The Supreme Court of South Carolina

In the Matter of Benjamin Blakely Boyd, Respondent.

Appellate Case No. 2015-001270

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition seeking to appoint the Receiver to protect the interests of respondent and his clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules. The request is based on respondent's current medical condition.

IT IS ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that the Receiver, Peyre T. Lumpkin, 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 account(s) respondent may have maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, 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 account(s) respondent may have maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow, operating accounts and/or any other law office accounts of respondent shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin 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 the Receiver, 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/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 19, 2015

The Supreme Court of South Carolina

In the Matter of Adam Fisher, Jr., Respondent.

Appellate Case No. 2015-001285

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition seeking to appoint the Receiver to protect the interests of respondent and his clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules. The request is based on respondent's current medical condition.

IT IS ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that the Receiver, Peyre T. Lumpkin, 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 account(s) respondent may have maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, 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 account(s) respondent may have maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow, operating accounts and/or any other law office accounts of respondent shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin 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 the Receiver, 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/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 19, 2015

The Supreme Court of South Carolina

In the Matter of William Linwood Mullen, Jr., Deceased.

Appellate Case No. 2015-001284

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that William Linwood Mullen, Jr., Esquire, passed away on June 8, 2015, and requesting the appointment of the Receiver, Peyre T. Lumpkin, to protect the interests of Mr. Mullen's clients pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition is granted.

IT IS ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for Mr. Mullen's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mullen maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Mullen's clients. Mr. Lumpkin may make disbursements from Mr. Mullen's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mullen maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Mullen, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

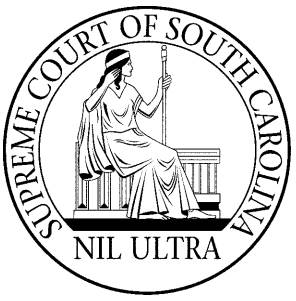
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Mullen's mail and the authority to direct that Mr. Mullen’s mail be delivered to Mr. Lumpkin’s office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 18, 2015



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 15, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Skipper, Veronica Skipper, Michael Perry Bowers, Specialty Logging, LLC, and Harold Moors, Plaintiffs,

v.

ACE Property and Casualty Insurance Company, Brantley C. Rowlen, and Erin Lawson Coia, Defendants.

Appellate Case No. 2014-001979

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
J. Michelle Childs, United States District Judge

Opinion No. 27547
Heard April 7, 2015 – Filed July 15, 2015

CERTIFIED QUESTION ANSWERED

Blake A. Hewitt, of Bluestein Nichols Thompson & Delgado, of Columbia; Mark B. Tinsley, of Gooding & Gooding, of Allendale; and Randolph Murdaugh, IV, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Plaintiffs.

Robert H. Hood, Robert H. Hood, Jr., and Deborah Harrison Sheffield, all of the Hood Law Firm, LLC, of Charleston, for Defendants Brantley C. Rowlen and Erin Lawson Coia.

A. Camden Lewis, of Lewis, Babcock & Griffin, L.L.P., of Columbia; Ronald K. Wray, II and Gray T. Culbreath, both of Gallivan, White & Boyd, P.A., of Greenville; and Robert Rivera, Jr. and Robert S. Safi, both of Susman Godfrey L.L.P., of Houston, Texas, for Defendant Ace Property and Casualty Insurance Company.

David C. Marshall, of Turner Padget Graham & Laney P.A., of Columbia; and Alan G. Jones, of McAngus, Goudelock & Courie, of Myrtle Beach, for Amicus Curiae, South Carolina Defense Trial Attorneys' Association.

David C. Marshall and R. Hawthorne Barrett, of Turner Padget Graham & Laney P.A., of Columbia, for Amicus Curiae, Property Casualty Insurance Association of America.

JUSTICE KITTREDGE: We certified the following question from the United States District Court for the District of South Carolina: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" In answering the question "no," we adopt the majority rule and hold that such assignments are void as against public policy.

I.

George Skipper, a citizen of Georgia, was involved in a motor vehicle accident with a logging truck that was driven by Harold Moors and owned by Specialty Logging, LLC (Specialty). Specialty had a commercial automobile insurance policy with a $1,000,000 per occurrence limit (the Policy), which was issued by ACE Property and Casualty Insurance Company (ACE). Following the accident, Skipper retained an attorney who wrote a demand letter to ACE offering to settle

the case for the limits of the Policy. ACE retained two lawyers from Atlanta, Brantley C. Rowlen and Erin Lawson Coia, to represent Specialty and Moors. Specialty and Moors, through counsel, offered Skipper $50,000.

Not satisfied with the $50,000 offer, Skipper and his wife (the Skippers) filed a lawsuit in the Allendale County Court of Common Pleas against Specialty and Moors. Additional attempts to settle the case proved fruitless.

Unbeknownst to ACE or its attorneys, the Skippers entered into a settlement with the allegedly at-fault defendants, Moors and Specialty. Moors, Specialty, and Specialty's owner Michael Perry Bowers (collectively, Specialty Parties) agreed to execute a Confession of Judgment for $4,500,000, in which they admitted liability for the Skippers' injuries and losses. The Specialty Parties also agreed to pursue a legal malpractice claim against ACE and its attorneys Rowlen and Coia (collectively, Defendants) and assigned the predominant interest in that claim to the Skippers.[1] In exchange for the Specialty Parties' admission of liability, the Skippers agreed not to execute the judgment as long as the Specialty Parties cooperated in the legal malpractice litigation against Defendants.

Armed with the assignment, the Skippers and Specialty Parties (collectively, Plaintiffs) filed a legal malpractice action against Defendants in the Allendale County Court of Common Pleas. The case was removed to the United States District Court for the District of South Carolina. In federal court, Defendants asserted the assignment of the malpractice claim was invalid and that the Skippers had no valid claims to assert. The parties filed competing motions, which (we are informed) turn on whether the assignment to the Skippers was valid.

Because the question of whether a legal malpractice claim can be assigned between adversaries in litigation in which the alleged malpractice arose is a novel question in South Carolina, this Court accepted the certified question of United States District Court Judge J. Michelle Childs.

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[1] The terms of the assignment indicated that the Skippers would receive between eighty-five and ninety-five percent of any proceeds from a settlement or judgment in the legal malpractice case, even if that amount was less than the $4,500,000 Confession of Judgment.

II.

The majority rule in other jurisdictions is to prohibit the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. *See Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79 (D.D.C. 2009) ("[T]he majority of courts have found that the costs to society outweigh the benefits and that overriding public policy concerns render these types of assignments invalid."). The most common reason other courts have declined to permit assignments of legal malpractice claims is to avoid the risk of collusion between the parties. Were we to permit such assignments, plaintiffs and defendants would be incentivized to collude against the defendant's attorney. When an original defendant is essentially relieved of liability, there is little incentive for the consent judgment to reflect the actual loss. As courts around the country have recognized, the potential for inflated damages in such consent judgments is manifest. *See id.* ("Because the 'losing' party in the consent judgment will never have to pay, nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action."). This potential for collusion and inflated consent judgments undermines the very nature of the jury system. *See Prince v. Peterson*, 538 P.2d 1325, 1329 (Utah 1975) (noting "[w]e frequently declare our commitment to the jury system, under which it is the prerogative of lay citizens to determine questions of fact, both as to liability and the fixing of damages"). Simply put, "[a] party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary." *Alcman Servs. Corp. v. Bullock*, 925 F. Supp. 252, 258 (D.N.J. 1996).

In addition to the heightened risk for collusion, permitting the assignment of legal malpractice claims between adversaries threatens the integrity of the attorney-client relationship. The relationship between an attorney and a client is a fiduciary one by nature and "is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004) (citations omitted). Permitting these assignments would allow plaintiffs "to drive a wedge between the defense attorney and his client by creating a conflict of interest." *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994).

Moreover, permitting an assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose would lead to disreputable role reversals in which the plaintiff-assignee would be required to take a position "diametrically opposed" to its position in the underlying litigation. *Id*. The Court of Appeals of Texas detailed this role reversal in *Zuniga*:

> In each assigned malpractice case, there would be a demeaning reversal of roles. The two litigants would have to take positions diametrically opposed to their positions during the underlying litigation because the legal malpractice case requires a "suit within a suit." To prove proximate cause, the client must show that his lawsuit or defense would have been successful "but for" the attorney's negligence. In the malpractice suit, the [plaintiff-assignees] would argue that [the defendant-assignor] suffered judgment not on the strength of the [plaintiff-assignees'] claim but because of attorney negligence.
>
> In the underlying tort case, the [plaintiff-assignees'] position was: we have a valid tort case involving a defective . . . ladder [built by the defendant assignor], and we will win the case on the merits even if [the defendant-assignor's] lawyer represents it capably. But to prove proximate cause in the legal malpractice case, the [plaintiff-assignees] would have to take the contrary position: we would have lost our tort case and [the defendant-assignor] would have prevailed if its lawyers had capably defended our suit. [The defendant-assignor] would have won the defective-ladder case if only its lawyers had used due care and competence.
>
> For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth. It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.

Id. (internal citations omitted).

We have carefully considered the arguments of Plaintiffs' able counsel urging this Court to adopt the minority rule, but we find the majority rule more compelling and persuasive. Accordingly, in South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Allen Cain, Appellant.

Appellate Case No. 2013-000817

Appeal From Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5324
Heard January 7, 2015 – Filed July 15, 2015

AFFIRMED

Thomas James Rode, of Thurmond Kirchner Timbes & Yelverton, P.A., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

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

WILLIAMS, J.: Charles Allen Cain appeals his conviction for trafficking methamphetamine, arguing the circuit court erred in (1) admitting testimony from the State's forensic chemistry expert regarding the "theoretical yield" of

methamphetamine he could have produced and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 2012, Deputy Kevan Kyle and Deputy Chris Wilbanks, both of the Spartanburg County Sheriff's Office (the Sheriff's Office), encountered Cain and Tiphani Parkhurst while attempting to serve a family court bench warrant for Travis Kirby at a Spartanburg County home. Although the house had no running water or electricity, it appeared Cain and Parkhurst were illegally obtaining both through a drop cord and a hose pipe running from a neighboring trailer. Further, the house appeared to be under construction.

The deputies knocked on the backdoor of the house—which led to a single bedroom—because they saw a vehicle parked directly in front of that door. When Cain and Parkhurst came to the door, the deputies explained they were looking for Kirby and requested identification. Cain and Parkhurst produced their driver's licenses but denied knowing Kirby. They also told Deputy Kyle they were "renting the bedroom from the owner of the house . . . and they had nothing else to do with the rest of the house." While it appeared Cain and Parkhurst had been living in the bedroom, which had no bathroom or kitchen, the deputies believed they had access to the rest of the house as well. Deputy Kyle further believed Cain and Parkhurst were hiding Kirby because they seemed nervous, were "making furtive gestures," and did not want him to look inside the rest of the house.

Deputy Kyle showed Cain and Parkhurst the bench warrant and explained the deputies had a right to search the house if they believed Kirby was inside. With the consent of Cain and Parkhurst, the deputies searched the bedroom as well as the rest of the house. During the search, Deputy Kyle observed a bottle resting on the counter that had "tubing coming from the top." The tubing ran through a window and opened up outside. He also discovered several discarded bottles with multicolored pellets, coffee filters, tin foil, and batteries in the living room—all of which are "common [for] a one pot meth lab." Based on the deputies' training and experience, they determined the house was being used as a lab to manufacture methamphetamine.

When the deputies returned to Cain and Parkhurst's bedroom, they found the interior door to the bedroom that led to the rest of the house was barricaded. Additionally, the deputies discovered Cain and Parkhurst had left the residence in

Parkhurst's vehicle. The deputies further noticed what appeared to be the contents of a one pot meth lab—multicolored pellets poured out onto the grass and concrete. The pellets were still fresh and wet.

Thereafter, Cain and Parkhurst were indicted for trafficking methamphetamine in violation of section 44-53-375(C) of the South Carolina Code (Supp. 2014). The case was called for a jury trial in Spartanburg County. Because Cain and Parkhurst failed to appear at trial, they were jointly tried in their absence on February 28 and March 1, 2013.

During pretrial motions, Cain moved to dismiss his indictment, arguing the State could not establish the "attempt to manufacture" element for trafficking methamphetamine because no methamphetamine was found in the home. The State, however, sought to establish Cain's guilt "through extrapolation from the aggregate components" found in the house to demonstrate the yield of methamphetamine would have been more than the trafficking quantity, arguing the plain meaning of the statute allowed it to proceed under a theoretical yield theory. Based on this theoretical yield calculation, the State argued Cain and Parkhurst had the necessary ingredients to produce between ten and twenty-eight grams of methamphetamine.[1]

Subsequently, the State called Beth Stuart to testify. Stuart, a forensic chemist with the Sheriff's Office, examined the crime scene on January 17, 2012.[2] Per the State's request, the circuit court qualified Stuart as an expert in "forensic chemistry and chemical analysis" without objection.

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[1] Acknowledging the novelty of this issue, the State directed the circuit court to two cases from other jurisdictions in support of its argument: *State v. Knapp*, 778 N.W.2d 218, 2009 WL 4842395, at *1 (Iowa Ct. App. 2009), and *United States v. Spencer*, 439 F.3d 905 (8th Cir. 2006). The circuit court repeatedly took the matter under advisement.

[2] Stuart has a B.S. in chemistry and biochemistry from the College of Charleston, a M.S. in chemistry from the University of South Carolina, and over eight years of experience as a chemical analyst. Stuart testified she completed training at the police academy, as well as the Drug Enforcement Administration's "forensic chemist school" and "clandestine lab school." Stuart is also a member of the Clandestine Lab Investigating Chemist Association and is certified by the American Board of Criminalistics in all areas of forensic science.

Stuart explained that people often use common household products to manufacture methamphetamine. She then described the "one pot method" in great detail and stated Cain and Parkhurst employed this method to manufacture methamphetamine at the Spartanburg County home. According to Stuart, the Sheriff's Office photographed the components in and around the house—and a company specializing in the disposal of chemical waste came to the house to dispose of the meth lab components—because the components were too dangerous to bring back to the Sheriff's Office. She also said the Sheriff's Office does not fingerprint meth labs due to the inherent danger of the chemicals used to manufacture methamphetamine.

Moreover, Stuart testified that "the only thing of significance" she found inside the bedroom was a piece of aluminum foil shaped to smoke methamphetamine. In the living room, however, Stuart found twenty empty pseudoephedrine packets (blister packs) in trash bags, each of which previously contained twenty-four 30-milligram tablets. She found four additional blister packs in a trashcan outside Cain and Parkhurst's bedroom that each previously contained ten 120-milligram tablets of pseudoephedrine. Stuart concluded the blister packs previously contained a total of 19.2 grams of pseudoephedrine. In addition to the empty blister packs, Stuart found the following items in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot."

