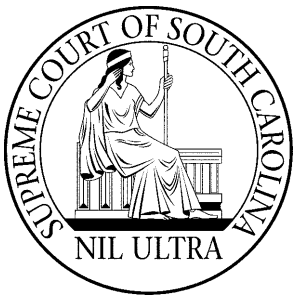

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
December 22, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Tara E. Trantham, Respondent.

Appellate Case No. 2021-001456

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 14, 2021

The Supreme Court of South Carolina

In the Matter of John Keith Blincow, Jr., Respondent.

Appellate Case Nos. 2021-001487 and 2021-001495

ORDER

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

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by

this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 21, 2021

cc:
Mr. John Keith Blincow, Jr.
John S. Nichols, Esquire
Caitlin Creswick Heyward, Esquire
Deborah Stroud McKeown, Esquire
Peyre T. Lumpkin, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald Stanley and Sean Reiter, Individually and as Class Representatives, Respondents,

v.

Southern States Police Benevolent Association, Inc., Appellant.

Appellate Case No. 2019-000182

Appeal From Charleston County
Edward W. Miller, Circuit Court Judge

Opinion No. 5882
Heard November 10, 2021 – Filed December 22, 2021

DISMISSED

James Andrew Yoho, of Boyle, Leonard & Anderson, P.A. of Charleston; James Edward Bradley, of Moore Bradley Myers, PA, of West Columbia; and Barry Goheen, of Atlanta, Georgia; all for Appellant.

Andrew John Savage, III, of Savage Law Firm, of Charleston; Eric Steven Bland, of Bland Richter, LLP, of Columbia; Daniel Francis Lynch, IV, and Carl Everette Pierce, II, both of Pierce, Sloan, Wilson, Kennedy & Early, LLC, of Charleston; Scott Michael Mongillo and Ronald L. Richter, Jr., both of Bland Richter, LLP, of

Charleston; and Joseph C. Wilson, IV, of Joseph C Wilson Law Firm LLC, of Folly Beach; all for Respondents.

HILL, J.: This is an appeal of an order certifying a class action lawsuit against Appellant, the Southern States Police Benevolent Association, Inc. (PBA). PBA attacks the order on several fronts, but none of the preserved issues are immediately appealable. We therefore dismiss the appeal.

I.

The order certifies as a class certain South Carolina PBA members for the purpose of determining the scope of their rights to legal representation PBA provides. PBA claims the trial court's class certification order should be reversed because it improperly impairs PBA's business activities and wrongly certified a damages class.

We cannot address these issues because they are not immediately appealable. Where, as here, a Rule 23, SCRCP, class certification order does not address the merits, it is interlocutory and may not be appealed until after final judgment. *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 148, 838 S.E.2d 510, 512 (2020); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008). Believing it has found a path around this precedent, PBA points to the following portion of the certification order:

> Any notices required by the law and the South Carolina Rules of Civil Procedure shall be given to the class in a form and manner to be determined by the Court upon application by Plaintiffs or Defendants. In the interim, no party shall communicate with the class members regarding this class action and the allegations contained herein.

According to PBA, this provision amounts to an injunction, triggering S.C. Code Ann. § 14-3-330(4) (2017), which provides an interlocutory order granting an injunction is immediately appealable. *See Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (holding precertification order allowing defendant but not plaintiff to contact potential class members amounted to an injunction that was immediately appealable). PBA further asserts the order runs afoul of *Eldridge* and *Gulf Oil Co. v. Bernard*, which require that orders restraining

communications with class members must "be based on a clear record and specific findings reflecting a weighing of the need for a limitation and the potential interference with the parties' rights." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, (1981).

We question whether the communication order here, which was designed by the skilled circuit judge to evaporate once the class notice was issued, is a true injunction of the type envisioned by *Eldridge*. The order at issue there only applied to the plaintiff, and was entered before the class was certified. Several courts and commentators have cautioned that procedural orders in class action cases that in no way provide substantive relief or address the merits of a case are not appealable as injunctions under the federal final judgment statute. *See Cobell v. Kempthorne*, 455 F.3d 317, 322 (D.C. Cir. 2006) (setting forth test of when a provision of a Rule 23, Fed. R. Civ. P., class certification order qualifies as an immediately appealable injunction); 16 Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* § 3922.2 (3d ed. 1998); 3 William B. Rubenstein, *Newberg on Class Actions* § 8:41 (5th ed. 2021). We note the federal appealability statute mirrors the phrasing regarding "injunctions" found in S.C. Code Ann. § 14-3-330(4). *See* 28 U.S.C.A. § 1292(a)(1) (2006) ("The courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."). We are also concerned that an overly generous view of what constitutes an injunction for purposes of appealability may sap the efficiency of class actions by allowing for immediate appeal of what in reality may be an interlocutory procedural ruling. If any routine phrase in a class certification order may be interpreted as an immediately appealable injunction, the entire class action—premised as it is on the idea that the advantages of economy of scale might help both sides and streamline the litigation—could be brought to a halt by a party bent on delay.

But we do not have to confront these questions about what constitutes an "injunction" here. The provision of the trial court's order limiting communication was not discussed before the order was issued. PBA did not object to or mention the provision in its Rule 59(e), SCRCP, motion and raises the issue for the first time on appeal. We therefore find the issue unpreserved. When a party receives an order containing relief that was not requested or contemplated, the party must present its objections to the issue to the trial court in a Rule 59(e), SCRCP, motion to preserve the issue for appeal. *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60-61, 427 S.E.2d 673, 675-76 (1993); *In re Timmerman*, 331 S.C. 455,

460, 502 S.E.2d 920, 922 (Ct. App. 1998). This gives the trial court the opportunity to consider and rule upon the issue in the trial setting after it has been refined by fact-finding and sharpened by argument. This in turn allows us to provide the meaningful consideration only a complete record provides. As an appellate court, "we are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Because PBA's challenge to the communication limitation is unpreserved and none of PBA's other issues are immediately appealable, PBA's appeal is

DISMISSED.

KONDUROS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael James Dinkins, Appellant.

Appellate Case No. 2017-002360

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

Opinion No. 5883
Heard September 23, 2020 – Filed December 22, 2021

AFFIRMED

Steven Smith McKenzie, of Coffey & McKenzie, PA, of Manning, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia, and Solicitor Ernest Adolphus Finney, III, of Sumter; all for Respondent.

