for appellate review.

Husband listed a one-third interest in a nonmarital, thirty-acre property on his financial declaration dated September 14, 2009, and valued his interest at $20,000. On his November 2010 declaration, Husband omitted the property. On Husband's financial declaration presented at trial, Husband disclosed a fifty percent interest in a three-acre orange farm as a marital asset and valued his interest at $21,875. During trial, he testified the property was three acres, valued at between $35,000 and $40,000, and conceded it was a marital asset. On Wife's 2012 financial declaration, she listed a thirty-acre farm, valued at $1.4 million. The court found, "Throughout this case, Husband made different and contradictory representations [regarding] . . . the acreage of the farm, his percentage ownership in the farm, and the value of his interest." The court found, "[b]ased on the credibility of the competing testimony, the family farm i[n] Greece is a marital asset subject to equitable division and assigned a value of $1,420,000." On appeal, Husband argues he does not own a thirty-acre family farm in Greece and Wife failed to meet her burden of proving the existence of such a farm as part of the marital estate.

A party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment. *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). At trial, Husband made no arguments as to the existence of the family farm or that Wife "made up" the farm. Rather, the parties argued about its value and whether the property was three or thirty acres. Thus, Husband is precluded from raising this issue on appeal. *See id.* at 113, 597 S.E.2d at 149 (finding the issue was not preserved because a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment); *McClurg v. Deaton*, 380 S.C. 563, 576-80, 671 S.E.2d 87, 94-96 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) (addressing two grounds for setting aside a default judgment but finding a third ground not preserved for appellate review because it was raised for the first time in a motion to reconsider).

II. Note Payable

Husband argues the family court erred in finding a note payable to his brother was not a marital debt. We disagree.

Husband listed a $235,000 note payable to his brother on his list of marital debts. At trial, he testified that when he and his brother opened the Carolina Fine Foods in Simpsonville, he had a family and was short on cash; thus, his brother "put some extra" money on the equipment for the restaurant and to purchase the lot next door with an agreement Husband would "pay him later."

When asked about the alleged $235,000 note payable to Husband's brother, Wife testified she had seen a note, but she did not know anything else about it. John Henry Heckman, III, an attorney in Greenville, testified he prepared the note in May 2004. The terms of the note indicated the full amount would be paid on or before June 1, 2014; provided zero interest; and stated pre-payments could be made without penalty at any time. Heckman admitted he did not witness any money change hands between Husband and the brother, and he did not remember if the brother was present at the execution of the note. The family court concluded, "Based on the lack of credible evidence presented, the alleged debt owned by Husband to [the brother] is not recognized as a marital debt subject to equitable apportionment."

"Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution." *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005) (citing *Smith v. Smith*, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997)). There is a rebuttable presumption that a debt incurred prior to marital litigation is marital in nature and must be considered in equitably apportioning the marital estate. *Id.* "For purposes of equitable distribution, 'marital debt' is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable." *Hardy v. Hardy*, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993). "[B]asically the same rules of fairness and equity [that] apply to the equitable division of marital property also apply to the division of marital debts." *Id.* at 437, 429 S.E.2d at 814.

In *Pruitt v. Pruitt*, 389 S.C. 250, 267, 697 S.E.2d 702, 711 (Ct. App. 2010), this court deferred to the family court's finding that alleged debts listed by the husband

as marital debts did not qualify as marital debts because they were not adequately explained by his testimony at trial. Although the appellate court views the evidence de novo, it defers to the family court's findings of fact due to "the superior position of the [family court] to determine credibility and the appellant's burden to satisfy the appellate court that the preponderance of the evidence is against the finding of the [family] court." *Lewis v. Lewis*, 392 S.C. 381, 388, 709 S.E.2d 650, 653 (2011). Deferring to the family court's superior position to determine credibility, we find no error in the finding that the alleged debt was not a marital debt. *See Grumbos v. Grumbos*, 393 S.C. 33, 46-47, 710 S.E.2d 76, 83-84 (Ct. App. 2011) (affirming the family court's refusal to find a husband's familial and other debts were marital after considering the intra-family nature of the debts and the lack of credible documentation and testimony to substantiate the debts); *Allen v. Allen*, 287 S.C. 501, 507, 339 S.E.2d 872, 876 (Ct. App. 1986) (finding loans from close family members must be closely scrutinized for legitimacy).