To calculate the theoretical yield, Stuart explained she "can see how much starting stuff they had and work [her] way to how much product they could [have] made with that starting stuff." She further stated she uses "the weights of all the different compounds in [an equation] to determine theoretical yield." The State then asked Stuart how much methamphetamine an individual could make with 19.2 grams of pseudoephedrine. Cain objected to the admission of this testimony, questioning its reliability and doubting whether "some learned treatise" supported the theory. Cain argued Stuart's theoretical yield testimony was outside the scope of her qualification as an expert in forensic chemistry. The circuit court overruled the objection subject to the State laying a proper foundation.

The State then established that—as part of earning her bachelor's degree as well as her master's in chemistry—Stuart worked in "actual research settings" with equations and theoretical yields "to determine how much product [she] wanted and how much [she] needed to start with" to perform reactions. On voir dire, Stuart

explained the theoretical yield equation was "pseudoephedrine, plus lithium, plus ammonia gas yields methamphetamine." She also stated she knew it is "a one-to-one molar ratio between pseudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]." The circuit court then qualified Stuart as "an expert in the field of chemistry to be able to give her opinion in the area of theoretical yields."

After the additional qualification, Stuart testified that an individual could manufacture the following amounts of methamphetamine with 19.2 grams of pseudoephedrine: 17.67 grams with a 100% yield, 14.13 grams with an 80% yield, 13.25 grams with a 75% yield, and 11.48 grams with a 65% yield. Stuart, however, acknowledged she had no way of determining the percentage yield Cain and Parkhurst theoretically would have been able to obtain. She also acknowledged that her figures were based on chemical conversions performed by a trained chemist using pure chemicals, a hood, and real glassware in "ideal laboratory conditions." Stuart agreed that, if some chemicals do not properly react and become wasted, it is not possible to attain a 100% yield. Moreover, she conceded that neither methamphetamine nor pseudoephedrine was found in or around the house.

Cain moved for a directed verdict after the State rested its case, arguing the evidence of custody and control of the requisite ingredients was insufficient to establish intent to traffic methamphetamine. The circuit court denied Cain's motion for a directed verdict on the custody and control argument but took under advisement the theoretical yield issue, electing to take it up at the close of all evidence.

Subsequently, the defense presented testimony from Leon Fowler Sr., who lived in the trailer located one hundred feet behind the house the deputies searched. Fowler explained that his son owned both the house and the trailer. Fowler further stated he thought Cain and Parkhurst were "living in that one [bed]room," but he was not sure. He was also unsure about how long Cain and Parkhurst lived in the house, but said it was "not over two or three weeks." Fowler testified that he did not know Cain and Parkhurst; he just knew they were his son's friends. Nevertheless, he would let them come to his trailer to bathe and use the restroom because the house had no running water.

Although Fowler was not sure whether Cain and Parkhurst had a power cord running from his trailer to the house, Fowler said his son sometimes did "when he

was working on the house." Fowler further stated it seemed like a power cord was hooked up when the police arrived, but he would not swear to it. Finally, Fowler confirmed he was unaware of the meth lab in the house, stating he did not want to know what was going on in the house.

At the close of all evidence, the circuit court denied Cain's motion to dismiss based on a "plain reading of the statute" and the "persuasive authority" provided by the State. The circuit court believed "theoretical yield would be an appropriate analysis in this case" and submitted a special interrogatory to the jury, instructing it to determine whether the State proved beyond a reasonable doubt that the theoretical yield was ten or more, but less than twenty-eight, grams.

The jury found Cain guilty of trafficking methamphetamine, and the circuit court denied his motion for a new trial. On April 11, 2013, Cain was sentenced to ten years in prison. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in admitting Stuart's scientific expert testimony regarding the theoretical yield of methamphetamine Cain could have produced from the empty blister packs of pseudoephedrine?

II. Did the circuit court err in denying Cain's motion for a directed verdict?

LAW/ANALYSIS

I. Theoretical Yield Testimony

A. Reliability

Cain first argues the circuit court erred in admitting Stuart's expert testimony regarding the theoretical yield of methamphetamine he could have produced because the State failed to prove Stuart's methodology was reliable and would assist the trier of fact. We disagree.

"Generally, the admission of expert testimony is a matter within the sound discretion of the [circuit] court." *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013) (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991)) (internal quotation marks omitted). "Thus, we will not reverse the [circuit] court's decision to admit or exclude expert testimony absent a prejudicial abuse of

discretion." *Id.* at 343–44, 748 S.E.2d at 208 (citing *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted).

"All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Rule 702, SCRE, provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The admissibility of scientific evidence depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citation and internal quotation marks omitted). When the circuit court admits scientific evidence under Rule 702, it "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

"Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686 (citations omitted). A court should look at several factors to determine the reliability of scientific expert testimony: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citation omitted).

Additionally, if the evidence is admissible under Rule 702, then the circuit court should determine whether "its probative value is outweighed by its prejudicial

effect."[3] *Id.* at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *Id.* at 20–21, 515 S.E.2d at 518.

In the instant case, after the State laid a foundation and Cain cross-examined Stuart during voir dire, the circuit court properly qualified her as an expert in chemistry to be able to give her opinion on theoretical yields. *See id.* at 20, 515 S.E.2d at 518 (stating the circuit court must find the expert witness is qualified). Cain, however, does not contest the circuit court's finding that the expert was qualified. Thus, our analysis focuses on his argument that Stuart's theoretical yield methodology was not reliable and could not assist the trier of fact. *See id.* (stating the circuit court must also find the expert's testimony will assist the trier of fact and the underlying science reliable).

Based upon our review of the record, we find the circuit court properly concluded Stuart's scientific expert testimony regarding the theoretical yield methodology was reliable. First, the circuit court thoroughly considered the prior application of theoretical yield analysis to the type of evidence involved in this case. *See id.* at 19, 515 S.E.2d at 517 (stating the circuit court should consider the "prior application of the method to the type of evidence involved in the case" (citation omitted)). At the beginning of trial, the State cited cases from other jurisdictions in which courts approved of experts giving theoretical yield testimony in similar situations,[4] and the circuit court repeatedly took the matter under advisement. At the close of all evidence, the circuit court denied Cain's motion to dismiss, finding these cases persuasive and the theoretical yield analysis appropriate for this case.

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[3] Because neither party addresses whether the circuit court properly weighed the probative value of Stuart's theoretical yield testimony against its prejudicial effect, we decline to address that portion of the analysis in determining this issue.

[4] *See Spencer*, 439 F.3d at 916 (holding the evidence was sufficient for the jury to find the appellant attempted to manufacture methamphetamine when, although he may not have possessed all the materials for a fully working methamphetamine lab, he "had ordered, received, and possessed chemicals and equipment necessary to manufacture methamphetamine"); *Knapp*, 2009 WL 4842395, at *4 (holding the amount of methamphetamine appellant could have yielded based upon the crushed pseudoephedrine found on the appellant's person, coupled with the other evidence presented, was sufficient for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine).

The cases on which the court based its ruling were directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter.

Furthermore, the circuit court had sufficient evidence from which it could conclude the theoretical yield methodology was consistent with recognized scientific laws and procedures. *See Council*, 335 S.C. at 19, 515 S.E.2d at 517 (stating the court should also consider "the consistency of the method with recognized scientific laws and procedures" (citation omitted)). At trial, Stuart testified that calculating the theoretical yield involved basic chemistry equations. Stuart stated she began using chemical equations during her first semester of college, explaining that every chemistry course involved equations. She further testified that determining a yield based on multiple ingredients is a "core standard" of chemistry. Accordingly, Stuart's testimony demonstrates the science behind the methodology was reliable because it was consistent with recognized scientific laws and procedures.

Additionally, Stuart adequately explained the quality control procedures she uses to ensure reliability of the theoretical yield method. *See id.* (stating the court should look at "the quality control procedures used to ensure reliability" (citation omitted)). According to Stuart, the necessary controls are no more than a calculator, the periodic table, and a basic understanding of chemistry.

Based on the foregoing, we hold the circuit court clearly performed its gatekeeping function in the instant case by thoroughly considering the reliability of Stuart's methodology. *See White*, 382 S.C. at 270, 676 S.E.2d at 686 (stating the circuit court must perform its "gatekeeping function [by] ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration"); *Council*, 335 S.C. at 20, 515 S.E.2d at 518 (outlining the factors a court should consider in determining whether the underlying science used in expert testimony meets the reliability standard under Rule 702, SCRE).

Nevertheless, Cain argues the theoretical yield analysis did not assist the trier of fact because it was not reliable. In light of our previous holding that Stuart's methodology was reliable, we disagree and find the circuit court properly concluded Stuart's expert testimony regarding the theoretical yield analysis would assist the trier of fact in determining a fact at issue in this case. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518 (stating the circuit court must find the scientific evidence will assist the trier of fact). While Stuart and the deputies found all of the components of a methamphetamine lab in Cain's home, the blister packs of

pseudoephedrine they discovered were empty. Thus, Stuart's theoretical yield equations helped the jury determine how much methamphetamine Cain could have produced—an important fact at issue—based on the amount previously contained in the empty blister packs as well as the other components found at the scene.

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield of methamphetamine Cain could have produced because the court properly found her methodology was reliable and would assist the trier of fact in determining a fact at issue.

B. Stuart's Conclusion

Cain further contends the circuit court erred in admitting Stuart's expert testimony because the State failed to establish her conclusion was supported by facts. According to Cain, Stuart improperly relied solely on hypothetical facts—the empty blister packs of pseudoephedrine—to calculate the theoretical yield, and she presented no testimony regarding the amounts of other ingredients present at the scene. We disagree.

Rule 703, SCRE, outlines the basis upon which experts may offer opinion testimony and provides the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While an expert may offer an opinion based upon hypothetical facts, those facts must have evidentiary support. *See Campbell v. Paschal*, 290 S.C. 1, 17, 347 S.E.2d 892, 902 (Ct. App. 1986) ("The facts used in a hypothetical question presented to an expert witness must have some evidentiary support." (citations omitted)); *see also Newman v. Hy-Way Heat Sys., Inc.*, 789 F.2d 269, 270 (4th Cir. 1986) ("It is fixed law that an expert can give [an] opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced." (citation and internal quotation marks omitted)).

Other jurisdictions considering the theoretical yield issue have determined evidence of yield calculations based upon empty precursor containers is admissible and sufficient to support a factual finding for the intended quantity of methamphetamine production. *See, e.g.*, *United States v. Engler*, 521 F.3d 965, 974 (8th Cir. 2008) (finding the evidence of "empty blister packs representing 2,016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine" was sufficient to support a verdict for attempted manufacture of more than five grams); *United States v. Titlbach*, 339 F.3d 692, 696 (8th Cir. 2003) ("A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers."); *United States v. Basinger*, 60 F.3d 1400, 1409–10 (9th Cir. 1995) (finding that, for sentencing purposes, reliance on an expert's yield calculations of methamphetamine based upon two empty one-pound containers of ephedrine was not clearly erroneous); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present").

Additionally, in *Varble v. Commonwealth*, the Kentucky Supreme Court rejected the appellant's argument that he could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. 125 S.W.3d 246, 254 (Ky. 2004), *superseded on other grounds by statute*, KRE 103, *as recognized in Stansbury v. Commonwealth*, No. 2013-SC-000592-MR, 2015 WL 730065, at *3 n.1 (Ky. Feb. 19, 2015). According to the court, testimony that the odor of anhydrous ammonia was emanating from two air tanks and the discoloration of brass fittings was likely caused by anhydrous ammonia was circumstantial evidence of the appellant's possession of the precursor. *Id.* The court further stated appellant's argument was "akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." *Id.* Nevertheless, the court concluded that, given the appellant "was found in possession of all the other chemicals necessary to manufacture methamphetamine," it was for the jury to decide whether he possessed those chemicals at the same time he possessed the anhydrous ammonia and the Sudafed. *Id.*

In the instant case, Stuart gave the following explanation of the equation she used to calculate the theoretical yield:

> I can take the weight of the [p]seudoephedrine and do the math of its mass from the periodic table and tell you how many moles of [p]seudoephedrine I have. I know it's a one-to-one molar ratio between [p]seudoephedrine and methamphetamine from the equations of how to make meth[amphetamine]. . . . [A]ll I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

Based upon the amount of pseudoephedrine each empty blister pack contained, as well as her experience using this equation, Stuart calculated the theoretical yield of methamphetamine Cain could have produced under various yield percentages. Stuart further testified she found bottles of "pink mush"—the waste product of methamphetamine—along with two one-pots in the last stages of production, as evidenced by a "grimy" two-liter bottle with a tube running out of the bathroom window. According to Stuart, the pink mush was comprised of remnants of cold medicine tablets stripped of the active ingredient necessary to produce methamphetamine.

Based on the foregoing, we find the hypothetical facts upon which Stuart based her calculations and offered an opinion regarding the theoretical yield were supported by other evidence properly admitted into the record. *See, e.g.*, *Beshore*, 961 F.2d at 1383 (finding that, "[e]ven in the absence of a necessary precursor chemical[,] the district court could properly approximate the amount of controlled substance that could have been produced" because an "approximation does not require that every precursor chemical be present"); *Newman*, 789 F.2d at 270 (noting "an expert can give his opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced" (citation and internal quotation marks omitted)); *Campbell*, 290 S.C. at 17, 347 S.E.2d at 902 (stating hypothetical facts relied upon by experts "must have some evidentiary support" (citation omitted)). Further, to the extent Cain argues the record contains conflicting evidence and testimony, we believe the jury was free to give Stuart's testimony such weight as it deemed appropriate when weighing all of the evidence. *See Council*, 335 S.C. at 20–21, 515 S.E.2d at 518 (noting once scientific evidence is found to be reliable and admitted under the *Jones* standard, Rule 702, SCRE, and Rule 403, SCRE, "the jury may give it such weight as it deems appropriate").

Accordingly, we affirm the circuit court's admission of Stuart's expert testimony regarding the theoretical yield based on the empty blister packs of pseudoephedrine because her testimony was supported by the facts.

II. Directed Verdict

Next, Cain contends the circuit court erred in denying his motion for a directed verdict, arguing the State presented insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine to support a trafficking conviction. We disagree.

"Attempt crimes are generally ones of specific intent[,] such that the act constituting the attempt must be done with the intent to commit that particular crime." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (citation omitted).

> In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. Additionally, the State must prove that the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime. The preparation consists [of] devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission[] after the preparations are made.

Id. (internal citations and quotation marks omitted). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." *Id.* (quoting *State v. Quick*, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942)).

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination[,] except in extreme cases when there is no evidence thereon. The intent with which an act is done denotes a

> state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Meggett, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) (quoting *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971)).