MCDONALD, J.: Michael James Dinkins appeals his convictions for second-degree assault and battery and criminal sexual conduct (CSC) with a minor in the third degree, arguing the circuit court erred in: (1) failing to direct a verdict on one count of third-degree CSC with a minor when the State failed to produce evidence of intent; (2) charging the jury that assault and battery is a lesser included offense

of third-degree CSC with a minor due to the circuit court's lack of subject matter jurisdiction; and (3) admitting evidence of prior bad acts. We affirm.

Facts and Procedural History

In 2012, the family court awarded custody of Child, who was then eight years old, to her maternal aunt (Aunt) and Aunt's husband, Dinkins.[1] Initially, Child lived with her maternal grandmother (Grandmother) during the week because Aunt worked long hours at a hospital; Child visited Aunt's home on the weekends and on Aunt's days off from work.

In 2013, Child, Aunt, Dinkins, and Grandmother took a trip to Topsail Island, North Carolina. According to Child, when she and Dinkins were alone in the living room, Dinkins rubbed her leg and touched her "very close to [her] private area." Child did not immediately disclose this incident to anyone, but eventually told Grandmother. Grandmother responded that they "needed to just watch things all more, very carefully" to see if anything else happened before telling Aunt. Dinkins had been drinking heavily that day, and Grandmother believed alcohol might have contributed to his behavior.

Approximately a year and a half after her mother's death—from December 2013 through February 2014—Child saw counselor Sarah McClam for grief treatment. In August 2014, Child began living full time with Aunt and Dinkins. Child's counseling with McClam resumed in May 2015, after Child wrote a concerning letter to her deceased mother. This treatment period continued until August 2015, when Child improved. Child did not report concerns about Dinkins during the 2013–14 treatment period or when she resumed treatment in 2015.

On December 31, 2015, Child (then eleven years old) and Dinkins stayed up late one night to watch movies, and Child fell asleep on the living room couch. At trial, Child testified Dinkins kissed her on the lips and put his tongue in her mouth. Child pretended to be sleeping because she was scared and went to find Grandmother after Dinkins left the living room. When Aunt came back inside the house later that night, Child told her Dinkins had kissed her on the couch. Child

[1] Child's mother died in July 2012. Although her father is active in her life, he suffers from a health condition that renders him unable to drive and care for Child.

explained she disclosed this incident because "she knew that it was really wrong and [she] didn't need to let it go on anymore."

Aunt and Grandmother did not report the couch incident to law enforcement but contacted McClam to schedule an emergency appointment for Child to talk with her about what happened. When Child and Aunt met with McClam in January 2016, Child disclosed the December 31 incident and reported that Dinkins had been previously inappropriate toward her on October 27, 2015, (Child's eleventh birthday) and December 26, 2015.

Child clarified that on October 27, 2015, Dinkins climbed into bed with her, and "pushed up his pelvic area up and down on top" of her. She further alleged that later that day, she was on the couch when Dinkins grabbed her hand and made her feel something "wet" and "spongy" in the middle of his body "where his private area was." Child claimed she did not immediately report the incident to anyone because she knew her aunt was happy, and she did not want her aunt "to have to get a divorce from my uncle." Child also disclosed that on December 26, 2015, Dinkins made her sit in his lap, and then put his hands under her shirt and touched her breasts over her bra for several minutes. Again, she did not immediately tell anyone because she was afraid Aunt and Dinkins would divorce and she wanted Aunt to be happy. Aunt stated this was the first time she learned of these prior incidents.

After the January 2016 session with Aunt and Child, McClam notified the South Carolina Department of Social Services and the Clarendon County Sheriff's Office (CCSO) of Child's disclosures. CCSO Investigator Kimberly Marlow then spoke with Grandmother, Aunt, and Child's father about the allegations. During Investigator Marlow's interview with Dinkins, Dinkins claimed he kissed Child on the forehead and then kissed his fingers and touched them to Child's mouth. Investigator Marlow testified Dinkins's story changed several times during the interview.

In August 2017, a Clarendon County grand jury indicted Dinkins on four counts of third-degree CSC with a minor: two counts from October 27, 2015, one count from December 26, 2015, and one count from December 31, 2015.

Pretrial, the State filed a written motion seeking to admit the following as evidence of other crimes, wrongs, or acts under Rule 404(b), SCRE:

1. During spring break of 2013, the defendant reached under the victim's nightgown and touched the victim on her vaginal area. The victim did not tell anyone until . . . several months later when she told her grandmother. Grandmother spoke with the victim's aunt who in turn told the defendant that this behavior was inappropriate and made victim uncomfortable.

2. Between 2013 and 2015 the defendant kissed victim on the back of her neck. This incident was witnessed by the victim's aunt who confronted the defendant [and] informed him that his behavior was inappropriate and made victim uncomfortable. She asked the defendant to refrain from such behavior.

3. Between 2013 and 2015 the defendant touched victim's legs and thighs making victim uncomfortable.

4. Between 2013 and 2015 the Defendant showed the victim pictures of models from Victoria Secret catalog. He told the victim that this was how he wanted the victim to look when she grew up.

5. Between 2013 and 2015 the defendant offered to buy victim [a] revealing bathing suit.

6. Around 2014 the defendant touched victim's leg under the table. This incident was witnessed by victim's grandmother who notified victim's aunt. Aunt told the defendant that this type of behavior made victim uncomfortable.

7. On or about December 26, 2015 the Defendant sen[t] the victim the text message "LUKUAMU," which stands for "Love You, Kiss You, Already Miss You." He also sent the victim a message "You're the bomb.com."

The State argued evidence of these incidents was admissible to show a common scheme or plan under Rule 404(b) because the incidents all involved Child and occurred within a two-year period. The State further explained it sought to introduce "those prior bad acts to show that there was nothing innocent. He was told on prior occasions do not touch the victim in that manner, it makes her uncomfortable, it's inappropriate, and yet he continued to do it." The State noted the incidents were evidence of Dinkins's intent, an element necessary to establish third-degree CSC with a minor.

After taking testimony from Aunt and Child, the circuit court found two of the seven prior incidents—the 2013 spring break incident and the neck kissing incident—were admissible under Rule 404(b), stating, "For purposes of—of the prior bad acts, I've taken into consideration the *Wallace* factors."[2] "[T]he location of the abuse all took place in the home, with the exception of the Topsail incident in the mountains at spring break, and that was obviously within the family confines."

At trial, Child testified that the first time Dinkins inappropriately touched her was on a spring break trip to Topsail Island in 2013. She and Dinkins were alone in the living room and sitting on the couch watching television when he put his hand on her upper thigh. Child reported the incident to Grandmother later that night. Child also recalled Dinkins kissing her on the neck at their home in Manning but could not remember exactly when this happened. Aunt testified she witnessed Dinkins kiss Child on the neck in 2014 in the hallway at their house. Dinkins did not know she could see him, and he walked up behind Child, pulled her hair back, and "tenderly laid his lips on her." Aunt explained, "It wasn't like a quick smack. It was like a, like a tender, not a kiss between parent and child."