III. Transmutation[2]

Husband argues the family court erred in finding various properties were transmuted into marital property. We disagree.

A. 25 Hawkins Street and 633 S.E. Main Street

Husband argues the family court erred in finding property located at 25 Hawkins Street in Travelers Rest and 633 S.E. Main Street in Simpsonville transmuted into marital property. He argues the family court erred because his use of income to support the marriage did not transmute the properties into marital properties. We disagree.

Husband purchased the 25 Hawkins Street property prior to the marriage. He later refinanced it several times during the marriage to obtain funds that were used to pay various family expenses, including private school tuition for the children and new marital properties. Husband testified he also owned the property at 633 S.E. Main Street prior to the marriage and acknowledged it was used during the marriage to obtain a loan "for whatever [he] needed money for at the time."

[2] We combine Husband's third and fourth issues on appeal.

The court found 25 Hawkins Road was a marital asset, finding although Husband owned the property prior to the marriage, Wife met the burden of proving the asset was transmuted into marital property because the parties extinguished all of the debt owed against the property at the time of the marriage from income earned during the marriage. Furthermore, the parties refinanced the property numerous times during the marriage to support the marriage. As to the 633 S.E. Main Street property, the court found that during the marriage, the parties extinguished the premarital debt. The court found Husband did not trace the income used to extinguish the debt to nonmarital sources and the parties refinanced the property several times throughout the marriage, using the proceeds in support of the marriage. Thus, the court found the property was a marital asset.

B. Historical House and Four-Story Building in Greece

Husband also argues the family court erred in finding the historical house and the four-story building in Greece transmuted into marital property.

The historical house is located in Sparta, Greece. It consists of a basement shop, two shops and an apartment on the ground floor, and an apartment on the first floor. In September 1981, Husband paid $7,000 for an option to purchase the historical house for $125,000. Between 1982 and 1990, Husband made payments on the loan used to finance the purchase after Husband exercised his option. Wife testified the parties rented out the historical house in Greece during the marriage. The court found Husband owned an option to purchase the historical house prior to the marriage. The terms of the sale required payments over eight years, of which the last several occurred during the marriage. The court found the parties used income from the rental of the property in support of the marriage.

The four-story building is also located in Sparta, Greece. Wife testified that during the marriage, the family returned to Greece for two months each summer. For the first several years, the parties split the summer between the parties' parents' homes. In approximately 1998, Wife wanted a home in Greece. According to Wife, Husband owned the bare land in Sparta at the time of the marriage, and a retail and office building had been built and added onto during the marriage. When Wife decided she wanted a home in Sparta, the parties added a fourth-story apartment onto the three-story building. Wife testified her father managed the construction project without remuneration.

As to the four-story building, Husband testified he owned the land prior to the marriage and had already applied for permits to build. Husband testified he initially built the first floor of retail units, rented them out, and gradually built the remaining floors with his money and "a little" help from his father. He argues each floor is a separate parcel of real estate because the custom in Greece is to purchase and sell by the floor rather than by the building. The court found the permit for the construction of the four-story building was obtained in 1986, after the marriage, and construction began that year. The court found numerous loans were taken on the property, and they were fully paid by money earned during the marriage. The court further found Wife's father was heavily involved in the construction of the building; Wife's mother was involved in the management of the building; and neither parent was paid for the efforts. Finally, the court found the income from the property was used in support of the marriage by being deposited into a Greek account, of which Wife was a co-owner. The court concluded Husband's equity in the property at the time of the marriage was transmuted into marital property and all improvements constructed and paid for during the marriage were marital property.