The statute under which Cain was charged provides as follows:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or *who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine* . . . is guilty of a felony which is known as trafficking in methamphetamine . . . .

S.C. Code Ann. § 44-53-375(C) (Supp. 2014) (emphasis added) (internal quotation marks omitted). The State charged Cain with violating the trafficking statute by attempting or aiding and abetting in the manufacture of methamphetamine. *See id.* Upon conviction of a first offense, an individual must be punished for "a term of imprisonment not less than three years nor more than ten years, no part of which may be suspended nor probation granted," if the quantity involved is "ten grams or more, but less than twenty-eight grams." § 44-53-375(C)(1)(a).

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . ." S.C. Code Ann. § 44-53-110(25) (Supp. 2014). "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine." § 44-53-110(28). "Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." § 44-53-375(D). Paraphernalia is statutorily

defined as "any instrument, device, article, or contrivance used, designed for use, or intended for use in ingesting, smoking, administering, manufacturing, or preparing a controlled substance." § 44-53-110(33).

"When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Zeigler*, 364 S.C. 94, 101, 610 S.E.2d 859, 863 (Ct. App. 2005) (citations omitted). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (citing *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007)). Further, the circuit court "should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Id.* (citing *State v. Hernandez*, 382 S.C. 620, 625–26, 677 S.E.2d 603, 605–06 (2009)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Zeigler*, 364 S.C. at 102, 610 S.E.2d at 863 (citations and internal quotation marks omitted). The circuit court, however, "is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 102–03, 610 S.E.2d at 863 (citations omitted).

In reviewing the denial of a motion for a directed verdict, this court must view "the evidence and all reasonable inferences in the light most favorable to the State." *Brandt*, 393 S.C. at 542, 713 S.E.2d at 599 (citing *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006)). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, we must find the case was properly submitted to the jury. *Id.* (citation omitted). This court may only reverse a denial of a motion for a directed verdict when no evidence supports the circuit court's ruling. *Zeigler*, 364 S.C. at 103, 610 S.E.2d at 863 (citation omitted).

In the instant case, Cain argues the circuit court erred in denying his motion for a directed verdict for the following reasons: (1) under the trafficking statute, the State was required to present evidence of potential yield and could not simply rely on a "hypothetical theoretical yield"; and (2) the State failed to prove Cain had custody and control of the pseudoephedrine sufficient to form an intent to manufacture in excess of ten grams of methamphetamine. We address each issue in turn.

A. Evidence of Potential Yield

Cain contends the circuit court erred in denying his motion for a directed verdict because the record lacked substantial circumstantial evidence of his intent to manufacture ten or more grams of methamphetamine. According to Cain, the State was required to present evidence of "potential yield" calculations based on his particular capabilities and the manufacturing site—and could not simply rely on a "hypothetical theoretical yield"—to prove his intent. We find this issue is not preserved for appellate review.

Issues not raised to the circuit court in support of a motion for a directed verdict are not preserved for appellate review. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (citation omitted). "A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (citation omitted).

Based upon our review of the record, we find the only issue raised in Cain's directed verdict motion was whether the State proved he and Parkhurst were in constructive possession of the methamphetamine instruments and paraphernalia found on the premises. While Cain argues the State should have been required to show a "potential yield," as opposed to a "hypothetical theoretical yield," these terms of art were used for the first time on appeal. Thus, to the extent Cain asks this court to create a distinction between these terms, we find the theoretical yield versus potential yield issue was not raised as a ground in his directed verdict motion, nor at any other point during the trial.[5] *See id.*

Accordingly, because Cain's potential yield argument was not raised to and ruled upon by the circuit court, we find the issue is not preserved for appellate review. *See Russell*, 345 S.C. at 132, 546 S.E.2d at 204.

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[5] The record is devoid of any reference to a potential yield calculation. Although Cain raised several objections during trial to the State relying on a theoretical weight to establish his intent to traffic methamphetamine, his objections were based on the fact that the State could not show evidence of an *actual* weight of methamphetamine because the pseudoephedrine blister packs were empty.

B. Constructive Possession

According to Cain, the circuit court also erred in denying his motion for a directed verdict because the State's evidence of custody and control—when viewed in the light most favorable to the State—does not support the finding that Cain possessed pseudoephedrine at a single time as part of a larger plan to manufacture in excess of ten grams of methamphetamine. Instead, Cain argues "the only inference to be drawn is that there were either several smaller manufacturings, or several failed attempts over a period of time[, a]ll of which would be independent of the others." We disagree.[6]

"Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." *State v. Burgess*, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) (quoting *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996)) (internal quotation marks omitted). "Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared." *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981) (citations omitted). "Possession requires more than mere presence." *State v. Jackson*, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct. App. 2011) (citation and internal quotation marks omitted).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of contraband. *Id.* at 255, 717 S.E.2d at 612 (citing *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605). "Possession of drugs may be inferred from the circumstances and may be imputed to anyone who has the power

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[6] As a preliminary matter, while Cain did not renew his motion for a directed verdict until after the jury was charged, the circuit court accepted the renewal as timely and ruled upon the motion, stating "[o]bviously we visited the issue, and you may not have said . . . I'll renew, but that's the way I took it for both of you." Although the State raised no objection during this colloquy—and the record demonstrates the parties had a mutual understanding—the State now maintains on appeal that the issue of constructive possession is not preserved. We disagree and find this issue preserved for appellate review because it was raised to and ruled upon by the circuit court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court].").

and intent to control the disposition and use of the drugs." *State v. Brown*, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995) (citation omitted). In a case in which "contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury." *Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (citation omitted).

In the instant case, we find the State presented substantial circumstantial evidence of Cain's custody and control of the pseudoephedrine originally contained in the empty blister packs to establish constructive possession. The evidence shows the deputies discovered an active meth lab with a batch of methamphetamine in the gassing-out phase. Moreover, the record indicates Stuart and the deputies found the following components in and around the house: a bottle with tubing in the bathroom, instant cold packs, a plastic funnel, a roll of aluminum foil, face masks, coffee filters, wrappings from lithium batteries, needles, several "one pot" bottles, and the "pink solid" dumped out of a "one pot." Although some evidence suggested Cain rented only a single bedroom and had no connection to the rest of the house, the record indicated he and Parkhurst were living alone in the house. Cain also fled the home and barricaded the door to his bedroom before the deputies discovered the meth lab, actions which we find to be further circumstantial evidence of his guilt. *See State v. Crawford*, 362 S.C. 627, 635–36, 608 S.E.2d 886, 890–91 (Ct. App. 2005) (noting flight may be considered as evidence of guilt (citations omitted)).

We find the State produced substantial circumstantial evidence from which the circuit court could infer that Cain intended to manufacture in excess of ten grams of methamphetamine. *See Hudson*, 277 S.C. at 203, 284 S.E.2d at 775 (stating that, when contraband materials are found on premises under the control of the accused, this "gives rise to an inference of knowledge and possession [that] may be sufficient to carry the case to the jury"). While Cain argues the circuit court should have drawn a different inference from the evidence, the court was concerned with the existence of evidence, not its weight. *See Zeigler*, 364 S.C. at 101, 610 S.E.2d at 863 (noting that, when a circuit court rules upon a directed verdict motion, the court "is concerned with the existence or nonexistence of evidence, not its weight") (citations omitted). Based upon our review of the record, the evidence of possession created a quintessential jury question, such that the circuit court properly submitted the case to the jury. *See, e.g.*, *Varble*, 125 S.W.3d at 254 (concluding when appellant was found in possession of all the other chemicals

necessary to manufacture methamphetamine, it was for the jury to decide whether he possessed those chemicals at the same time he possessed anhydrous ammonia and Sudafed).

Accordingly, we affirm the circuit court's denial of Cain's motion for a directed verdict on the issue of constructive possession.

CONCLUSION

Based on the foregoing analysis, the circuit court's judgment is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel Ricigliano, Jr., Appellant,

v.

Linda Ricigliano, Respondent.

Appellate Case No. 2012-212586

Appeal From Dorchester County
William J. Wylie, Jr., Family Court Judge

Opinion No. 5325
Heard December 9, 2014 – Filed July 15, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

David L. DeVane, of Summerville, for Appellant.

Elizabeth Murray Hight, of Hight Law Firm, LLC, of Summerville, for Respondent.

HUFF, J.: In this domestic relations matter, Daniel Ricigliano, Jr. (Husband) appeals the order of the family court asserting the court erred in (1) awarding him rehabilitative alimony instead of permanent periodic alimony and making the award conditional, (2) equally dividing the parties' marital estate, (3) failing to hold Linda Ricigliano (Wife) in contempt for violating the court's order restraining her from disparaging him in their child's presence, and (4) failing to order Wife to

contribute to Husband's extraordinary attorney's fees and costs. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL HISTORY

The parties were married in New York on November 2, 1996, and have one child from the marriage (Daughter), who was ten years old at the time of the hearing in this matter. In 2005, the parties relocated to South Carolina to advance Wife's career with United States Customs and Border Protection (hereinafter Customs).

On January 17, 2009, the parties separated after Wife informed Husband in October 2008 that she did not love him and wanted to separate. Shortly after the separation, on January 23, 2009, Husband filed this action seeking, among other things, a divorce on the basis of Wife's adultery. Husband first had suspicions Wife was committing adultery in 2007 when he discovered sexually explicit images of another man and somewhat seductive pictures of Wife on Wife's cell phone. According to Husband, when he confronted Wife about the pictures, she denied having any sexual encounters with the man, indicating she and this man were just playing around, and Husband forgave Wife for engaging in such behavior. Husband further denied Wife told him about any other affairs or other men involved in her life. In December 2008, Husband again became suspicious of Wife and hired Steven Abrams, an attorney and expert computer forensics examiner, to make a clone of Wife's computer. Abrams' report indicated Wife was having an extramarital affair with an individual named Steven Goldfarb, which appeared to start in Fall 2008. E-mails recovered between Wife and Goldfarb also implied the two may have been contemplating having a baby together. Wife did in fact get pregnant while Wife and Husband were separated and had Goldfarb's baby in September 2010. Husband alleged in his complaint that he believed Wife commenced an adulterous relationship, which he had not condoned. Wife denied this allegation in her Answer. When Husband's Interrogatories raised a question concerning Wife's involvement in affairs, Wife pled "her 5th Amendment right" in August 2009. When also asked to provide the name, address and phone numbers of any individuals with whom she had sexual relations since their marriage, Wife again pled "her 5th Amendment right." In November 2009, Wife amended her Answers to Interrogatories to admit her sexual relationship with Goldfarb. In her June 2010 deposition, Wife finally admitted she had engaged in four extramarital affairs during their marriage.

Husband is a high school graduate who started a company called Prime Builders in New York around 1998 or 1999. After the parties' move to South Carolina, Husband became employed with the company Southern Specialties in August 2006. He also restarted Prime Builders in South Carolina in 2007, while he was continuing to work for Southern Specialties. However, the relocation from New York to South Carolina was a difficult transition for his business, and Husband testified he had to start over and build up his clientele. In Spring 2009, Husband was laid off from Southern Specialties when the company closed. Husband obtained his South Carolina Commercial Residential Builders License in 2009 and was self-employed with Prime Builders at the time of the hearing in 2011.

Husband testified that during the marriage, he cooked and cleaned and maintained the household. He stated he repaired anything that was broken in the home and remodeled the kitchen, bathrooms, living room, and dining room. Wife was responsible for handling the finances and paying the bills. Husband also testified the parties dined out two to three times a week, they made donations to their church as well as charitable donations, and they entertained in their home and threw parties at their pool. He estimated he worked an average of thirty-five to forty hours a week, while Wife worked over forty hours and traveled often for work. Because of his flexible schedule, he had more time to take care of Daughter and the house, and he cared for Daughter when Wife was travelling. He claimed he was the primary caretaker of Daughter prior to the parties' separation. Husband testified his standard of living had been affected "[q]uite a bit" since the parties' separation, and he struggled to pay bills. At the time of the hearing, he had "maxed everything out" on his credit cards and was living in a smaller apartment.

Other than his current income, there is little, and somewhat conflicting, evidence of Husband's financial situation in the record before us. Husband lost the income from Southern Specialties in 2009. At some point, Prime Builders was not doing well because of the economy, but Husband agreed it had improved. However, he characterized it as "turning around" at that point in time and stated he was "still not making decent money." Husband testified he was making about $2,100 a month at the time of the hearing, and his financial declaration showed he had a gross monthly income of $2,136. Additionally, there is a notation in a "Relocation Proposal" document, developed in the parties' counseling sessions by Dr. Gibbs, indicating that from a review of Husband's financial history, it appeared that from 2003 to 2010, Husband made approximately $120,000. However, during Husband's cross-examination, there is an indication that Husband may have

testified in his 2010 deposition that his income total for the three previous years had been $354,000.[1] Husband testified his income fluctuated with the economy. This brief and vague reference to Husband's deposition testimony is the only indication Husband may have made a substantial income in the past, other than Wife's assertion that there were times in South Carolina that Husband made as much, if not more, money than she did.

Wife, who holds a degree in criminology with a minor in criminal justice, began working for Customs as an intern while in college and was employed by Customs upon graduation in June 1994. She was originally hired to work at the Port of Buffalo in New York and worked there for twelve years. Wife testified Husband's business did not support their household, but her job did. She did not have training and promotion opportunities in Buffalo, which factored into her decision to leave Buffalo. During a Christmas 2004 trip to see her brother in Mt. Pleasant, South Carolina, Wife interviewed for a position in the Port of Charleston and was hired shortly thereafter in 2005. Wife worked in that position for three years, until November 2008, when she was selected for employment in a three-year temporary position in Charleston as a course developer and instructor with Customs. This position was only to last through November 2011, with the possibility of extending the job two times in one-year increments for a total of five years of employment possible if extensions were granted. Both Wife and her supervisor testified Wife's request for extension was denied. Wife was then allowed to request three locations for continued employment with Customs, and she chose Charleston, Columbia, and Greenville, but none of those choices had available openings for her. Wife then applied for positions with the federal government in the Washington, D.C. area, where Goldfarb was headquartered, and she ultimately received a job offer there to begin shortly after the hearing in this matter. Wife noted her income afforded her the opportunity to provide Daughter with private school, health care, extracurricular activities, vacations, clothes, shoes, food, and everything Daughter needs. In order to continue her career with the federal government, she had to relocate. At the time of the hearing, Wife's Charleston employment provided an annual gross income of $87,278, and she was at level GS-13, Step 3 with the federal government. However, the new job in Washington, D.C. came with an offer of a GS-13, Step 6 to insure she would not lose any income.[2] If she passed

[1] Husband's deposition is not included in the record on appeal.
[2] It appears the base pay for a position in Washington, D.C. at a particular level is increased substantially to adjust for a higher cost of living.

her performance review, she had the potential of being promoted to the GS-14 level. A GS-14, Step 4 carried a salary of $93,166, and the pay would be adjusted 24.22 percent for the Washington, D.C. locality. Goldfarb testified he believed Wife's upgrade to GS-14 would be at Step 4 and her annual salary would probably be $117,000. Goldfarb was himself at level GS-14, Step 4. Additionally, both Wife and Goldfarb testified they planned to marry as soon as they possibly could. Goldfarb agreed that he and Wife would have a combined household income of "just shy of [a] quarter of [a] million dollars a year." The Washington, D.C. job would be a promotion for Wife.