The jury convicted Dinkins of second-degree assault and battery on count one of the indictment (Child's allegation that Dinkins got into bed with her and climbed on top of her) and count four (Child's allegation that Dinkins reached his hand under her shirt and touched her breasts). The jury acquitted Dinkins on count two (Child's allegation that Dinkins took her hand and forced her to touch his genitals). The jury convicted Dinkins of third-degree CSC with a minor on count three of the

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[2] *See State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), *overruled by State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). At the time of Dinkins's trial, our supreme court had not yet decided *Perry*.

indictment (Child's allegation that Dinkins kissed her and put his tongue in her mouth). The circuit court sentenced Dinkins concurrently to six years' imprisonment suspended upon the service of three years' imprisonment and three years' probation for third-degree CSC with a minor, and three years' imprisonment for assault and battery.

During post-trial motions, Dinkins argued "French kissing" did not fall within the third-degree CSC with a minor statute, the circuit court lacked subject matter jurisdiction to charge second-degree assault and battery as a lesser included offense of third-degree CSC with a minor, and the circuit court erred in admitting evidence of prior bad acts. The circuit court denied the post-trial motions.

Standard of Review

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (quoting *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011)).

"The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 115 (Ct. App. 2008) (quoting *State v. Irick*, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001)).

Law and Analysis

I. Directed Verdict

Dinkins argues the circuit court erred in failing to direct a verdict on the third count of the indictment, which alleged Dinkins "French kissed" Child. Specifically, Dinkins contends the State failed to present evidence of his intent to arouse, appeal

to, or gratify the lust, passions, or desires of either himself or Child as required under section 16-3-655 of the South Carolina Code (2015). We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Prather*, 429 S.C. 583, 608, 840 S.E.2d 551, 564 (2020) (quoting *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)). "We must affirm the trial court's decision to submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt." *Id*.

Section 16-3-655(C) provides:

> A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.

At trial, Child testified she and Dinkins stayed up late to watch movies on December 31, 2015, and Dinkins kissed her on the lips and put his tongue in her mouth while she was asleep on the couch. When Dinkins left the room, Child went to Grandmother's room and started pacing. Child then reported the incident to Aunt.

Grandmother testified that when Child woke her up, she was visibly upset and looking for Aunt. Aunt testified Child was crying and scared when she told her Dinkins kissed her and put his tongue in her mouth. Aunt confronted Dinkins, who denied this, claiming he kissed his fingers and then touched them to Child's forehead and mouth. Aunt did not believe Dinkins's explanation, so she told Grandmother and Child they were leaving. Aunt testified Dinkins did not deny kissing Child but claimed "he was just trying to show her affection."

Psychologist Elizabeth Ralston was qualified without objection as an expert in child abuse dynamics and disclosure. Ralston did not meet with or treat Child; as a blind expert, her only knowledge of the case was provided by the State. Ralston

discussed delayed disclosure, the reasons a child might delay disclosing abuse, partial disclosure, and the characteristics and symptoms a sexually abused child might exhibit. Ralston acknowledged the symptoms of a sexually abused child could overlap with those of a child who suffered the loss of a parent.

At the close of the State's case, Dinkins moved for a directed verdict on all counts, arguing the State did not present the necessary evidence "about the intent of arousing, appealing to, or gratifying the lust or passion of the sexual desires of the actor in any of the indictment[s]." The circuit court denied the motion, noting the question of intent would be a question of fact for the jury.

We find the circuit court properly denied Dinkins's directed verdict motion because, viewing the evidence in the light most favorable to the State, the State presented evidence necessary to satisfy the elements of third-degree CSC with a minor. Specifically, Child's testimony that Dinkins put his tongue in her mouth while she pretended to be asleep was evidence of conduct from which a jury could reasonably determine Dinkins's intent to arouse, appeal to, or gratify his own lust, passions, or sexual desires. *See* § 16-3-655(C); *State v. Meggett*, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) ("[W]hether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct.").

II. Subject Matter Jurisdiction of Lesser Included Offense

Dinkins next argues the circuit court lacked subject matter jurisdiction to charge second-degree assault and battery as a lesser included offense of third-degree CSC with a minor. We disagree.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Gantt v. Selph*, 423 S.C. 333, 337, 814 S.E.2d 523, 525 (2018) (quoting *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994)). "[A] defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted." *State v. Gentry*, 363 S.C. 93, 101–02, 610 S.E.2d 494, 499 (2005). "The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." *Id.* at 100, 610 S.E.2d at 498.

As an initial matter, we find the circuit court had subject matter jurisdiction over the criminal offenses of which Dinkins was convicted. *See id.* at 101, 610 S.E.2d at 499 ("Circuit courts obviously have subject matter jurisdiction to try criminal matters."). Whether the circuit court erred in charging the jury with second-degree assault and battery as a lesser included (or lesser-related) offense of criminal sexual conduct does not constitute a question of subject matter jurisdiction.[3] *See id.* (clarifying the subject matter jurisdiction of the court and the sufficiency of an indictment "are two distinct concepts").

Prior to charging the jury, the circuit court asked, "There's been some discussion about the lesser included charge of assault and battery first degree or some other lesser included offense. What is the Defendant's position on that?" Dinkins responded that assault and battery second degree would be "akin to ABHAN," which was formerly recognized as a lesser included offense of CSC prior to the Legislature's codification of the assault and battery offenses.

At the close of the State's case, the circuit court advised,

> [T]here's been some discussion yesterday and today about the lesser included offenses. And you know, and I asked y'all to take a look at it and we would discuss it this morning. We discussed it briefly in chambers this morning, and I think there was a consensus that perhaps lesser included offenses should be charged on count one and count four. Upon my review of the law, I have some questions and I'd ask for your input . . . because the law is

[3] In *State v. Hernandez*, our supreme court found assault and battery of a high and aggravated nature was no longer considered a lesser included offense of CSC after the 2010 codification of the assault and battery crimes because the statute specifies the crimes of which the varying degrees of assault and battery are lesser included offenses, and CSC is not included. 428 S.C. 257, 260–61, 834 S.E.2d 462, 463–64 (2019) (per curiam). Section 16-3-600(D)(3) of the South Carolina Code (2015) provides, "Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature [ABHAN], as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."