"The term 'marital property' . . . means 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 . . . ." S.C. Code Ann. § 20-3-630(A) (2014). "Property acquired prior to the marriage is generally considered nonmarital." *Pirri v. Pirri*, 369 S.C. 258, 270, 631 S.E.2d 279, 285 (Ct. App. 2006). Nonmarital property "may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013) (citing *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 871 (1986)). "[T]ransmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988). The party claiming nonmarital property has transmuted into marital property must produce evidence that the parties regarded the property as common property during the marriage. *Id.* at 295, 372 S.E.2d at 110-11. "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Id.* at 295, 372 S.E.2d at 111.

We find no merit to Husband's reliance on *Fitzwater v. Fitzwater*, 396 S.C. 361, 721 S.E.2d 7 (Ct. App. 2011) and *Peterkin v. Peterkin*, 293 S.C. 311, 360 S.E.2d 311 (1987). In *Fitzwater*, this court affirmed the family court's finding that the husband's nonmarital property was not transmuted. 396 S.C. at 368, 721 S.E.2d at 11. The parties in *Fitzwater* never used the "property as a marital home, never placed the property in [the wife's] name, and [the husband] never made any substantial improvements to the property during the marriage." *Id.* Also, although the husband in *Fitzwater* mortgaged the property during the marriage, the proceeds were used to pay for improvements to nonmarital property. *Id.* In this case, there is abundant evidence the properties at issue were either mortgaged numerous times and the proceeds were used in support of the marriage or income from the properties was used in support of the marriage. Furthermore, many of the properties were mortgaged at the time of the marriage, and the notes were paid off using marital funds.

We likewise distinguish *Peterkin*, in which the court stated the following: "Merely using the income derived from these items in support of the marriage does not transmute them into marital property." 293 S.C. at 313, 360 S.E.2d at 313. In *Peterkin*, the husband inherited land, a trust, and stocks. *Id.* at 312, 360 S.E.2d at 312. The income generated from the assets was used in support of the marriage. *Id.* Conversely in this case, the equity in the assets was built by marital funds by either paying for the assets, by paying off numerous mortgages, or by building property on unimproved land.

We find all four of these properties were utilized by the parties in support of the marriage and were accordingly marital property. *See Johnson*, 296 S.C. at 295, 372 S.E.2d at 110 (explaining utilization of property by the parties in support of the marriage is evidence of transmutation); *Calhoun v. Calhoun*, 339 S.C. 96, 106, 529 S.E.2d 14, 20 (2000) ("When property is determined to have been transmuted, the entire property, not just a portion of the property, is included in the parties' marital property . . . .").

IV. Equitable Distribution Percentage

Husband argues the family court erred in equally dividing the marital estate without considering his superior contribution to the assets of the marriage. He also

argues the family court allocated income-producing assets to Wife to give her "backdoor alimony."[3] We disagree.

In making an equitable apportionment of marital property, the family court "must give weight in such proportion as it finds appropriate" to all of the following factors:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce . . . ; (2) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage . . . ; (3) the value of the marital property . . . . The contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; provided, that the court shall consider the quality of the contribution as well as its factual existence; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) the need of each spouse or either spouse for additional training or education in order to achieve that spouses's (sic) income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether . . . alimony has been awarded; (10) the desirability of awarding the family home . . . ; (11) the tax consequences to each or either party . . . ; (12) the existence and extent of any support obligations, from a prior marriage or for any other reason or reasons, of either party; (13) liens and any other encumbrances upon the marital property . . . ; (14) child custody

[3] During the hearing, the family court found there was misconduct by both parties, and the divorce was granted on one year's continuous separation. Neither party sought alimony.

> arrangements and obligations at the time of the entry of the order; and (15) such other relevant factors as the trial court shall expressly enumerate in its order.

S.C. Code Ann. § 20-3-620(B) (2014).