Following eight days of hearing in July and August 2011, the family court issued an order on January 20, 2012, (1) granting Husband a divorce on the ground of Wife's adultery, (2) awarding primary custody of Daughter to Wife and allowing Wife to relocate with Daughter, (3) awarding Husband rehabilitative alimony of $500 a month "[i]f and only if" Husband chose to relocate within six months of the decree, with any decision to relocate after the six month period foreclosing any payment of alimony, (4) dividing the marital assets not already divided by agreement of the parties fifty-fifty, (5) requiring each party to pay their own attorney's fees and expenses and equally dividing the fees of the court-ordered psychologist and the Guardian ad Litem, with the exception of ordering Wife to reimburse Husband $3,100 toward the fees of his forensic expert, Abrams, and (6) declining to hold Wife in contempt, finding no clear and convincing evidence she purposely or willfully violated any of the court's orders.

ISSUES

1. Whether the family court erred in awarding conditional alimony and failing to award permanent periodic alimony in light of the duration of the parties' marriage and their educational background, employment history, earning potential, standard of living, and marital misconduct.

2. Whether the family court erred in equally apportioning the parties' marital estate.

3. Whether the family court erred in failing to hold Wife in criminal contempt of court for violating the court's restraining order by repeatedly disparaging Husband in Daughter's presence.

4. Whether the family court erred in inequitably leaving Husband without contribution from Wife for his extraordinary attorney's fees and costs.

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Alimony

Husband first contends the family court erred in awarding him conditional, rehabilitative alimony and failing to award him permanent periodic alimony. Husband maintains the facts of this case clearly warrant a substantial award of permanent periodic alimony. He argues the award of rehabilitative alimony was neither appropriate nor clearly defined by the family court and the family court failed to address the relevant factors the court should contemplate before awarding rehabilitative alimony or make any factual finding as to the rehabilitative goal an award of such alimony would achieve. Husband also contends the family court erred in making award of the rehabilitative alimony contingent on his relocation to Washington, D.C. We agree.

"Alimony is a substitute for the support normally incidental to the marital relationship." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Id.* (quoting

Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001)). "An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." *Id.* at 452, 759 S.E.2d at 423.

In deciding whether to award a party alimony, the family court *must consider* and give appropriate weight to 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) the physical and emotional condition of each spouse; (3) the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce . . . ; (9) custody of the children . . . ; (10) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce . . . if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage . . . ; (11) the tax consequences to each party as a result of the particular form of support awarded; (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and (13) such other factors the court considers relevant.

S.C. Code Ann. § 20-3-130(C) (2014). "The court is required to consider *all* relevant factors in determining alimony." *Craig v. Craig*, 358 S.C. 548, 554-55, 595 S.E.2d 837, 841 (Ct. App. 2004) (emphasis added); *see also Epperly v. Epperly*, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994) (holding the family court failed to address all the required statutory factors and remanding for the family court to redetermine alimony, considering all relevant factors).

"Although rehabilitative alimony may be an appropriate form of spousal support in some cases, permanent periodic alimony is favored in South Carolina. If a claim for alimony is well-founded, the law favors the award of permanent periodic alimony." *Jenkins v. Jenkins*, 345 S.C. 88, 95, 545 S.E.2d 531, 535 (Ct. App. 2001). "Rehabilitative alimony may be awarded only upon a showing of special circumstances justifying a departure from the normal preference for permanent periodic support. The purpose of rehabilitative alimony is to encourage a dependent spouse to become self-supporting after a divorce." *Id.* Rehabilitative alimony "should be approved only in exceptional circumstances, in part, because it seldom suffices to maintain the level of support the dependent spouse enjoyed as an incident to the marriage." *Id.* Additionally, the following factors must be considered in deciding whether rehabilitative alimony is appropriate:

> (1) the duration of the marriage; (2) the age, health, and education of the supported spouse; (3) the financial resources of the parties; (4) the parties' accustomed standard of living; (5) the ability of the supporting spouse to meet his needs while meeting those of the supported spouse; (6) the time necessary for the supported spouse to acquire job training or skills; (7) the likelihood that the supported spouse will successfully complete retraining; and (8) the supported spouse's likelihood of success in the job market.

Id. Further, "[t]here must be evidence demonstrating the self-sufficiency of the supported spouse at the expiration of the ordered payments for rehabilitative alimony to be granted." *Id.*

We agree with Husband that the family court erred in awarding him conditional rehabilitative alimony and denying him permanent periodic alimony.

The family court order contains one, short paragraph concerning alimony. It states as follows:

> [Husband] has few ties to South Carolina and his construction business does not generate enough steady income to be a sufficient reason for him not to relocate to

> the D.C. area; however, should he choose to relocate he would need to reestablish his business or start over as an employee of someone else. If and only if, [Husband] chooses to relocate within six months of this Decree, [Wife] shall be required to pay him rehabilitative alimony in the amount of $500.00 a month. If [Husband] chooses to stay in South Carolina, it is reasonable to expect his business to continue to grow, therefore he would not require support from [Wife]. Additionally, if [Husband] decides to move to the D.C. area[] after the six month window [Wife] shall not be required to pay him any alimony.

Clearly, the family court failed to make the requisite findings under section 20-3-130(C).

As noted, there was conflicting evidence as to Husband's previous earnings in the record. Nonetheless, the record paints a clear picture that, at the time of the divorce and in the preceding two years, Husband's income was substantially lower than that of Wife's and Husband was living well below the standard of living he enjoyed during the marriage. Additionally, the family court's findings are inconsistent, inasmuch as it determined Husband's construction business in South Carolina generated an insufficient income to warrant him not relocating, but at the same time found his business in South Carolina was expected to continue to grow such that he would not need support from Wife were he to remain in South Carolina.

Based upon the record before us, we find the preponderance of the evidence supports an award of permanent periodic alimony. In particular, the consideration of the following factors warrants such an award: (1) the duration of the marriage and ages of the parties; (2) the educational background of each spouse; (3) the employment history and earning potential of each spouse; (4) the standard of living established during the marriage; (5) the current and reasonably anticipated earnings of both spouses; and (6) marital misconduct or fault of either or both parties. The parties were married for over twelve years at the time they separated, were married for fifteen years at the time the divorce was finalized, and were in their late thirties at the time of the hearing. Wife is more educated than Husband, with Wife holding a Bachelor's degree and Husband having only graduated from high school. Wife

has maintained steady employment with Customs and was making a substantial income at the time of the hearing with an anticipated promotion in the near future, whereas Husband's income has fluctuated based upon having to start his business over after relocation for Wife's career advancement as well as economic conditions that affected his trade. The parties maintained a good standard of living during the marriage. Wife was poised to increase her income with the relocation and custody award of the family court, while Husband was still in in the process of trying to turn his business around. Lastly, Wife was completely at fault in the breakup of the marriage, having engaged in numerous affairs during the marriage and ultimately getting pregnant and moving on with her latest paramour, and this misconduct both affected the economic circumstances of the parties and contributed to the breakup of the marriage. As to Husband's anticipated earnings we note, while his business was in the process of turning around, the only evidence of record was that he still was not making a "decent" income at the time of the hearing and he had not made much money for at least the last two years. The evidence does not support a finding that his anticipated earnings would support him "as nearly as is practical, in the same position he . . . enjoyed during the marriage." *Crossland*, 408 S.C. at 451, 759 S.E.2d at 423. Additionally, to make such a determination, the family court would have had to engage in speculation, as the record is devoid of evidence of the amount of income Husband is anticipated to receive assuming his business does rebound. *See id.* at 454, 759 S.E.2d at 425 (finding, because the family court must have sufficient evidence upon which to base a determination of a person's earning potential for purposes of awarding alimony, the family court did not err in refusing to engage in speculation as to the benefits Wife might expect to receive, as the family court was not presented with sufficient evidence on the matter). Assuming Husband's business does ultimately improve to the point that he does not need further support, Wife could then bring an action based upon the change in circumstances. *See id.* at 454 n.5, 759 S.E.2d at 425 n.5 (finding Husband was not foreclosed from seeking to modify alimony when Wife actually began receiving social security benefits after her sixty-fifth birthday, noting that, though a change in circumstances within the contemplation of the parties at the time the divorce was entered generally would not provide a basis for modifying alimony, if the date and amount of the anticipated change is not ascertainable and the original decree does not prospectively account for the future circumstance, such a modification may be appropriate).

Further, the family court clearly erred in awarding Husband rehabilitative alimony. As noted, the law favors the award of permanent periodic alimony, and

rehabilitative alimony may be awarded only in exceptional circumstances, when there has been a showing of special circumstances justifying a departure from the normal preference for permanent periodic support. *Jenkins*, 345 S.C. at 95, 545 S.E.2d at 535. Additionally, the family court failed to consider the appropriate factors in determining whether rehabilitative alimony was proper under the circumstances. *Id.* Finally, there is no evidence demonstrating Husband will be self-sufficient at the expiration of the ordered payments. *See id.* ("There must be evidence demonstrating the self-sufficiency of the supported spouse at the expiration of the ordered payments for rehabilitative alimony to be granted.").

As to the conditional requirement that Husband relocate in order to receive any alimony, we also find error. The only evidence of record concerning the financial impact of relocating on Husband is his and Dr. Gibbs' testimony that they looked into various alternatives for moving to the D.C. area and it was not economically feasible for Husband to do so. There is nothing to show the trifling amount of rehabilitative alimony the family court awarded would be sufficient to allow Husband to relocate with financial stability.

In sum, we find Husband is entitled to permanent periodic alimony. We therefore reverse and remand this issue with instruction for the family court to award him permanent periodic alimony after consideration of the requisite factors. *See id.* at 97, 545 S.E.2d at 536 (finding permanent periodic alimony was warranted, reversing the award of rehabilitative alimony, and remanding the issue to the family court for determination of an appropriate award of permanent periodic alimony).

II. Equitable Distribution

Husband next argues the family court erred in equally apportioning the marital estate. He contends the court failed to identify all of the marital assets and the contributions of the parties. In particular, he asserts the court erred by failing to include Wife's earned annual leave as a marital asset subject to apportionment and excluding Husband's postseparation financial contributions toward the mortgage and preseparation physical improvements to the marital home. He also maintains that the overall distribution is unfair under the circumstances. Husband also contends Wife conceded in her closing argument that "this case could be considered for a 60/40 distribution," and a fair evaluation of the equitable

apportionment factors warrants a finding he is entitled to a split of sixty-forty in his favor. We disagree.

"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*, 408 S.C. at 455, 759 S.E.2d at 425. "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, 517 S.E.2d 720 (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." *Id.* "The ultimate goal of [equitable] 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). "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. "Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is fair." *Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 55 (Ct. App. 2006).

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 spouse's 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 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).

Though our courts have held there is no recognized presumption in favor of a fifty-fifty division, we have approved an equal division of marital property "as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage." *Crossland*, 408 S.C. at 456-57, 759 S.E.2d at 426. Further, while a spouse's adultery that causes the breakup of a marriage is an appropriate consideration for equitable apportionment, our courts "have consistently held that fault does not justify a severe penalty." *Doe*, 370 S.C. at 215, 634 S.E.2d at 56. Our laws do not "sanction the consideration of fault as a permissible punitive factor." *Id.* at 216, 634 S.E.2d at 56-57.

In regard to equitable distribution, the family court found, despite Wife's adultery and its role in the demise of the marriage, Wife made a greater financial contribution to the marital estate. It determined the marital estate should be divided fifty-fifty. The court found the $117,917 from the sale of the marital home should be divided equally after deducting $11,313 for the Guardian ad Litem fees. It found the debts should also be divided equally, with the exception of repair of

the air conditioning system on the marital home in the amount of $3,950, which was to be reimbursed by Wife. The family court also found the marital value of Wife's retirement account was $94,904.46 and her pension account was $466,244, and these assets were to be divided equally between the parties. As to other items of marital property, the family court found the parties' agreement as to division to be fair and equitable, and incorporated that agreement into the order.

First, we find Husband's arguments that the family court erred by failing to include Wife's earned annual leave and by excluding Husband's postseparation financial contributions toward the mortgage and preseparation physical improvements to the marital home are not preserved. Although Husband testified at trial that he made preseparation home improvements and postseparation mortgage payments, and counsel for Husband specifically asked for equitable distribution of Wife's annual leave in his closing argument to the family court, there is nothing to indicate Husband raised to the family court any error in the court's failure to include these matters in apportioning the marital property. While the record contains an order on Husband's motion to alter or amend the family court's divorce order pursuant to Rule 59(e), SCRCP, this order simply indicates that, with the exception of modification of Husband's visitation, the family court denied Husband's motion "as to all matters." It does not indicate what other arguments Husband may have made. Further, the motion to alter or amend is not included in the record on appeal. *See Taylor v. Taylor*, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). "When the family court does not rule on an issue presented to it, the issue must be raised by a post-trial motion to be preserved for appeal." *Bodkin v. Bodkin*, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010). If a party then fails to raise the issues in a Rule 59(e) motion, they are unpreserved for our review. *Id.* Because the family court did not rule on these matters, and there is nothing in the record to indicate Husband raised them in a posttrial motion, they are not preserved.

As to Husband's argument that the overall distribution is unfair, we disagree. Admittedly, Wife was at fault in the breakdown of the marriage and she has a greater earning capacity. However, we disagree with Husband's assertion that Wife has significant nonmarital assets in the form of her retirement accounts, as only three years of her retirement was nonmarital and the bulk of her retirement accounts were considered marital and divided equally with Husband. As well, though Husband may have contributed financially to the household and put labor

into the marital home, he has characterized Wife as the primary breadwinner throughout the marriage. Thus, her contributions to the marital home are likely, at a minimum, equal to that of Husband's. Additionally, Wife made the sole financial contributions to her retirement accounts, the bulk of which were divided evenly with Husband. Lastly, we do not agree with Husband's assertion that Wife conceded a sixty-forty split of the marital estate in favor of Husband might be warranted. In closing argument, Wife's counsel did state Wife requested "the fees be split fifty-fifty or if the court were to take into consideration the adultery, sixty-forty." However, that was only a reference to *fees*, not equitable distribution of the parties' marital estate. Counsel stated that Wife asked "that their debts and assets be equitably divided." This was the only reference to the division of the marital estate. Further, we find nothing in the record to indicate Husband sought a greater split than fifty-fifty for equitable distribution. Other than asking for "equitable" distribution, Husband has only suggested an "equal" division of some of the assets and all of the debts. In sum, upon review of the entire record and after consideration of the relevant factors, we find the fifty-fifty division as a whole is fair. Accordingly, we affirm the division.