> sort of unclear in this area and I really want to hear what both of you have to say in this regard.

The circuit court discussed whether first-degree or second-degree assault and battery would be the appropriate charge, and both the State and Dinkins's counsel agreed second-degree would be appropriate because it includes an attempt to injure.

> THE COURT: All right. And my question to you is, do you want me to charge that?
>
> [COUNSEL]: I need to discuss that with my client. I'd love to discuss it over the break.
>
> THE COURT: There's no time like the present. We're gonna sit right here and let you do it.
>
> [COUNSEL]: Okay.
>
> (Pause)
>
> [COUNSEL]: Your Honor, after conferring with my client, he would ask the Court to charge A&B second.

Dinkins requested that the circuit court charge the jury with second-degree assault and battery. Thus, he waived his challenge to the propriety of the charge on appeal. *See State v. Parris*, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) ("When the defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide."); *cf. State v. Dickerson*, 395 S.C. 101, 120 n.6, 716 S.E.2d 895, 906 n.6 (2011) (finding "a defendant's ability to waive notice of a particular charge does not also grant him an unqualified, non-reciprocal right to request any charge supported by the evidence, for to do so would grant him an unfair tactical advantage that interferes with the State's prerogative of deciding on which charges to try a defendant").

III. Prior Bad Acts

Finally, Dinkins argues the circuit court erred in admitting evidence of prior bad acts committed against Child. We disagree.

Rule 404(b), of the South Carolina Rules of Evidence, 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. 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.

"Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *Perry*, 430 S.C. at 30, 842 S.E.2d at 657.

> When evidence of other crimes is admitted based *solely* on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again.

Id. at 41, 842 S.E.2d at 663 (emphasis added).

Our supreme court addressed other crimes evidence admitted to show a common scheme or plan under Rule 404(b), SCRE, in *Perry*, 430 S.C. at 34, 842 S.E.2d at 659. There, the court analyzed the chronology of South Carolina's case law regarding the admission of other crimes, noting that for eighty years South Carolina courts required "a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged" in order to admit prior bad acts evidence under *State v. Lyle*.[4] *Id.* at 31, 842 S.E.2d at 658. Then, in

[4] 125 S.C. 406, 118 S.E. 803 (1923).

2009, *Wallace*[5] appeared to abandon the logical connection test and "effectively created a new rule of evidence, and rendered meaningless the restrictive application of the common scheme or plan exception that is so deeply embedded in our precedent." *Id.* at 34–37, 842 S.E.2d at 659–61 (footnote omitted). Thus, the *Perry* court overruled *Wallace*, reiterating that the test for determining whether evidence of other crimes is admissible is the *Lyle* logical connection test. *Id.* at 44, 842 S.E.2d at 665.

Based on its clarification of the law, the supreme court held evidence that Perry sexually assaulted his stepdaughter more than twenty years prior to his trial for sexual offenses against his biological daughters was inadmissible to show a common scheme or plan because the evidence demonstrated nothing beyond the defendant's propensity to commit the subsequent crimes. *Id.* The supreme court found the State failed to meet the burden necessary to admit the prior bad acts under the logical connection test because it "did not identify any fact in the crimes charged that was made more or less likely to be true" by the stepdaughter's testimony. *Id*. at 40, 44, 842 S.E.2d at 663, 665. The *Perry* court reiterated, "The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged." *Id.* at 44, 842 S.E.2d at 665. "The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'" *Id.* (quoting *Lyle*, 125 S.C. at 417, 118 S.E.2d at 807). "Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case." *Id.* (quoting *Lyle*, 125 S.C. at 417, 118 S.E. at 807).

The Rule 404(b) evidence offered here differs from that erroneously admitted in *Perry* because *Perry* addressed evidence of remote conduct against a separate victim, whereas this case involves Dinkins's repeated inappropriate conduct towards *this* child over the course of three years. The circuit court carefully considered the seven acts offered by the State, admitting evidence of only two of the seven. We find the prior acts probative as to a pattern of grooming—they are evidence of Dinkins's motive and intent, and these prior acts counter the argument

[5] 384 S.C. at 428, 683 S.E.2d at 275.

that Dinkins's actions toward Child were innocent and properly familial. *See* 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."); *Perry*, 430 S.C. at 72, 842 S.E.2d at 679–80 (Kittredge, J., dissenting) ("[T]he hallmark of the common scheme or plan exception is that the charged and uncharged crimes are connected in the mind of the actor by some common purpose or motive. Thus, as with the *modus operandi* exception where identity is interwoven with common scheme or plan, motive can also be inextricably intertwined with a common scheme or plan."). The charged and uncharged acts here are logically connected within the pattern of grooming, which included an escalation of the conduct towards this child. *See, e.g.*, *Clasby*, 385 S.C. at 157, 682 S.E.2d at 897 ("[E]vidence that defendant began touching and committing other sexual misconduct with victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor, second degree[,] on the ground that the 'six to seven year pattern of escalating abuse of Victim by [defendant was] the essence of grooming and continuous illicit activity.'" (second alteration in original) (quoting *Kirton*, 381 S.C. at 36, 671 S.E.2d at 121–22)).

The State is required to prove intent as an element of third-degree CSC with a minor. *See* § 16-3-655(C) ("A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child."). As Dinkins's prior acts against Child were probative of his intent toward and grooming of Child, the circuit court did not abuse its discretion in admitting evidence of two of the seven instances the State sought to admit under Rule 404(b), SCRE.

Conclusion

Based on the foregoing, Dinkins's convictions are

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank James Rish, Sr., Respondent,

v.

Kathy Cotney Rish, Appellant.

Appellate Case No. 2019-000504

Appeal From Newberry County
Joseph C. Smithdeal, Family Court Judge

Opinion No. 5884
Submitted December 1, 2021 – Filed December 22, 2021

VACATED IN PART, AFFIRMED IN PART

Leslie Ragsdale Fisk, of Spartanburg, and J. Edwin McDonnell, of Campobello, both for Appellant.

Christopher Paul Thompson, of Mayo, and Kenneth Philip Shabel, of Kennedy & Brannon, P.A., of Spartanburg, both for Respondent.

THOMAS, J: Frank James Rish, Sr. (Husband) filed this action in family court against Kathy Cotney Rish (Wife) seeking to terminate or modify alimony. Wife appeals the family court's order terminating alimony, arguing the court erred in finding (1) the parties' 2003 divorce decree did not divest the court of the power to

modify alimony, (2) Wife waived the court's lack of jurisdiction by failing to appeal a 2011 modification of alimony order, and (3) the court erred in denying her motion to reconsider pursuant to Rule 59(e), SCRCP, or set aside as void pursuant to Rule 60(b)(4), SCRCP. We vacate in part and affirm in part.