"The division of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion." *Crossland v. Crossland*, 408 S.C. 443, 455, 759 S.E.2d 419, 425 (2014) (citing *Craig v. Craig*, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005)). "Equitable distribution of marital property 'is based on the recognition that marriage is, among other things, an economic partnership.'" *Id.* at 456, 759 S.E.2d at 426 (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Morris*, 335 S.C. at 531, 517 S.E.2d at 723. "The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership." *King v. King*, 384 S.C. 134, 143, 681 S.E.2d 609, 614 (Ct. App. 2009) (citing *Johnson*, 296 S.C. at 298, 372 S.E.2d at 112). "On review, this court looks to the overall fairness of the apportionment, and if the end result is equitable, that this court might have weighed specific factors differently than the family court is irrelevant." *Morris*, 335 S.C. at 531, 517 S.E.2d at 723 (citing *Johnson*, 296 S.C. at 300-01, 372 S.E.2d at 113).

In regard to equitable distribution, the court found "[b]ased on all relevant evidence and applicable law, it is fair and equitable to apportion the overall marital estate 50% to Husband and 50% to Wife." In support of the award, we note the parties were in a long-term marriage; any misconduct was disregarded by the family court; both are in good health; Wife has very low earning potential; neither party has obligations from a previous marriage; and Wife is not receiving alimony. Although Husband provided far greater direct contributions to the parties' assets, Wife contributed in the traditional stay-at-home spouse role that the parties contemplated and agreed upon. As to Husband's "back door alimony" argument, we find no merit. Husband relies on *Wannamaker v. Wannamaker*, 305 S.C. 36, 41, 406 S.E.2d 180, 183 (Ct. App. 1991), in which this court found the family court erred by apportioning the wife an interest in the husband's medical partnership, which he established *after* the separation. We also find no merit in

Husband's reliance on *Berry v. Berry*, 294 S.C. 334, 335, 364 S.E.2d 463, 463-64 (1988), in which the supreme court affirmed this court's decision prohibiting the family court from using equitable division of marital property to award alimony barred by adultery. In *Berry*, the family court indicated it had increased the wife's equitable distribution share to compensate for the alimony which could not be awarded. *Id.* at 335 n.1, 364 S.E.2d at 463 n.1. This court reversed and remanded. *Id.* at 335, 364 S.E.2d at 463. In affirming, the supreme court made clear "the preclusion of an alimony award to a spouse cannot be used to increase an equitable distribution award." *Id.* at 335, 364 S.E.2d at 464. However, the court also made clear the family court could still consider two of the relevant factors used when equitably dividing marital property: (1) the present income of the parties; and (2) the effect of distribution of assets on the ability to pay alimony and support. *Id.* We find no error by the family court in its apportionment of the marital estate. *See Crossland*, 408 S.C. at 456-57, 759 S.E.2d at 426 (explaining that though there is no recognized presumption in favor of a fifty-fifty division, an equal division of marital property is an appropriate starting point for a family court in dividing the estate of a long-term marriage).

V. Highway 14 Land

Husband argues the family court erred in exercising jurisdiction over the Highway 14 property. We disagree.

Husband testified he owned the property fifty-fifty with his brother. The Highway 14 deed indicated the property was owned solely by Husband. The court found the property was in Husband's individual name, the net fair market value of the property was $225,305.05, and the property was marital.

Generally, the "jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. If jurisdiction once attaches to the person and subject matter of the litigation the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached." *Gardner v. Gardner*, 253 S.C. 296, 302, 170 S.E.2d 372, 375 (1969). In *Gilley v. Gilley*, 327 S.C. 8, 9-10, 488 S.E.2d 310, 311 (1997), the wife brought an action in circuit court to partition property the wife and the husband owned as tenants-in-common. The husband subsequently brought an action in family court for equitable distribution. *Id.* at 10, 488 S.E.2d at 311. Citing *Gardner*, the supreme court found the circuit court properly maintained jurisdiction based on the status of the case at the time of filing. *Id.* at 10-11, 488

S.E.2d at 312. In the present case, the parties were properly in family court at the time the brother filed his action in circuit court. Thus, the family court maintained jurisdiction.