III. Contempt

Husband argued in his brief that the family court erred in failing to hold Wife in criminal contempt for violating the court's restraining order by repeatedly disparaging Husband in Daughter's presence. However, at the time of oral argument, Husband conceded he no longer desired to proceed on the matters of contempt. At any rate, a review of the record convinces us Husband has not clearly and specifically shown Wife's contemptuous conduct. *See Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004) ("Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct.").

IV. Attorney's Fees

Lastly, Husband contends the family court erred in failing to require Wife to contribute to his attorney's fees and costs.

The family court may, after considering the financial resources and marital fault of both parties, 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 the party to pay the fees; (2) beneficial results obtained; (3) the financial conditions of the parties; and (4) the effect a fee award will have on the 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 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).

Recognizing Husband was required to prove Wife's adultery due to Wife's denial in her responsive pleadings, the family court ordered Wife to reimburse Husband for the fees of Husband's forensic computer expert. Other than these fees, the family court ordered the parties to pay their own attorney's fees, and that the fees of the Guardian ad Litem and Dr. Saylor be divided equally between them. This is the extent of the family court's order on this matter, and there is no indication the family court considered any of the *E.D.M.* factors in deciding whether to make an award of attorney's fees and costs. Notably, there is no indication the family court gave any consideration whatsoever to financial considerations, i.e., the abilities of the parties to pay, the financial conditions of the parties, and the effect an award would have on the parties. Additionally, a remand on this matter is appropriate in light of our decision to reverse the denial of permanent periodic alimony and remand for the family court to determine the appropriate amount of permanent periodic alimony to award. *See Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) ("[S]ince the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered.").

CONCLUSION

Based on the foregoing, we (1) reverse the denial of permanent periodic alimony to Husband and remand to the family court for a determination of the appropriate award, retroactive to the date of the original hearing, (2) affirm the equal apportionment of the marital estate, (3) affirm the family court's decision declining to hold Wife in contempt, and (4) remand the issue of attorney's fees for reconsideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Denise Wright, Appellant,

v.

PRG Real Estate Management, Inc., Franklin Pineridge Associates, and Karen Campbell Individually and in her Representative Capacity as an Agent of PRG Real Estate Management, Inc., Respondents.

Appellate Case No. 2013-002157

Appeal From Richland County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5326
Heard January 15, 2015 – Filed July 15, 2015

AFFIRMED

Jordan Christopher Calloway, S. Randall Hood, and Deborah G. Casey, McGowan Hood & Felder, LLC, all of Rock Hill; Whitney Boykin Harrison, McGowan Hood & Felder, LLC, of Columbia; Gerald Malloy, Malloy Law Firm, of Hartsville; and Edward Wayne Ridgeway, Jr., Burriss & Ridgeway, of Columbia, all for Appellant.

Brian Arnold Comer and Christian Stegmaier, Collins & Lacy, PC, of Columbia, both for Respondents.

FEW, C.J.: Two men abducted Denise Wright at gunpoint from the parking lot of the apartment she leased at Wellspring Apartment Complex. Wright filed this lawsuit alleging Wellspring's owners and managers[1] (the respondents) were negligent in providing security and were liable under the South Carolina Unfair Trade Practices Act. *See* S.C. Code Ann. § 39-5-10 to -180 (1985 & Supp. 2014). The circuit court granted summary judgment on both claims, finding the respondents had no duty to provide security for Wright and there was no evidence the respondents engaged in unfair or deceptive acts. We affirm.

I. Facts and Procedural History

In 2003, Wright leased an apartment at Wellspring, which is part of a planned unit development known as the "Harbison Community Association." Several public walking trails weave through the community. Wellspring and other properties within the community are accessible from these public trails.

On the night of September 18, 2008, Wright parked her car in Wellspring's parking lot and was walking to her apartment when two men held her at gunpoint and demanded money. When she responded she had none, they forced her to drive them to various automatic teller machines to make withdrawals from her account. After approximately thirty-five minutes, the men fled the car, and Wright called the police. The men have never been identified.

In 2011, Wright filed this action, alleging the respondents were negligent in failing to protect tenants from third-party criminal activity by not (1) providing adequate lighting in the common areas, (2) maintaining the overgrown shrubbery to an appropriate height, and (3) executing its courtesy officer program in a reasonable manner. She also brought an unfair trade practices claim, arguing a Wellspring employee committed unfair and deceptive acts in making statements concerning the safety and security of the apartment complex when Wright filled out her rental application.

[1] PRG Real Estate Management manages Wellspring, Franklin Pineridge Associates is the owner, and Karen Campbell was the property manager at the time of the incident.

The respondents moved for summary judgment on both claims, which the circuit court granted. The court first held the negligence cause of action failed as a matter of law because the respondents had no duty to protect Wright against third-party criminal activity. The court then found Wright presented no evidence the respondents engaged in unfair or deceptive acts.

II. Standard of Review

Rule 56(c), SCRCP, provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, we review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). When the circuit court grants summary judgment on a question of fact, we view "the evidence and all inferences which can reasonably be drawn therefrom . . . in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "[T]he non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim." *Chastain v. Hiltabidle*, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009). "[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). We must affirm summary judgment where the non-moving party "fails to . . . establish the existence of an element essential to the party's case." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007).

III. Negligence Claim

To prevail on a negligence claim, the plaintiff must demonstrate the defendant owed her a duty of reasonable care. *See Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (stating "the existence of a legal duty of care owed by the defendant to the plaintiff" is "[a]n essential element in a cause of action for negligence"). The existence or non-existence of a duty is a question of law. *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005).

Generally, residential landlords do not owe tenants a duty to protect them from the criminal activity of third parties. *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C.

440, 441 S.E.2d 317 (1994) (*Cramer I*). In *Cramer I*, the plaintiff asked our supreme court "to extend the duty [to provide security] owed by store owners and innkeepers to landlords." 312 S.C. at 442, 441 S.E.2d at 318. The supreme court pointed out store owners and innkeepers have a duty to protect their customers from foreseeable criminal activity because they invite the public onto their premises. 312 S.C. at 442-43, 441 S.E.2d at 318. The court explained this duty is based on the principle that "[o]ne who invites all may reasonably expect that all might not behave" and therefore bears responsibility for any injury resulting from the failure to take reasonable precautions against criminal activity. 312 S.C. at 443, 441 S.E.2d at 318 (quoting *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1213 (D.S.C. 1990) (applying South Carolina law)). The court concluded, however, there was a "fundamental distinction between the relationships of landlord/tenant and store owner/invitee and innkeeper/guest." *Id.* Accordingly, the court "decline[d] to find that landlords owe an affirmative duty to protect tenants from criminal activity merely by reason of the [landlord/tenant] relationship." 312 S.C. at 443, 441 S.E.2d at 318-19; *see also Cramer v. Balcor Prop. Mgmt., Inc.*, 848 F. Supp. 1222 (D.S.C. 1994) (*Cramer II*) (relying on *Cramer I* to grant summary judgment on the tenant's negligence claim).[2]

Wright acknowledges landlords do not generally have a duty to provide security services and protect tenants from criminal activity. However, she makes three arguments to support her position that a duty exists under the facts of this case. For the reasons we explain below, we reject these arguments and find the circuit court correctly granted summary judgment.

A. "Particular Circumstances"

In *Cramer I*, the supreme court relied on the nature of apartment complexes as private places not held open to the public. *See* 312 S.C. at 443, 441 S.E.2d at 318 (relying on the fact the complex was "private and only for those specifically invited"); *see also Cooke*, 741 F. Supp. at 1213 ("An apartment complex is not a

[2] *Cramer I* and *Cramer II* arose from the same lawsuit. *Cramer I* was "certified to [the supreme court] by the United States District Court for the District of South Carolina," 312 S.C. at 441, 441 S.E.2d at 317, and the district court decided *Cramer II* after the supreme court answered the certified question. 848 F. Supp. at 1224.

place of public resort . . . . [and] is of its nature private and only for those specifically invited." (citation omitted)); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997) ("[A]n apartment complex is not a place held open to the public and is instead a private place for only people who are specifically invited."). The *Cramer I* court recognized, however, "A duty may arise under the *particular circumstances* of the individual case based upon a showing of negligence constituting the proximate cause of the loss." 312 S.C. at 443 n.1, 441 S.E.2d at 319 n.1 (emphasis added).

Wright relies on this language from *Cramer I*. She contends her case presents "particular circumstances" that give rise to a duty to protect her. Specifically, she argues Wellspring is "unique" and "analogous to a retail store or motel" because the "series of walking trails that weave through [Wellspring]" constitute "places to which the public are invited to enter and remain for extended periods." Because of these differences between Wellspring and the typical private apartment complex, Wright argues this case is not controlled by *Cramer I*. In particular, she argues (1) the "manner of access" to Wellspring—through the trails—is different from other apartment complexes because the common areas can be directly accessed by the public; (2) the respondents invited the public to the premises via the walking trails, (3) the respondents could reasonably expect the public to use the common areas—based on the nature and location of Wellspring—and (4) the existence of several public policy considerations. We find none of these circumstances distinguishes this case from *Cramer I*.

First, we find the evidence does not support Wright's assertion that the "rare" nature of Wellspring warrants different treatment from the apartment complexes in *Cramer I*, *Cooke*, and *Goode*. Rather, all the evidence in this case shows Wellspring is private property and its tenants are the only people the respondents specifically invited onto the premises. Under these circumstances, the trails at Wellspring are the same as public sidewalks or streets that adjoin any apartment complex because the trails—like sidewalks and streets—simply allow tenants and their invited guests to access the property. The fact that uninvited people may access the properties from the trails—like sidewalks and streets—does not change the analysis.

Wright argues, however, that Wellspring is different from the type of complex addressed in *Cramer I*, *Cooke*, and *Goode* because "Wellspring is part of the Harbison Community Association," which Wright points out "maintains a series of

walking trails that weave through the community," "including one trail that goes directly through Wellspring." We find these arguments and the evidence upon which they are based do not remove this case from the general rule the supreme court explained in *Cramer I*. There, the court focused on whether the apartment owners or managers invited the public onto the premises—not on the physical layout of the apartment building or complex. 312 S.C. at 442-43, 441 S.E.2d at 318-19. In *Goode*, this court relied on *Cramer I* to find the apartment complex owed no duty because the public was not invited. 329 S.C. at 441, 494 S.E.2d at 831. Wright has cited no authority for focusing on the physical layout of an apartment building or complex as a basis for determining the existence of a duty. *Cf. Cramer I*, 312 S.C. at 443, 441 S.E.2d at 318 ("Tenants in a huge apartment complex, or a tenant on the second floor of a house converted to an apartment, do not live where the world is invited to come." (quoting *Cooke*, 741 F. Supp. at 1213)); *Goode*, 329 S.C. at 442, 494 S.E.2d at 831 (same).

As the circuit court found, therefore, the fact that public streets—or trails—adjoin or even traverse the apartment complex does not remove the case from *Cramer I*. Rather, our inquiry must be whether the respondents invited the public onto the premises.[3]

Wright argues the public was invited onto Wellspring's premises. In support of her argument, she presented evidence that other entities invited the public to use the trails at Harbison, including the trail that goes through the Wellspring property. For example, Wright points out the Harbison Community Association maintains a website on which it advertises to the public the availability of its trails and the South Carolina Department of Parks, Recreation and Tourism advertises on its website the availability of the Harbison trails, describing them as "multiuse trails" that are "within the neighborhoods of Harbison." According to Wright, the Department's website "includes a graphic map of the area with suggested routes for the public" and "describes the experience of an average user of the trails: 'As you walk these well-shaded trails, you pass the backyards of homes.'" The Richland County Conservation Commission also advertises the trails in a brochure entitled

[3] As we explain below, we find no evidence the respondents invited the public onto the premises. Thus, we do not address the question whether doing so would remove this case from *Cramer I*. Rather, we discuss this for the sole purpose of squarely addressing Wright's argument on appeal.

"Richland County Trails," which states the Harbison trails are "paved pathways weaving through neighborhoods."

Based on this evidence, Wright argues *Cramer I* does not apply because the public is invited onto Wellspring's premises. We disagree. While there is evidence that these other entities invited the public to use the trails, Wright produced no evidence that these entities invited the public onto Wellspring's property. As to the trail that goes through Wellspring, the only evidence in the record indicates this trail is also on public property—not Wellspring's premises. As to the actions of the respondents themselves, Wright presented no evidence they invited the public to use the trails. Viewing this evidence in the light most favorable to Wright, we find this is not Wellspring's invitation to the *public* to use the trails. Additionally, Wright conceded at oral argument the respondents took no action to invite the public onto Wellspring's property.

We find Wright presented no evidence to support a finding the respondents—or anyone else—invited the public onto Wellspring's premises. Therefore, even if Wright's theory is valid—that *Cramer I* does not apply when such an invitation did occur—the facts of this case do not support the theory.

Turning to Wright's third argument, she asserts the unique nature of Wellspring created a duty on the respondents to take measures to exclude the public from the property, such as erecting a fence or posting signs to indicate that Wellspring was private property. We reject this argument for two reasons. First, as previously discussed, the trails do not distinguish Wellspring from homes situated along public sidewalks or streets. Second, the fact that the respondents did not take measures to exclude the public from the property does not take this case out of the *Cramer I* context. Under the facts of this case, their *inaction* may be relevant to whether they breached an otherwise existing duty, but their inaction does not support the existence of a duty. *Cf. Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) (holding one who *does* act, even though under no obligation to do so, becomes obligated to act with reasonable care).

Finally, Wright asserts a duty to provide security should be imposed on landlords based on public policy considerations. First, she contends a landlord's "superior knowledge of the crime risk in the area" is a "circumstance" that can establish a duty of reasonable care to guard against the danger posed by third-party criminals. Wright argues "[f]rom a public policy perspective, assigning all responsibility for

security to a tenant ignores the fact that a landlord is better positioned to know when and where crimes are occurring." Second, Wright urges us to recognize that a landlord who retains "exclusive control over common areas, and therefore exclusive ability to care for the common areas, must also have a duty to take reasonable actions to keep those areas reasonably secure." She reasons that when a landlord has exclusive control of common areas, the landlord "is in a far superior position to take steps necessary to secure the premises for the safety of the tenants."

The circuit court rejected these arguments, stating this "is just another way of arguing that a landlord has a duty to protect tenants from the foreseeable risk of criminal activity." We agree. [4]

Because we find the facts of this case indistinguishable from *Cramer I*, we hold the respondents owed no duty to provide security for Wright.