FACTS

The parties were married in 1972 and had two emancipated children at the time of their divorce. The divorce decree, dated March 28, 2003, incorporated the parties' agreement and required Husband to pay alimony of $650 per month "as periodic alimony which is non-modifiable and will cease only at the death of [Wife] or [Husband] or the remarriage of [Wife]."

By order dated June 7, 2011, the court reduced Husband's alimony obligation to $550 per month. Wife did not appeal the 2011 order. In 2016, Husband filed this action to modify and/or terminate alimony. At a hearing held April 16, 2018, Wife argued the divorce decree made alimony non-modifiable. The court found the 2011 order modifying alimony was "law of the case" on the issue of modification due to Wife's failure to appeal the order. By order filed May 4, 2018, the court found Husband declared monthly income of $1,483 and Wife declared monthly income of $1,709. The court also found both parties' declarations were lacking in various areas, and both parties' testified their health had declined, and they had received inheritances since the previous order. The court concluded Husband's financial situation had substantially declined; thus, it terminated alimony.

Wife moved for reconsideration under Rule 59(e), SCRCP, and to void the order under Rule 60(b)(4), SCRCP, arguing the 2011 modification order was void because the divorce decree mandated alimony was non-modifiable except upon either party's death or Wife's remarriage. Wife argued the order on appeal was likewise void for lack of subject matter jurisdiction. Husband filed a return, arguing that because Wife failed to appeal or file a motion to reconsider the 2011 order, Wife was barred from raising the court's subject matter jurisdiction by "laches, estoppel, [and] undue prejudice." Husband also argued the court had jurisdiction to modify alimony.

After a hearing, the court denied Wife's motion by order dated August 14, 2019. The court found it had continuing jurisdiction to modify the divorce decree because the decree did not "unambiguously deny the family court jurisdiction to

modify or terminate the alimony obligation." The court further found "[t]he motion for reconsideration [as to Rule 60(b)(4), SCRCP,] was not filed within a reasonable time and is therefore subject to the equitable doctrines of estoppel and laches." Thus, the court denied the motion. This appeal followed.

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law for the court." *Hammer v. Hammer*, 399 S.C. 100, 104–05, 730 S.E.2d 874, 876 (Ct. App. 2012) (quoting *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009)). "In appeals from the family court, [the appellate court] reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see Singh v. Singh*, 434 S.C. 223, 228, 863 S.E.2d 330, 332–33 (2021) (applying a de novo standard of review to the denial of Rule 60(b), SCRCP, motions raising the legal question of the family court's authority to delegate its jurisdiction to an arbitrator). "[A] reviewing court is free to decide questions of law with no particular deference to the trial court." *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012) (footnote omitted).

LAW/ANALYSIS

Termination of Alimony

Wife maintains the family court erred in terminating alimony because it lacked subject matter jurisdiction to modify or terminate alimony under the 2003 divorce decree. We agree.

The divorce decree stated the periodic alimony would be "non-modifiable and will cease only at the death of [Wife] or [Husband] or the remarriage of [Wife]." As noted by Wife, any action taken by the family court with regard to agreements over which it lacks subject matter jurisdiction is void. *See Gainey v. Gainey*, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009) ("A judgment of a court without subject matter jurisdiction is void . . . ."). "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)).

The family court derives its subject matter jurisdiction over divorces, including alimony, from our legislature. S.C. Code Ann. § 63-3-530(A)(2)&(14) (2010) ("The family court has exclusive jurisdiction . . . to hear and determine actions for divorce . . . [and] to order support of a spouse . . . ."); S.C. Code Ann. § 20-3-130 (2014) (providing the family court with the authority to award alimony).

In *Moseley v. Mosier*, our supreme court explained the family court also had jurisdiction over contractual agreements to separate or divorce by stating, "[J]urisdiction for all domestic matters, whether by decree or by agreement, will vest in the family court. In all decrees entered after this decision, the parties may contract concerning their property settlement and alimony, but the submitted agreement must be approved by the family court." 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983); *see* S.C. Code Ann. § 20-3-690 (2014) ("The family courts of this State have subject matter jurisdiction over all contracts relating to property which is involved in a proceeding under this article and over the construction and enforcement of those contracts.").

However, our statutory scheme provides a method for parties to remove the issue of future modification of alimony from the family court's jurisdiction. "The parties may agree in writing if properly approved by the court to make the payment of alimony . . . nonmodifiable and not subject to subsequent modification by the court." S.C. Code Ann. § 20-3-130(G) (2014). "[O]nce a settlement agreement is approved by the family court, it may be enforced by the court's contempt powers unless the settlement agreement expressly denies the court continuing jurisdiction." *Hammer v. Hammer*, 399 S.C. 100, 106, 730 S.E.2d 874, 877 (Ct. App. 2012) (citing *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627). In *Croom v. Croom*, 305 S.C. 158, 159−61, 406 S.E.2d 381, 382−83 (Ct. App. 1991), this court found the family court could not modify an alimony obligation because the court-adopted alimony agreement provided "the terms and conditions of the agreement and any court order approving it 'shall not be modifiable by the parties or any court without written consent of the Husband and Wife.'"

In this case, the 2003 divorce decree did not "expressly deny" the family court continuing jurisdiction. Thus, we look to this court's discussion in *Degenhart v. Burriss*, 360 S.C. 497, 602 S.E.2d 96 (Ct. App. 2004). In *Degenhart*, this court reviewed the parties' agreement and final divorce order, which read as follows:

> Husband agrees to pay Wife alimony in the amount of $2,500.00 per month payable on the 1st day of each month beginning with the month of September, 1999 for a period of the earlier of seven years or upon the remarriage of Wife.

360 S.C. at 499, 602 S.E.2d at 97. The agreement also provided:

> The provisions of this AGREEMENT shall not be modified or changed except by mutual consent and agreement of the parties expressed in writing.

Id.

The husband in *Degenhart* argued *Croom* did not apply because his agreement lacked language specifically stating that the family court could not modify the agreement. *Id.* at 501, 602 S.E.2d at 98. The court rejected the husband's argument, finding the following:

> While this agreement does not expressly state that the family court *cannot* modify the agreement, it is clear and specific about how the agreement *can* be modified, that being "by mutual consent and agreement of the parties expressed in writing." Because the family court "must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully," we see no reason to require "magic words" for an unambiguous agreement to gain efficacy. *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). The agreement here, by stating that its terms "shall not be modified or changed except by mutual consent," clearly denies the family court the jurisdiction to modify the agreement by its own authority or at the behest of only one of the parties.