VI. Attorney's Fees

Husband argues the family court erred in awarding Wife more than $135,000 in attorney's fees and costs because she has the ability to pay her own fees. Husband also argues he should not have to pay fees incurred by Wife's experts, paralegals, and other members of Wife's attorney's staff. Husband next argues the order requiring him to pay Wife's attorney's fees diminishes his portion of the equitable distribution. Husband also argues the court ignored the fact that each party has the ability to pay their own fees and over-emphasized Wife's attorney's involvement with valuing the assets. Husband finally argues he "won" on some designations of assets and valuations. Wife argues the fact Husband "won" on seven of forty-seven disputes "hardly demonstrates that Wife failed to obtain a beneficial result."

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce. S.C. Code Ann. § 20-3-130(H) (2014). In deciding whether to award attorney's fees and costs, the court should consider the following factors: (1) the ability of each party to pay his or her fees; (2) beneficial results obtained; (3) the financial conditions of the parties; and (4) the effect a fee award will have on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

In this case, the court exhaustively considered the factors in determining to award fees, considered the factors to determine the amount of fees, and awarded Wife $135,117.33 in attorney's fees and costs. The court also found, "Husband admitted his failure to be truthful in deposition testimony, and Wife proved his deceit at trial" and "[t]here is limited evidence Husband made reasonable efforts to resolve this matter without contested litigation." *See Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010) (noting a party's failure to cooperate and behavior prolonging proceedings may be considered in awarding attorney's fees).

We find no reversible error in the family's court's award of attorney's fees to Wife. We find Husband demonstrated the ability to earn a substantial income from his restaurants and investments; Wife is not employed and has not worked other than in support of the marriage or the parties' businesses throughout her adult life; Wife

prevailed on the transmutation and valuation of many assets; and Husband is in a superior financial position to pay attorney's fees.

We likewise find no error in the amount of fees awarded by the family court. In determining the amount of reasonable attorney's fees, the court should consider the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (citing *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989)). "The question of whether to award attorney fees is one addressed to the sound discretion of the trial court." *Ariail v. Ariail*, 295 S.C. 486, 489, 369 S.E.2d 146, 148 (Ct. App. 1988) (citing *O'Neill v. O'Neill*, 293 S.C. 112, 120, 359 S.E.2d 68, 73 (Ct. App. 1987)).

Husband cites numerous cases from foreign jurisdictions for the proposition that fees incurred by paralegals and law clerks are not properly part of an award of attorney's fees. However, none of the cases cited pertain to an action for divorce. We find the family court is not prohibited from awarding fees incurred by paralegals and law clerks in its award of attorney's fees. *See Siraco v. Astru*e, 806 F. Supp. 2d 272, 279-80 (D. Me. 2011) (analyzing the reasonableness of attorney's fees in a Social Security disability award case and finding them reasonable despite the inclusion of paralegal time); *id.* at 278 ("[I]f a firm can organize its practice efficiently by using less of its lawyers' time, yet still produce high quality legal work, it should not be penalized in the fee it can recover. A different conclusion would lead this and other lawyers to do more of the work themselves and delegate less to paralegals, to no apparent gain."); *Newport v. Newport*, 759 S.W.2d 630, 636-37 (Mo. Ct. App. 1988) (providing that in an action for dissolution of a marriage, reasonable paralegal fees were allowable where there was direct evidence in the form of an itemized bill); *id.* at 637 (stating "the presumptive expertise of the trial judge" in assessing the reasonableness and necessity of attorneys' fees extended to paralegal fees); *see also* James J. Watson, J.D., Annotation, *Attorneys' Fees: Cost of Services Provided by Paralegals or the Like as Compensable Element of Award in State Court*, 73 A.L.R.4th 938 at § 3 (1989) (listing courts that have "held or recognized that the value or cost of legal services performed by paralegals or other similarly qualified persons is recoverable as a separate element or component of attorneys' fees awards under statutes, rules of court, or decisional law authorizing awards of attorneys' fees" (footnote omitted));

id. (including Alaska, Arizona, California, DC, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Montana, North Carolina, Oregon, Texas, and Wisconsin). Thus, we find no error in the family court's award of fees or in the amount awarded.

CONCLUSION

For the foregoing reasons, the family court's order is

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.