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[4] Wright's arguments, which she supports by relying exclusively on out-of-state precedent, are based on rules of law not recognized in South Carolina. *See Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 941 P.2d 218, 220 (Ariz. 1997) (stating a duty to protect "exist[s] because of Defendant's status with respect to the land and consequent power to prevent harm by exercising control over its property"); *Johns v. Hous. Auth. for City of Douglas*, 678 S.E.2d 571, 573 (Ga. Ct. App. 2009) ("A landlord's duty to exercise ordinary care to protect a tenant against third-party criminal attacks extends only to foreseeable criminal acts."); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship*, 826 A.2d 443, 453 (Md. 2003) ("By virtue of its control over the common areas, a landlord must exercise reasonable care to keep the tenant safe . . . from certain criminal acts committed within the common areas."); *Davenport v. D.M. Rental Props., Inc.*, 718 S.E.2d 188, 189-90 (N.C. Ct. App. 2011) (stating "a landlord has a duty to exercise reasonable care to protect his tenants from third-party criminal acts that occur on the premises if such acts are foreseeable"); *McPherson v. State ex rel. Dep't of Corr.*, 152 P.3d 918, 923 (Or. Ct. App. 2007) ("[A] landlord has a common-law duty to take reasonable steps to protect tenants in the property's common areas from reasonably foreseeable criminal acts by third persons."); *Tedder v. Raskin*, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987) ("[T]he same standard of care should apply to both the innkeeper and the landlord in the area of liability for injuries to tenants resulting from third-party crimes on the premises.").

B. Common Areas Exception

Wright argues there are exceptions to *Cramer I* that apply in this case to create a duty of reasonable care. *See Cramer II*, 848 F. Supp. at 1224 (stating that "the court must determine if an exception to the general rule that South Carolina common law imposes upon a landlord no general affirmative duty to maintain leased premises in a safe condition applies in this case"). Wright relies in particular on the common areas exception, under which a landlord has "a duty to maintain the common areas of a leased property in a safe condition." *Cramer II*, 848 F. Supp. at 1225. This duty applies to areas "for the common use of several tenants," such as "halls, entrances, porches or stairways." *Cooke*, 741 F. Supp. at 1211 (quoting *Daniels v. Timmons*, 216 S.C. 539, 549, 59 S.E.2d 149, 154 (1950)). Wright argues the common areas of Wellspring were in an "unsafe condition" because they were susceptible to criminal activity due to the respondents' failure to maintain its courtesy officer program, provide adequate lighting, and trim the overgrown shrubbery to an appropriate height.

Wright attempts to apply the duty to provide "safe" physical premises—structurally—to the provision of "secure" premises that protect against third-party criminal activity. In doing so, Wright again relies solely upon out-of-state precedent and secondary sources. We find the common areas exception does not apply to the facts of this case.

In *Cooke*, the district court "reject[ed] the application of the 'common areas' exception to criminal activity" because the exception had "never been applied in South Carolina to anything except physical injuries resulting directly from the *condition* of the premises themselves." 741 F. Supp. at 1211. In *Cramer II*, the court addressed the same issue. 848 F. Supp. at 1225. The plaintiff contended "the design and operation of the apartment complex was inadequate due to the lack of fencing around the perimeter, the insufficient lighting, the lack of security guards, and the poor locks on apartment doors." *Id.* The court relied on *Cooke* to find "[the common areas] exception is inapplicable to these facts." *Id.* The court reasoned, "To . . . apply the common areas exception to this situation would stretch the exception to the point of swallowing the rule." *Id.* We agree with *Cooke* and *Cramer II*, and hold South Carolina does not recognize a landlord's duty to keep common areas "secure" from third-party criminal activity. Thus, we find the

circuit court correctly determined the common areas exception does not apply under these facts.

C. Affirmative Acts Exception

Wright also contends the affirmative acts exception applies in this case to create a duty of reasonable care. *See Sherer*, 290 S.C. at 406, 351 S.E.2d at 150 (providing that one who undertakes to act, even though under no obligation to do so, becomes obligated to act with reasonable care); *see also Cooke*, 741 F. Supp. at 1209-10 (stating "one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care" (citation omitted)). Wright argues a duty was created by three affirmative acts of the respondents: (1) hiring courtesy officers to patrol the premises, (2) providing common area lighting, and (3) trimming the shrubbery throughout the common areas. We disagree.

With regard to the courtesy officer program, Wellspring maintained a program under which residents affiliated with law enforcement served as courtesy officers in exchange for a reduced rental rate. The program required courtesy officers to patrol Wellspring's premises for "a minimum of two hours each day" and answer calls from residents reporting a crime. Wellspring gave tenants a "security pager" number in its monthly tenant newsletter and told them to call the number or the Richland County Sheriff's Department "if you see anything suspicious." While nothing in the record reflects Wellspring terminated a courtesy officer, the position was occasionally vacant for various reasons—marriage, death, or the officer no longer being affiliated with law enforcement. When the position was vacant, Wellspring sought a new courtesy officer to fill the position. At the time of Wright's abduction, Wellspring did not have a courtesy officer in place.

We find the creation of its courtesy officer program did not impose on Wellspring a duty to exercise reasonable care in providing security at the complex. Rather, Wellspring's undertaking to create the program required only that Wellspring maintain the program itself with reasonable care. *See* 65 C.J.S. *Negligence* § 40 (2010) ("A person's duty to exercise reasonable care in performing a voluntarily assumed undertaking is limited to that undertaking . . . . A duty assumed because of a voluntary undertaking must be strictly limited to the scope of that undertaking."); *see also Byerly v. Connor*, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992) (finding defendant had no duty to inspect for a latent defect because he had "undertaken a *limited* duty to use due care to discover structural nonconformity

with permits" only (emphasis added)). The record in this case demonstrates the courtesy officer program contemplated times during which no officer would be on duty because the program required only that an officer patrol the complex two hours per day. The program also contemplated there would be times during which the courtesy officer positions would be vacant, and the respondents would seek to fill the position in a timely manner. Thus, the duty the respondents assumed by undertaking to provide a courtesy officer program did not include a general duty to provide security for its tenants. Under the facts of this case, the duty the respondents assumed was limited to exercising reasonable care in maintaining the courtesy officer program, and we find no evidence they failed to exercise reasonable care in fulfilling that duty.

In *Cramer II*, the court held the affirmative acts exception did not apply to facts that are indistinguishable from the facts of this case. 848 F. Supp. at 1224. The plaintiff argued the landlord's conduct of "hiring a 'courtesy officer' to patrol the grounds and then terminating that officer without replacing him" established a duty to exercise due care in maintaining the courtesy officer program—and breach of that duty resulted when the courtesy officer position was left vacant. *Id.* The court found "[the plaintiff] misapprehend[ed] the scope of the affirmative acts exception" because "a stronger connection between the act and the injury" is necessary to establish liability. *Id.* We agree with the reasoning of *Cramer II*. The fact that the courtesy officer position was vacant at the time is a circumstance too attenuated from the kidnapping and robbery of Wright to establish a duty to provide security.

Regarding lighting and shrubbery, Wright asserts the respondents provided lighting for the common areas and trimmed the shrubbery throughout the common areas. She contends the respondents had no obligation to provide these services, but because they undertook to do so, they had a duty to act with reasonable care. Wright points to evidence that the respondents provided lighting and maintained the shrubbery in part for security purposes—deterring crime. Wright presented expert testimony that the lighting "was totally inadequate" and the "overgrown" shrubbery could provide a hiding place for criminals, as it did in Wright's case.

We find neither the provision of lighting nor the trimming of shrubbery around the parking areas and apartment buildings, even if done in part for the purpose of making the premises more secure, gives rise to a duty to provide security. It is inconceivable that any apartment developer would not install lighting and shrubbery around the parking areas and apartment buildings of a complex. The

installation of lighting and maintenance of shrubbery serve multiple purposes in addition to increasing security—such as preventing accidental injury and improving aesthetics. If the law recognized these activities as "undertakings" sufficient to impose on developers and apartment managers a duty of reasonable care to provide security services, the rule of *Cramer I* would be swallowed by the affirmative acts exception. We find the installation of lighting and the maintenance of shrubbery did not impose on the respondents a duty to exercise reasonable care in providing security at the complex.

Because we find the respondents had no duty to protect Wright from third-party criminal activity under *Cramer I* and no exceptions to this rule apply, we hold the circuit court correctly granted summary judgment on Wright's negligence claim.[5]

IV. Unfair Trade Practices Claim

Under the South Carolina Unfair Trade Practices Act, it is unlawful to engage in "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (1985). A person who suffers "loss of money . . . as a result of . . . an unfair or deceptive" act or practice "may bring an action . . . to recover actual damages." S.C. Code Ann. § 39-5-140(a) (1985). Wright argues Wellspring's property manager made deceptive statements to her when she filled out her rental application. Specifically, she contends the manager told her Wellspring was a "safe and secure place" and that courtesy officers patrolled the premises. The circuit court found Wright failed to prove these statements constituted unfair or deceptive acts. We agree. The generalized statements that the apartments are safe and secure and are patrolled by courtesy officers—on the facts of this case—simply cannot be unfair or deceptive acts under subsection 39-5-20(a). *See Johnson v. Collins Entm't Co.*, 349 S.C. 613, 636, 564 S.E.2d 653, 665 (2002) ("An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." (citation omitted)); *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254,

[5] We decline to address the circuit court's ruling that the respondents' conduct did not proximately cause Wright's injuries. *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 the court's resolution of the issues it does address are dispositive of the appeal).

269, 536 S.E.2d 399, 407 (Ct. App. 2000) (stating "[a]n unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive" and "[a] deceptive practice is one which has a tendency to deceive"). We affirm the award of summary judgment.

V. Conclusion

The order of the circuit court granting summary judgment in favor of the respondents is **AFFIRMED**.

THOMAS, J., concurs. **LOCKEMY, J., concurring in part and dissenting in part in a separate opinion.**

LOCKEMY, J., concurring in part and dissenting in part: I respectfully concur in part and dissent in part. I agree with the majority that summary judgment was proper on Wright's claim under the Unfair Trade Practices Act. I disagree, however, with the majority that summary judgment should have been granted on Wright's negligence claim. Summary judgment must be denied in a negligence case when the non-moving party submits a mere scintilla of evidence. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment."). I find based on reviewing the record that Wright met that burden here. Oscar Wilde once quipped satirically, "[D]uty is what one expects of others . . . . ."[6] Applying that literally to the law in this case, Wright presented some evidence that she expected security would be provided and that the respondents accepted the duty to do so. In addition, she presented enough evidence to avoid summary judgement that the breach of that duty was a proximate cause of her abduction. I analyze below why the circuit court's grant of summary judgment to the respondents should be reversed and the case remanded for trial.

I. Duty

As stated by the majority, landlords generally do not owe an affirmative duty to protect tenants from criminal activity merely by reason of the landlord/tenant

[6] Oscar Wilde, *A Woman of No Importance* 68 (Arc Manor 2008) (1894).

relationship. *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C. 440, 443, 441 S.E.2d 317, 318-19 (1994). Nevertheless, "[a]t common law, when there is no duty to act but an act is voluntarily undertaken, the actor assumes a duty to use due care." *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986).[7] The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in the Restatement of Torts, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 (1965) (footnote omitted)). Section 323 "prescribes a duty of care" for purposes of South Carolina common law. *Sherer*, 290 S.C. at 408, 351 S.E.2d at 150. Specifically, section 323 "establishes a duty on one who undertakes to render services for the protection of another." *Id.* at 407, 351 S.E.2d at 150.

In *Goode v. St. Stephens United Methodist Church*, the appellant—a visitor to an apartment complex who was attacked by a tenant in a common area—sued the

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[7] The majority cites *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) to refer to this body of law as the "affirmative acts exception." I note that the exact same language from *Sherer* has been cited by this court when applying the "undertaking exception." *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 444, 494 S.E.2d 827, 832 (Ct. App. 1997). For purposes of my analysis, I refer to it as the "undertaking" exception.

complex, asserting it was negligent in failing to provide security. 329 S.C. at 438, 442, 494 S.E.2d at 829, 831. The appellant "argue[d] [the apartment complex] created a duty to protect him from the violent acts of third parties by undertaking to provide security to tenants and their guests." *Id.* at 444, 494 S.E.2d at 832. In support of his argument that the apartment complex owed him a duty, the appellant relied on both the common law "undertaking exception" and section 323 of the Restatement (Second) of Torts. *Id.* at 444, 494 S.E.2d at 832-33. Our court found "no basis for liability under either the Restatement (Second) of Torts nor the common law rule." *Id.* at 445, 494 S.E.2d at 833. In finding no duty was owed to the appellant, we noted the security measures undertaken by the complex—"repairing locks, securing windows, informing tenants of criminal acts occurring in the complex, and routinely inspecting the complex"—"were for the protection of the residents of the complex, not the general public." *Id.* at 444, 494 S.E.2d at 833. Our court also concluded there was no evidence that the security was performed with less than due care, and the appellant could not demonstrate the required element of reliance under section 323 because he admitted he knew the landlord did not provide security at the complex at the time he was attacked. *Id.* at 444-45, 494 S.E.2d at 833.

Unlike *Goode*, I believe Wright presented evidence—sufficient to survive summary judgment—that Wellspring had a duty to protect Wright from violent acts of third parties by undertaking to provide security to its tenants. First, Wellspring undertook to provide some form of security for the protection of its tenants. It is undisputed Wellspring offered a "courtesy officer program whereby a resident who was affiliated with law enforcement received a reduced rental rate to serve as a courtesy officer." In a monthly newsletter to its tenants, Wellspring provided tenants with a phone number for a "security pager," stated security is a "very top priority," and told tenants to "please call the security pager or Richland County Sheriff['s Department] if you see anything suspicious." Unlike the appellant in *Goode* who failed to show any of the apartment complex's security measures were taken for his protection, the security measures undertaken by Wellspring were for Wright's benefit, as a tenant at the apartment complex.

There was also evidence Wellspring performed its security program with less than due care. Wright stated that before she signed a lease at Wellspring, she asked an apartment manager if Wellspring provided security, and the apartment manager confirmed Wellspring had "security officers on duty." Despite the fact that Wright was informed Wellspring "had security officers on duty," it is undisputed that at

the time of her attack Wellspring had no "security" or "courtesy" officers. Similarly, Wellspring informed tenants to call the security pager if they "see anything suspicious"; however, at the time of Wright's attack, it is unclear if anyone answered this pager. The majority finds "the duty the respondents assumed was limited to exercising reasonable care in maintaining the courtesy officer program" and there was "no evidence [the respondents] failed to exercise reasonable care in fulfilling [its] duty." I disagree. I believe by specifically informing Wright that the complex had "security officers" and urging tenants to call the security pager in the event of an emergency, Wellspring undertook a duty to either provide security at the complex, or to take affirmative steps to ensure tenants were aware of the limitations of its security program. If the jury accepts Wright's evidence that Wellspring failed to do either, it could find a failure to exercise reasonable care in the performance of an undertaking.