Id.

We find it is likewise clear and specific in this case how alimony can be modified—by the death of either party or by Wife's remarriage —otherwise, it is non-modifiable. As this court found in *Degenhart*, no magic language is required as long as the agreement is clear and specific. Accordingly, we find the family court lacked subject matter jurisdiction to terminate alimony in this case. Thus, we vacate the order on appeal as void for lack of subject matter jurisdiction. *See Stoddard v. Riddle*, 362 S.C. 266, 269–70, 607 S.E.2d 97, 99 (Ct. App. 2004) (acknowledging the family court had no jurisdiction to modify a pre-*Moseley* agreement, but also concluding the language stating alimony "shall not in any manner be modified by the Court" would also have denied the family court jurisdiction to modify alimony "even if the agreement was entered into following the *Moseley* decision").

Modification of Alimony in the 2011 Order

Wife argues the family court erred in denying her motion to void the 2011 order under Rule 60(b)(4), SCRCP, by finding she either waived subject matter jurisdiction by failing to appeal the 2011 order or she was barred by estoppel and laches.[1] We disagree.

Wife's motion for reconsideration under Rule 59(e), SCRCP, and for relief under Rule 60(b)(4), SCRCP, sought to return the parties to the terms of the divorce decree by voiding both the 2011 modification of alimony order and the 2018 order on appeal terminating alimony. As to the termination of alimony in the 2018 order, we agree with Wife and, as previously discussed, we vacate the order terminating alimony because the family court lacked subject matter jurisdiction. However, we find no error in the family court's refusal to grant Wife's motion to set aside the 2011 modification order as void under Rule 60(b)(4), SCRCP.

Subject matter jurisdiction may not be waived even with consent of the parties. *Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943). "The issue of subject matter jurisdiction may be raised at any time including when raised for the first time on appeal . . . ." *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002); *see S.C. Dep't of Soc. Servs. v. Tran*, 418 S.C. 308, 318–19, 792 S.E.2d 254, 259–60 (Ct. App. 2016) (vacating the family court's termination of

[1] We combine Wife's second and third arguments.

parental rights order and earlier removal order based on lack of subject matter jurisdiction).

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] . . . the judgment is void[.]" Rule 60(b)(4), SCRCP. "A judgment of a court without subject-matter jurisdiction is void." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005).

In *Sijon v. Green*, 289 S.C. 126, 128 n.2, 345 S.E.2d 246, 248 n.2 (1986), our supreme court noted that Rule 60(b)(4) "requires that motions to set aside a judgment on the ground it is void must be brought within a reasonable time." Citing *Sijon*, this court also found "the reasonable time requirement applies to Rule 60(b)(4)." *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 643−44, 478 S.E.2d 868, 870−71 (Ct. App. 1996); *see* Rule 60(b), SCRCP ("The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order[,] or proceeding was entered or taken."). The court in *McDaniel* recognized "[t]here is disagreement among the various federal and state jurisdictions as to whether the reasonable time requirement should be imposed on motions which attack a judgment as void." 324 S.C. at 643 n.1, 478 S.E.2d at 870 n.1. However, it also noted South Carolina follows the minority rule, applying a reasonable time requirement to void judgments even though the minority rule is in conflict with authority that holds "a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception." *Id. But see Gatling v. Beach Palace, Inc.*, 294 S.C. 464, 464, 365 S.E.2d 736, 737 (Ct. App. 1988) (per curiam) (holding the reasonable time requirement does not apply to Rule 60(b)(4) because a void judgment is a nullity and may be attacked at any time).

Following the rule cited in *McDaniel*, we agree with the family court that Wife's acquiescence in the 2011 order for almost seven years was unreasonable under Rule 60(b)(4)'s reasonable time requirement. *See McDaniel*, 324 S.C. at 644, 478 S.E.2d at 871 (finding the special referee's ruling that the appellants' Rule 60(b) motion was untimely after nearly four years was not an abuse of discretion); *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (finding a four-year delay was unreasonable although "reluctant to proclaim that four years is a per se unreasonable period of time"). Accordingly, we affirm that portion of the family court's order that found Wife could not get relief from the 2011 order under her Rule 60(b)(4) post-trial motion.

Because we affirm under Rule 60(b)(4), SCRCP, we need not reach Wife's arguments as to estoppel and laches. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we vacate the family court's order to the extent it terminated alimony. We affirm the family court's order to the extent it found Wife's attempt to void the 2011 order reducing alimony was not timely filed under Rule 60(b)(4), SCRCP.

VACATED IN PART, AFFIRMED IN PART.[2]

HUFF and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Montrelle Lamont Campbell, Appellant.

Appellate Case No. 2018-000115

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

Opinion No. 5885
Heard September 15, 2021 – Filed December 22, 2021

REVERSED AND REMANDED

Appellate Defender Lara Mary Caudy and Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Joseph Maye, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

KONDUROS, J.: Montrelle Lamont Campbell appeals his convictions for murder and attempted murder. He contends that because attempted murder is a specific intent crime, the trial court erred in charging the jury that malice may be inferred when a deadly weapon is used. Additionally, he maintains that because no evidence supported an accomplice liability charge, the trial court erred by instructing the jury on "the hand of one is the hand of all" theory of accomplice liability. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On September 17, 2015, Katrina Brown was at her apartment in Gadsden Green[1] with her sister Kerri Brown and her friend Tonya Mosely when a woman named Kadeshia arrived around 11:30 p.m. Kadeshia was an old friend of Kerri's, but Katrina knew her. While the women were visiting, a man knocked on Katrina's door and told Kadeshia that someone was waiting for her outside. Kadeshia told the man to "[t]ell them I'm coming" but continued her conversation in Katrina's apartment. Eventually, Kadeshia's brother, Campbell, walked into Katrina's apartment without permission. Campbell, also known as "Troll," sat down without saying anything.

Katrina asked Campbell to leave because she did not know him,[2] and Campbell eventually left without saying a word. Katrina and Kadeshia then had a verbal altercation because Katrina believed Kadeshia should have apologized. Shortly after Kadeshia left, Katrina walked outside to smoke a cigarette. While Katrina was outside, Campbell hit her, knocking her to the ground. Campbell then stood over her and looked prepared to hit her again. Instead, Campbell moved back into the middle of the street while Kerri and Tonya helped Katrina up. Katrina, Kerri, and Tonya then followed Campbell into the middle of the street and "had a few words" with him. The women went back inside Katrina's apartment after she noticed Campbell looked prepared to reach for something inside of a car.