Next, there was evidence that unlike the appellant in *Goode*, Wright relied on Wellspring's security program when she decided to move to its apartment complex. When asked whether her decision to move to Wellspring was based on any amenities, Wright testified, "I was told that there were security officers on duty. So I felt like [Wellspring] would be a safe place." As previously stated, Wright entered her lease at Wellspring after it informed her that the complex had "security officers." Assuming this evidence is somehow insufficient to show reliance under section 323, I would still find a duty exists under this section because there is evidence the deficiencies in the respondents' security program increased the risk of harm Wright ultimately suffered. *See* Restatement (Second) of Torts § 323 (stating a duty can apply to one who undertakes to render services for another's benefit if "(a) his failure to exercise such care increases the risk of such harm, *or* (b) the harm is suffered because of the other's reliance upon the undertaking" (emphasis added)). By not having officers in place to patrol the area or answer the "security pager," the respondents undoubtedly increased the risk that a tenant would be attacked at the complex. As confirmed by William Booth, Wright's "security expert," criminals are less likely to lurk in areas where officers are actively patrolling. Accordingly, I believe Wright presented some evidence establishing a duty owed by the respondents under section 323.

In finding Wright failed to show a duty, the majority relies on *Cramer v. Balcor Prop. Mgmt., Inc.*, 848 F. Supp. 1222 (D.S.C. 1994) (*Cramer II*). I believe that reliance is misplaced. In *Cramer II*, the appellant argued under the "affirmative acts" exception, the landlord's conduct of "hiring a 'courtesy officer' to patrol the

grounds and then terminating that officer without replacing him" established a duty to protect the tenant from criminal activity of a third party and a breach of that duty occurred when the landlord failed to replace the terminated courtesy officer. *Id.* at 1224. The court disagreed, finding

> [the appellant] misapprehends the scope of the affirmative acts exception. The exception envisions a situation where the act of the landlord leads directly to the injury complained of. The cases which fit this exception are those where there is a stronger connection between the act and the injury, such as where a landlord leaves an apartment door unlocked and a third party enters.

Id. at 1224.

Cramer II described the "affirmative acts" exception as "'one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care.'" *Id.* (quoting *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1209-10 (D.S.C. 1990)). Interestingly, *Cooke* quoted *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985), which cited *Roundtree Villas Association, Inc. v. 4701 Kings Corporation*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984)—a case that found a "common law duty of care" arose under section 323 when a lender undertook to repair defects in condominiums. Thus, the source of *Cramer II*'s authority for the "affirmative acts" exception has its roots in section 323. Our courts have analyzed section 323 in the context of the common law "undertaking" exception—not the "affirmative acts" exception. *See, e.g., Goode*, 329 S.C. at 444-45, 494 S.E.2d at 832-33; *Sherer*, 290 S.C. at 406, 351 S.E.2d at 150; *Russell v. City of Columbia*, 305 S.C. 86, 89-90, 406 S.E.2d 338, 339-40 (1991). I find this significant because unlike *Cramer II*'s "affirmative acts" exception, the common law "undertaking" exception has not been limited to situations "such as where a landlord leaves an apartment door unlocked and a third party enters." For example, in *Goode*, the appellant raised a claim similar to the one Wright has made here that the apartment complex was negligent "in failing to provide security," and our court analyzed the claim under the common law "undertaking" exception and section 323. *See* 329 S.C. at 438, 444-45, 494 S.E.2d at 829, 832-33. Although our court in *Goode* ultimately found the appellant failed to show a duty arose under section 323, the decision was not based on the fact that

the exception applies only "where there is a stronger connection between the act and the injury." Therefore, I believe the court in *Cramer II* and the majority are mistaken to the extent they hold the "affirmative acts" exception (a/k/a "undertaking" exception) cannot apply in a situation where a landlord undertakes to provide security for its tenants. I interpret *Goode* to mean a tenant injured by a third party criminal attack at an apartment complex may be able to establish a duty owed by a landlord who has undertaken to provide security pursuant to section 323. Because Wright, in my opinion, presented some evidence as to each of the elements under section 323, I would find such a duty existed here for purposes of summary judgment. Therefore, I believe the circuit court erred in granting summary judgment on the ground that Wright failed to show a duty.

II. Proximate Cause

Because I believe Wright presented evidence tending to establish a duty under section 323, I next address whether the circuit court erred in finding Wright presented no evidence the respondents' negligence was a proximate cause of Wright's injuries.

"To show the defendant was the proximate cause of the injury, the plaintiff must establish the defendant was both the cause-in-fact and the legal cause of the injury." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011). Cause-in-fact may be proven "by showing the injury would not have occurred but for the defendant's negligence," while legal cause "is proved by establishing the plaintiff's injury was foreseeable." *Id.*

While the defendant's negligent conduct "need not be the sole cause of the injury" to establish proximate cause, an injury resulting from a third-party's criminal act may break the causal link between any negligence of the defendant and the plaintiff's injuries:

> Generally, if between the time of the original negligent act or omission and the occurrence of the injury, there intervenes a willful, malicious, or criminal act of a third person producing the injury, and the intervening act was not intended by the negligent actor and could not have been foreseen by him as a probable result of his own negligence, the causal link between the original

> negligence and the injury is broken, and there is no proximate causation.

Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). "[I]t is not necessary that the actor should have contemplated the particular chain of events that occurred, but only that the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." *Cody P.*, 395 S.C. at 621, 720 S.E.2d at 478 (internal quotation marks omitted).

"Ordinarily, legal cause is a question of fact for the jury." *Id.* "'Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law.'" *Id.* at 621, 720 S.E.2d at 479 (quoting *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986)).

Viewing the evidence in the light most favorable to Wright, I believe she presented a scintilla of evidence that the respondents' negligence was a proximate cause of her injuries. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment."). First, there is evidence Wright's injury was foreseeable. The respondents' "Courtesy Officer Independent Contractor Agreement" created a relationship between the respondents and the courtesy officers to provide services to prevent certain harms to the tenants. Courtesy officers were required to respond to calls regarding "[d]omestic altercations" and "[c]riminal acts." The fact that there were policies and procedures in place to prevent these harms indicates that the respondents perceived some threat of third party criminal acts directed at its tenants. *See Cody P.*, 395 S.C. at 622, 720 S.E.2d at 479 (relying in part on the defendant's policies and procedures that were "designed to avoid fraud and loss situations" to find an injury was foreseeable).

Wright also presented expert testimony that her injury was foreseeable. *See id.* (relying in part on expert testimony in finding evidence that an injury was foreseeable). Booth testified that, in his opinion, Wright's abduction was a "foreseeable incident." His opinion was based in part on his analysis of various crimes at Wellspring including other crimes in the Wellspring parking lot. For example, between 2007 and the first nine months of 2008, Booth documented

fifteen parking lot offenses at Wellspring. Booth testified that in the same parking lot where Wright was abducted, there had been an attempted home invasion and an attempted burglary within the previous two years. There had also been a series of vehicle related crimes over that same period that Booth referred to as "precursor crimes"—incidents that likely would have included crimes against a person had the car's owner been present. While the respondents presented testimony indicating Wright's abduction was not foreseeable, the evidence as a whole yields more than one inference regarding this issue. *See Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992) ("Only when the evidence is susceptible to only one inference does [the issue of legal cause] become a matter of law for the court.").

Finally, I believe there was evidence the respondents' negligence was a cause-in-fact of Wright's injuries. *See Singleton v. Sherer*, 377 S.C. 185, 203, 659 S.E.2d 196, 206 (Ct. App. 2008) ("Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence."). Booth testified,

> It is my opinion that had the courtesy officers been there and been patrolling the property as required that the perpetrators in this crime more likely than not would not have been in a position to rob and kidnap [Wright].

See J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 370, 635 S.E.2d 97, 102 (2006) (relying in part on expert testimony when deciding whether a defendant's negligence was a cause-in-fact of the plaintiff's injury). Admittedly, there is no guarantee Wright's attack would not have occurred even if Wellspring had courtesy officers at that time. Nevertheless, it must be remembered that on summary judgment, the non-moving party need only submit a mere scintilla of evidence for her claim to survive. I believe Wright presented evidence that a consistent presence of officers patrolling the area likely would have deterred perpetrators from the area where Wright was abducted. Alternatively, had the respondents taken steps to inform Wright that "security officers" were not on duty at the complex, one inference from the evidence is Wright likely would not have been in a position to be attacked. This inference is supported by Wright's testimony that the day after her attack, she asked a Wellspring representative: "Where are these security officers that are supposed to be walking the beat?" Therefore, I believe

there is evidence showing the respondents' negligence was a cause-in-fact of Wright's injuries.

Reviewing the evidence in the light most favorable to Wright, I believe she presented some evidence that the respondents' owed her a duty and the respondents negligence was a proximate cause of her injuries. I want to make clear that I am not making a finding that the respondents were negligent or that their negligence was a proximate cause of Wright's injuries. I simply feel there is a scintilla of evidence in the record from which a jury could find in favor of Wright as to those issues. Whether it will "pass with relief from the tossing sea of Cause and Theory to the firm ground of Result and Fact,"[8] should be decided at trial not with summary dismissal. Therefore, I would reverse the circuit court's grant of summary judgment on Wright's negligence claim and remand for further proceedings.

[8] Sir Winston S. Churchill, *The Story of the Malakand Field Force* 36 (Arc Manor 2008) (1898).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brenda Bratschi, Appellant.

Appellate Case No. 2012-211980

Appeal From Florence County
D. Craig Brown, Circuit Court Judge

Opinion No. 5327
Heard February 3, 2015 – Filed July 15, 2015

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Kaycie Smith Timmons, all of Columbia, and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

KONDUROS, J.: Brenda Bratschi appeals her convictions of murder and burying a body without notice, arguing the trial court erred in failing to grant her a directed

verdict. She also contends the trial court erred in admitting a 911 call into evidence. We affirm.

FACTS/PROCEDURAL HISTORY

On October 21, 2004, Investigator Michael Rhodes responded to a domestic violence call.[1] While he was on the way to the scene, he was redirected to the Coward Police Department, where one of the callers, Brenda, was located. Brenda told Investigator Rhodes she and her husband, Randy Bratschi, were at their home walking to their car to go to a credit union in Coward. According to Brenda, when she looked behind her, she saw Randy approaching her with a garden hoe in his hand. She stated he struck her on the hand and she grabbed a wooden tire thumper[2] and began hitting him to get him away from her. Brenda had a small laceration on her thumb.

Investigator Rhodes then went to the Lake City emergency room, where Randy was being attended to after authorities responded to his trailer because of his 911 call. Randy's face was swollen and had lacerations on it. He also had bruising on his chest, a skull fracture, and other injuries to his head. Dr. Ernest Atkinson treated Randy at the hospital, where he stayed for several days. Dr. Atkinson described the injuries as "pretty severe" but not life threatening. He stated that if one of the blows had been to the back of Randy's head instead of the front or side, it could have killed him.

Investigator Paul Byrd with the Florence County Sheriff Office's crime scene unit investigated the Bratschis' home and yard. He collected six guns and multiple boxes of ammunition from the home as well as another gun from Randy's boat. Investigator Kathleen Streett also investigated Randy and Brenda's altercation. Randy admitted to wielding a garden hoe but claimed he was only trying to get away from Brenda. At the time of the incident, Randy's bank account was overdrawn due to withdrawals by Brenda. Investigator Streett believed Randy was "terrified" of Brenda. Randy obtained a restraining order against Brenda from the family court because of the altercation. Investigator Streett charged Brenda with

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[1] Both parties to the dispute called 911. State's Exhibit 24 contained both of the calls.

[2] A tire thumper is used by truck drivers to check the air in their tires and looks like a small wooden baseball bat.

assault and battery with intent to kill.[3] After the protection order hearing, Randy visited Brenda to retrieve his black Isuzu Rodeo he previously had allowed her to drive.

Kathy Merrill and her husband, Russell Merrill, were longtime friends with Randy. They became friends with Brenda a few years before the altercation when Brenda and Randy began dating. Kathy testified Randy and another friend, Susan Hill, began dating after Randy and Brenda's altercation. Kathy also stated that sometime after the altercation Brenda told her she had hired a private investigator who took pictures of Randy and Susan. Kathy further testified Randy previously had a gun stolen from his home.

Susan testified she and Randy began dating after his altercation with Brenda. She indicated that after she and Randy began dating, she returned to her house one time and found a light on, a door ajar, and her inside dog outside; she had left the doors locked and the light off. Kathy and Susan both testified that shortly after the incident, they went to Randy's trailer to clean it for him. They found the door locked even though Randy left it unlocked for them.

On November 26, 2004, the Friday after Thanksgiving, Randy had plans to go to a turkey shoot with friends. He clocked out of work just before 7:00 a.m. that day. When his friends arrived at his home to pick him up, he did not answer the door. Randy's Isuzu Rodeo was there; however, Randy's truck and boat were not.[4] Randy's dog was inside the trailer. A makeshift alarm system Randy set up after the incident with Brenda was not set. The following day, Randy did not come to Russell's house for oysters like they had planned. Randy was scheduled to work special shifts on Saturday and Sunday but did not report to work. Brenda and Susan both called Russell's home looking for Randy that weekend. Russell contacted the police on Sunday about Randy. Brenda also contacted police to report him missing.

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[3] Those charges were still pending at the time of the murder trial.

[4] Frankie Miles, Brenda's seventeen-year-old son, lived with Randy and Brenda before their altercation. Russell believed Frankie had borrowed the truck and boat to go fishing. Investigator Phillip Hanna testified he verified Frankie was on a fishing or hunting trip several hundred miles away the Friday Randy went missing.

The police searched Randy's property and trailer. They found Randy's blood glucose meter at the home, which was last used on Thanksgiving at 5:47 p.m., before he went to work. They did not find anything under his trailer. The police used cadaver dogs, which did not discover anything.

Several witnesses saw a dark Isuzu Rodeo at a public boat landing on the Pee Dee River in Pamplico[5] over Thanksgiving weekend, beginning on Friday afternoon, and thought it looked like it had not moved. Officer Robbie Stone testified he ran the tag on the vehicle at the landing on Saturday night at 8:03 p.m. but it did not come back as stolen. Donald Huggins of the Florence County Sheriff's Office testified someone stopped by his farm on Sunday afternoon and told him a suspicious looking black SUV was at the landing. He called into the Sheriff's Office to have someone check the vehicle. Investigator Rhodes testified he observed a black vehicle at the landing on Sunday at 5:00 p.m. and ran the tags. Investigator Alvin Powell testified he observed a small dark SUV at the landing on the Monday following Thanksgiving and ran the tags but it was not stolen.