The next night, September 18, 2015, Katrina hosted a party at her apartment in Gadsden Green. The party ended around 6:30 a.m. on September 19, 2015, when a gunman shot at least fourteen bullets from a rifle into Katrina's apartment. The bullets struck Kerri in her head, Katrina's cousin Tierra Brown in her arm, and

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[1] Gadsden Green is a government housing community in Charleston.

[2] Katrina did not learn Campbell was Kadeshia's brother until the next day.

Katrina's friend Antwan Foster in the chest. Kerri and Tierra survived but Foster did not.

Because no one saw the shooter, police asked Katrina if she knew whether anyone wanted to harm her. Katrina testified she did not have a conflict with anyone in the neighborhood other than Campbell. While processing the crime scene, police recovered fourteen rifle shell casings and obtained security camera footage of the area around the time of the shooting from multiple locations.

The security footage showed a gold Buick parking on Nunan Street. Police determined Tomeka President owned the gold Buick in the security footage and identified Trivell "Vell" Richardson and Andrew "Ace" Rivers as the individuals exiting the car. The footage showed Richardson and Rivers walking toward Gadsden Green and Richardson eventually walking back to the car followed by a third individual holding a rifle. Richardson and Campbell were both charged with murder and two counts of attempted murder for the shooting at Katrina's apartment.

At Campbell's trial, President testified that Campbell was at her Austin Lakes apartment in North Charleston when she went to sleep around 11:45 p.m. the night before the shooting. President also stated Campbell was not there when she woke up the next morning[3] and her car and car keys were missing.

Richardson testified[4] he was at the Austin Lakes apartment complex in North Charleston during the early morning hours[5] on the day of the shooting when Campbell approached him in President's gold Buick. Campbell asked Richardson to go with him to get cigarettes, and Richardson got in the car. However, Richardson recalled that instead of stopping at the gas station, Campbell got on the interstate and drove downtown.

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[3] President did not state what time she woke but testified she had to be at work by 7:00 a.m.

[4] Richardson was not tried with Campbell; he testified he was still facing charges but was hoping for leniency for testifying on behalf of the State.

[5] Richardson stated he left a strip club around 4:00 a.m. before going to Austin Lakes.

After parking on Kennedy Street, Campbell exited the car, told Richardson to park it on Nunan Street, and began walking towards Gadsden Green. Richardson asked Rivers, who was on Kennedy Street when they arrived, to ride with him while he parked the car. Richardson and Rivers began walking towards Gadsden Green after parking the car on Nunan Street.

Richardson explained that he called Campbell to ask where he should leave the car keys because Richardson was uncomfortable being in Gadsden Green and wanted to leave. As Richardson and Rivers were walking toward Gadsden Green, Richardson said they heard gunshots. Richardson stated he returned to the car but Rivers ran in the opposite direction. While Richardson was trying to start the car, Campbell got in with a rifle and told him to "go." Richardson testified he then drove back to Austin Lakes in North Charleston.

Following the close of the State's case, the trial court denied Campbell's motion for a directed verdict. Campbell did not testify but presented testimony from Peggy Blake, who lived across the street from Katrina at the time of the shooting. Blake testified she heard the shooting and saw a black man wearing a hoodie and holding a "sporty rifle" get into a lime green car that drove away. However, police were unable to find a lime green car on the security camera footage.

Following the close of Campbell's case and the State's rebuttal, Campbell renewed his motion for a directed verdict, which the trial court also denied. The trial court then held a charge conference and informed the parties it planned to charge the jury that malice may be inferred by the use of a deadly weapon and instruct the jury on the hand of one is the hand of all theory of accomplice liability. Campbell first objected to the accomplice liability jury instruction, arguing no evidence implicated a second party. Campbell also objected to the inferred malice jury instruction, asserting it was inappropriate under *Belcher*.[6] After the trial court stated that *Belcher* did not apply because Campbell presented no evidence of

[6] *State v. Belcher*, 385 S.C. 597, 611, 685, S.E.2d 802, 809 (2009) ("[I]nstructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse[,] or justify the homicide."), *overruled by State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019) (holding "regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon").

mitigation such as self-defense, Campbell maintained his objection, arguing that "attempted murder does have a different burden. Since it[s] burden is higher, I think having that instruction basically is counter somewhat to that different burden."

The State argued both it and Campbell presented sufficient evidence for an accomplice liability charge because the charge has an any evidence standard. Regarding Campbell's objection to the inferred malice charge, the State "ha[d] nothing further to add" but asserted that the charge was proper. Ultimately, the trial court noted Campbell's objections but decided to give both the inferred malice and accomplice liability instructions.

The trial court charged the jury that "[m]alice aforethought may be expressed or inferred . . . . Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon . . . ." The trial court also instructed the jury regarding accomplice liability:

> [I]f a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose . . . . If two or more people are acting together . . . assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.

Following deliberations, the jury convicted Campbell of murder and attempted murder. The trial court sentenced him to life in prison for murder and thirty years' imprisonment for each attempted murder charge with the sentences running concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt

is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Inferred Malice

Campbell argues the trial court erred by giving an inferred malice jury instruction because attempted murder is a specific intent crime and requires both express malice and a specific intent to kill pursuant to our supreme court's ruling in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). We agree.

"A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). "[A] specific intent to kill is an element of attempted murder as codified in section 16-3-29." *King*, 422 S.C. at 56, 810 S.E.2d at 22.

In *Burdette*, our supreme court held the trial court erred by giving an inferred malice jury instruction because, pursuant to *Belcher*, "[t]here was evidence presented at trial that tended to reduce, mitigate, excuse, or justify" the defendant's killing of the victim. 427 S.C. 490, 495, 832 S.E.2d 575, 578 (2019). The supreme court further "consider[ed] whether the permissive inference charge may be given in any setting, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice." *Id.* at 502, 832 S.E.2d at 582 (emphasis omitted).

The supreme court noted "[i]t is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts." *Id.* (quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). The supreme court observed that "[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, . . . the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to

the jury." *Id.* The supreme court determined that "[e]ven telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." *Id.* at 502-03, 832 S.E.2d at 582.

The supreme court concluded that "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence" and held that "[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon." *Id.* at 503-05, 832 S.E.2d at 582-83. Additionally, the supreme court stated that its ruling was effective in all cases pending on direct review or not yet final if the issue was preserved. *Id.* at 505, 832 S.E.2d at 583.

In the present case, the trial court instructed the jury that malice could be inferred by the use of a deadly weapon over Campbell's objection. *Burdette* made clear that trial courts cannot instruct the jury that malice may be inferred by the use of a deadly weapon, regardless of the evidence presented. Although our supreme court decided *Burdette* after Campbell's trial, its holding applies to all cases that were pending on direct appeal if the issue was preserved, which it was in this case.[7] *Id.* Accordingly, the trial court erred by giving the charge.

The State argues any error by the trial court instructing the jury on inferred malice was harmless. The State asserts the jury could have found Campbell had express malice based on the evidence that Campbell had recently hit Katrina, Campbell drove across town in his girlfriend's car, and fourteen rounds were fired from a rifle into Katrina's apartment. We disagree.

"An erroneous instruction alone is insufficient to warrant this [c]ourt's reversal." *Id.* at 496, 832 S.E.2d at 578. "[E]rroneous jury instructions are subject to a harmless error analysis." *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "In

[7] Campbell filed his notice of appeal on January 23, 2018, and *Burdette* was decided on July 31, 2019.

making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* at 496, 575 S.E.2d at 578-79 (quoting *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

In *State v. Brooks*, this court held the trial court's error in giving an inferred malice jury instruction was harmless because "the jury could have found that [the defendant]'s conduct showed a total disregard for human life, allowing the jury to infer malice from this conduct." 428 S.C. 618, 632, 837 S.E.2d 236, 243 (Ct. App. 2019), *cert. denied*, S.C. Sup. Ct. order dated Aug. 10, 2020. The court of appeals noted the defendant in *Brooks* displayed his gun, taunted his targets, ignored a hands up gesture by one of his targets, and ignored his friend's "no" plea. *Id.* at 630-31, 837 S.E.2d at 242-43. Additionally, the court of appeals interpreted the defendant's attempts to cover up his guilt as indications of malice. *Id.* at 631, 837 S.E.2d at 243.

In the present case, the evidence of express malice is significantly less than the amount in *Brooks*. The State contends Campbell's previous altercation with Katrina, Campbell driving across town to commit the crime, and someone firing a weapon fourteen times into Katrina's apartment is sufficient evidence of express malice to overcome the trial court's erroneous inferred malice jury instruction. However, Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed.

Moreover, we cannot state beyond a reasonable doubt that the erroneous instruction did not contribute to the verdict. The jury could have reasonably found malice partially based on the use of a weapon. Indeed, the jury may have found malice based solely on the use of a weapon. Therefore, the error in giving the inferred malice instruction was not harmless. Accordingly, we reverse the trial court giving the instruction.

II. Accomplice Liability

Campbell asserts the trial court erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the charge. Campbell argues neither party presented evidence he acted with another pursuant to a common design or plan. We agree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *Id.*

> [A] person who joins with another to commit a crime is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act; if two or more are together, acting together, and assisting each other in committing the offense, all are guilty; a finding of a prior arranged plan or scheme is necessary for criminal liability to attach to the accomplice who does not directly commit the criminal act; when an act is done in the presence of and with the assistance of others, the act is done by all.

State v. Washington, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020).

In *Washington*, our supreme court affirmed in part, reversed in part, vacated in part, and remanded to the trial court for a new trial this court's decision to affirm the conviction of a defendant who had been indicted for murder and convicted of the lesser included offense of voluntary manslaughter. *Id.* at 397, 848 S.E.2d at 781. The supreme court observed that the trial court's instruction "convey[ed] the gist of the accomplice liability theory" and was correct for a case that warranted the instruction. *Id.* at 406, S.E.2d at 785.

The supreme court acknowledged, "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Id.* at 409, 848 S.E.2d at 787 (quoting *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011)). The supreme court noted that "[f]or an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that

fact.'" *Id.* at 407, 848 S.E.2d at 786 (alteration in original) (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 439). After observing that the record contained evidence the defendant was both the shooter and not the shooter, the supreme court reasoned that "[t]he question becomes whether there was equivocal evidence the shooter, if not [the defendant], was an accomplice of [the defendant]." *Id.*

The supreme court compared Washington's case to *Wilds v. State*, in which this court affirmed the post-conviction relief court's grant of relief on the issue of accomplice liability. 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014). In *Wilds*, this court found the post-conviction relief court correctly determined the trial court erred in charging accomplice liability because neither party presented evidence that anyone besides the defendant was the shooter. *Id.* at 440, 756 S.E.2d at 791. The supreme court in *Washington* reasoned that, like the jury in *Wilds*, the jury in *Washington* may have doubted the possible accomplice's testimony he did not shoot the victim. *Washington*, 431 S.C. at 410, 848 S.E.2d at 787. Still, the supreme court found some evidence must have been presented that the only possible accomplice shot the victim to warrant an accomplice liability jury instruction. *Id.* Because no evidence of that kind was presented, the supreme court determined the trial court erred by instructing the jury on accomplice liability. *Id.* at 403, 410, 848 S.E.2d at 784, 787.

Here, the trial court erred by charging the jury on accomplice liability. Blake's testimony that she saw a man wearing a hoodie and holding a rifle leave the scene of the shooting in a lime green car is evidence that someone other than Campbell may have been the shooter, as Campbell was allegedly wearing a jersey and the video footage and Richardson's testimony indicate he left in President's gold Buick. Because Richardson's testimony presented evidence that Campbell was the shooter, like *Washington*, the question is whether the Record contains equivocal evidence the man seen by Blake was Campbell's accomplice.

Based on the evidence presented at trial, only Richardson could have been Campbell's accomplice. On the day of the shooting, Richardson rode with Campbell from North Charleston to Gadsden Green, parked the car for Campbell, and drove Campbell back to North Charleston. Like in *Wilds* and *Washington*, the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with Campbell to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and Campbell had joined together in a common plan or scheme to carry out the shooting. Indeed, Richardson

testified he did not know Campbell was going to drive to Gadsden Green or why Campbell asked him to park the car on Nunan Street.

Even if Richardson's involvement was equivocal evidence he and Campbell worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in Gadsden Green around the time of the shooting, it also showed him walking without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car. Consequently, Richardson does not meet the description of the man seen by Blake.

Thus, neither party presented evidence that either Campbell was working with the man seen by Blake or that Richardson was the shooter. Therefore, the trial court erred by giving an accomplice liability jury instruction. Accordingly, we reverse the trial court and remand for a new trial on the murder and attempted murder charges.

CONCLUSION

The trial court committed reversible error by giving both inferred malice and accomplice liability jury instructions. Therefore, Campbell's convictions of murder and attempted murder are

REVERSED AND REMANDED.

HILL and HEWITT, JJ., concur.