On the Tuesday following Thanksgiving, Investigator Streett entered the Isuzu into the National Crime Information Computer (NCIC) as belonging to a missing person. On December 1, 2004, the Wednesday following Thanksgiving, Deputy Brad Bazen ran the plates on the Isuzu through NCIC, and it indicated the car belonged to a missing person, Randy. An envelope containing $900 in $100 denominations was found in the driver's seat during a search of the vehicle. Small spots of Brenda's blood were found on the steering wheel, steering wheel column, dashboard, and gearshift of the Isuzu. The blood spots were later determined to be several days to one week old. No usable fingerprints were found inside of the vehicle, and a body did not appear to have been transported in the back of the vehicle. The car did not appear to have been hotwired. Police searched the area around the vehicle and the river but found nothing.

Jerome Eaddy lived near the boat landing. The Friday after Thanksgiving, he returned home after work sometime after 11:00 p.m. He observed someone walking alongside the road. The person went to his neighbor's house and then came to his house. Eaddy later identified the person as Brenda. Brenda told him she needed a ride home. Eaddy and his mother gave Brenda a ride to Coward. They dropped her off at a trailer home development near Randy's trailer. Eaddy

[5] Randy sometimes drove to the landing "to get away from things."

was not certain which night around Thanksgiving he gave Brenda a ride. Eaddy did not believe Brenda was nervous, angry, crying, or bleeding and thought she seemed calm. The police later searched parts of Brenda's family farm because it was near where Eaddy took her but only found a rectangular hole recently dug near a deer stand, which was about a quarter of a mile from Randy's home. Investigator Hanna believed the hole resembled a grave.

William Rauch, a friend of Brenda and Randy, saw Brenda leaving Randy's property during daylight hours on either the Friday or Saturday after Thanksgiving. He stated Brenda was driving her car, which was "a little brown tannish car." Another friend of Randy, Edward Jeffcoat, testified he visited Randy to get lifejackets from him on the morning of Thanksgiving or the next day.

Brenda did not move back into Randy's home[6] once the protection order expired. On July 16, 2009, after Marty McDonald had purchased Randy's property at a tax sale, he was having the trailer removed from the land. McDonald noticed something under the trailer he initially thought was a gourd. After looking closer, he determined it was a human skull. McDonald contacted the police, who recovered skeletal remains, clothing, and a pair of boots. The body was found inside a blue tarp buried in a shallow grave that varied in depth from eight to eighteen inches deep. DNA testing concluded the skeleton was Randy. The Florence County Sheriff's Office, crime scene investigators, and a forensic anthropologist were all unable to make a determination as to how, when, or where Randy had died.

Brenda was arrested on December 7, 2009, for Randy's murder. In June 2010, a grand jury indicted Brenda for murder and burying a body without notice.[7] During trial, the State introduced the 911 calls. Brenda objected to Randy's call being played, arguing it violated the Confrontation Clause of the Sixth Amendment and was unfairly prejudicial under Rule 403, SCRE.[8] The trial court overruled the objection. Brenda moved for a directed verdict at the close of the State's case, which the trial court denied.

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[6] There was no mortgage on the home.

[7] Frankie was charged with misprision of a felony for giving deceptive and false information to police during the investigation of a felony.

[8] Brenda had objected to the tape on the same grounds during a motion in limine.

Heath Matthews, Brenda's nephew, testified Brenda moved in with his mother, his father, and him once Randy obtained the restraining order against her. He also testified he heard Frankie talking to Randy on the phone the Saturday after Thanksgiving while they were returning from their fishing and hunting trip. He estimated the call lasted three to four minutes. On cross-examination, Heath indicated he had only met Randy once but had talked to him on the phone before. Dennis Matthews, another nephew of Brenda, testified he saw Randy driving his Isuzu between 3:00 and 3:30 p.m. on the Sunday after Thanksgiving. Dennis testified he had never met Randy but had seen him before. Brenda's uncle, William Miles, testified he also saw Randy the Sunday after Thanksgiving driving the Isuzu. Brenda also called Frankie as a witness but he asserted his Fifth Amendment rights instead of answering any questions. Brenda renewed her motion for a directed verdict at the close of her case, which the trial court again denied.

The jury convicted her of both counts. The trial court sentenced her to life imprisonment for murder and three years' imprisonment for the burial charge, with credit for time served. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

Brenda maintains the trial court erred in denying her motion for a directed verdict because the State did not present evidence of how, when, or where the victim was killed and the evidence the State did present did not amount to substantial circumstantial evidence. 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. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. *State v. Venters*, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). Additionally, an appellate court must find a case was properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648. "A case should be submitted to the jury when the evidence is circumstantial if there is any substantial evidence which

reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (internal quotation marks omitted). "[T]he trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." *Id.* at 142, 708 S.E.2d at 778. "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013).

In *State v. Frazier*, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010), the appellant "cite[d] to *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000), and *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984)[,] for the proposition that the trial court must grant a directed verdict if the State fails to present evidence placing the defendant at the scene of the crime." The court found the appellant

> overstates the holdings in these cases. In *Arnold, Martin*, and *Schrock*[,] we held that the State did not produce substantial circumstantial evidence of the defendant's guilt and noted that the State presented *no* evidence that the defendant was at the scene. We reject any interpretation that these cases altered or increased the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence. In this case, unlike *Arnold*, *Martin*, and *Schrock*, the State offered substantial circumstantial evidence of Frazier's guilt.

Frazier, 386 S.C. at 532, 689 S.E.2d at 613.

In *State v. Miller*, the appellant "argue[d] *Schrock* is on point because no direct evidence placing him at the crime scene was presented." 287 S.C. 280, 284, 337 S.E.2d 883, 885 (1985), *overruled on other grounds by State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989). The *Miller* court found "*Schrock*, however, is distinguishable, standing for the simple proposition that a conviction will not stand where there is a complete absence of any competent evidence. *Schrock* will not be interpreted to impossibly increase the State's burden regarding cases relying solely on circumstantial evidence." *Id.*

"[A] directed verdict is not required merely because the State cannot conclusively show the defendant was at the crime scene at the relevant time." *Rogers*, 405 S.C. at 568, 748 S.E.2d at 273. In *Rogers*, this court found the *Frazier* court explained the *Arnold*, *Martin*, and *Schrock* "holdings were based on the State's failure to present *any* evidence placing the defendant at the scene, not the State's inability to provide conclusive proof on that point." *Rogers*, 405 S.C. at 568-69, 748 S.E.2d at 273.

In *Arnold*, our supreme court held fingerprint evidence placing Arnold with the victim on the day of the murder was not substantial and merely raised a suspicion of Arnold's guilt. 361 S.C. at 390, 605 S.E.2d at 531. The victim's body was discovered off a dirt road in Colleton County. *Id.* at 388, 605 S.E.2d at 530. The victim was last seen alive three days earlier, when he borrowed a friend's car to go to an appointment. *Id.* A witness testified he had introduced the victim to Arnold. *Id.* The witness also indicated that the day after the victim disappeared, he had received a message from Arnold to call him at a phone number belonging to Arnold's father. *Id.* at 389, 605 S.E.2d at 530. The car borrowed by the victim was found in Tennessee, approximately ten miles away from where Arnold's father lived. *Id.* at 389, 390 n.3, 605 S.E.2d at 530, 531 n.3. The car had unspecified scratches on it, and a coffee cup lid containing Arnold's fingerprint was found in the car's center console. *Id.* at 389, 605 S.E.2d at 530. In determining the circumstantial evidence presented by the State was not sufficient to overcome a directed verdict motion, the court reasoned:

> Viewing the evidence most favorably to the State, [Arnold]'s fingerprint on the coffee cup lid tab establishes he was in the borrowed [car] on the same day the victim was last seen alive. The fact that the [car] was found abandoned in Tennessee, the same state where [Arnold] was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that [Arnold] killed [the victim]. Further, there is no evidence [Arnold] was at the scene of the crime, which according to the State's theory was in Colleton County.

Id. at 390, 605 S.E.2d at 531 (footnote omitted).

In *State v. Bennett*, 408 S.C. 302, 307, 758 S.E.2d 743, 745 (Ct. App. 2014), *cert. granted* (Nov. 19, 2014), this court considered whether evidence of Bennett's fingerprint and DNA at the site of a burglary constituted substantial circumstantial evidence. A television, computer, monitor, and keyboard were stolen from a community center. *Id.* at 303-04, 758 S.E.2d at 744. Bennett's fingerprint was discovered on a wall-mounted television in the community room that appeared to have been manipulated by the burglar. *Id.* Additionally, two drops of Bennett's blood were found directly below the location of a missing television in the computer room. *Id.* at 305, 758 S.E.2d at 745. Bennett had frequently visited the center before the crime and spent much of his time in the computer room. *Id.* at 307, 758 S.E.2d at 745. The director of the center testified she did not recall seeing Bennett in the community room, which was solely used for scheduled events. *Id.* at 304-05, 758 S.E.2d at 744. However, the director acknowledged the community room was not always locked or consistently monitored. *Id.*

This court found because the State did not present substantial circumstantial evidence reasonably proving Bennett's guilt, Bennett was entitled to a directed verdict. *Id.* at 307-08, 758 S.E.2d at 746. The court recognized the evidence presented by the State "undoubtedly placed Bennett at the *location where a crime ultimately occurred.*" *Id.* at 307, 758 S.E.2d at 746. However, the court rejected the State's assertion "the evidence placed Bennett *at the scene of the crime.*" *Id.* The court reasoned "the exact locations of the DNA and fingerprint evidence . . . d[id] not rise above suspicion" because finding Bennett's DNA and fingerprints in communal areas he frequented before the crime was not "unexpected." *Id.*

In *State v. Pearson*, 410 S.C. 392, 394, 401, 764 S.E.2d 706, 707-08, 711 (Ct. App. 2014), *cert. granted* (Mar. 4, 2015), this court found the evidence tying Pearson to charges arising out of the robbery and beating of a victim and fleeing in the victim's car insufficient. The court found "the most damaging evidence was Pearson's fingerprint on the rear of [the victim's] vehicle." *Id.* at 401, 764 S.E.2d at 711. However, the court acknowledged other evidence showed Pearson had an opportunity to come in contact with the vehicle before the crimes occurred; the victim regularly parked his vehicle in a public lot, and Pearson assisted with a five-day project at the victim's residence. *Id.* (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (finding the fingerprint evidence was insufficient to prove the defendant's guilt because testimony was presented the defendant had been in and around the victim's house at least three times before the burglary)). The court noted "the State's fingerprint expert testified she could not determine

when the print was placed on the vehicle and that such a print could remain on a vehicle for an indefinite period if left undisturbed." *Id.* The court found, "Because the State offered no timing evidence to contradict reasonable explanations for the presence of the fingerprint, the jury could only have guessed the fingerprint was made at the time of the crimes." *Id.* at 401-02, 764 S.E.2d at 711 (citing *State v. Buckmon*, 347 S.C. 316, 322-23, 555 S.E.2d 402, 405 (2001) (holding a defendant was entitled to a directed verdict when none of the evidence presented by the State placed the defendant at the crime scene and the jury was left to speculate as to the defendant's guilt)).

In *Bostick*, 392 S.C. at 137-38, 708 S.E.2d at 775-76, Roger Bostick was convicted of the murder of his mother's neighbor, Sarah Polite. Polite's house was set on fire, and her body was found in her house. *Id.* at 136-37, 708 S.E.2d at 775. She had been struck in the head with a blunt force object but actually died as a result of carbon monoxide from the fire. *Id.* at 136, 708 S.E.2d at 775. The supreme court found:

> [T]he following pieces of circumstantial evidence of [Bostick's] guilt had been presented: (1) Polite's car keys, calculator, and other items from her home were found in the Bostick family's burn pile; (2) the fire in the burn pile was accelerated with either kerosene or diesel fuel, and Bostick's mother did not use those accelerants when she burned things in the pile; (3) Bostick had a pattern that matched gasoline on his shoes and gasoline was the accelerant used for the house fire; and (4) while the DNA from the blood found on Bostick's jeans excluded about ninety-nine percent of the population, the blood could not be matched to Polite's DNA.

Id. at 141-42, 708 S.E.2d at 778. The court additionally found:

> [T]he weapon used to beat Polite in the head was never introduced into evidence. Finally, no evidence was introduced concerning Bostick's knowledge that Polite may have had money in the briefcase [she typically brought home from church on Sunday with money to

> deposit at the bank on Monday] or if indeed any money was in the briefcase on that particular Sunday.

Id. at 136, 142, 708 S.E.2d at 775, 778. Ultimately, the court concluded:

> The evidence presented by the State raised, at most, a mere suspicion that Bostick committed this crime. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. Therefore, we find the circuit court erred in failing to direct a verdict in favor of Bostick.

Id. at 142, 708 S.E.2d at 778 (citation omitted).

In *State v. Lynch*, 412 S.C. 156, 161, 164-65, 771 S.E.2d 346, 349-51 (Ct. App. 2015), Lynch was convicted of the murder of his girlfriend and her granddaughter after they disappeared and he drove his girlfriend's car across the country and tried to cross the border into Canada. The victims' bodies were never found but the granddaughter's blood mixed with blood belonging to a man was discovered in the victims' apartment. *Id.* at 161, 168, 771 S.E.2d at 349, 352-53. The State presented evidence at trial Lynch was the last person seen with the victims at the place where the State alleged the murders occurred. *Id.* at 173, 771 S.E.2d at 355 (citing *State v. Williams*, 303 S.C. 274, 276, 400 S.E.2d 131, 132-33 (1991) (finding "substantial evidence" to prove the defendant's guilt when the victim was employed by the defendant, was last seen alive with the defendant, and the victim's decomposed body was found)); *see also State v. Lane*, 410 S.C. 505, 765 S.E.2d 557 (2014) (per curiam) (finding the State presented substantial circumstantial evidence the defendant was guilty of burglary when a piece of paper with the defendant's name was later found at the crime scene and a car with the same unusual paint as the defendant's was seen in the victim's driveway when the crime occurred). The court found this distinguished the case from *Arnold* in which the victim was last seen alone at his office, and although Arnold's fingerprint was found in the victim's car, the State presented no evidence Arnold was at the scene of the crime. *Lynch*, 412 S.C. at 173, 771 S.E.2d at 355. Moreover, Lynch admitted to police he last saw his girlfriend on the day before the State alleged the murder occurred. *Id.* Additionally, the State presented forensic evidence an assault occurred at the apartment where Lynch lived with the victims. *Id.* Lynch

also admitted he did not know anyone who wanted to harm the victims. *Id.* Additionally, the court noted DNA from a male was found in the victims' apartment and Lynch told police he had not seen other males in the apartment. *Id.* The court also took into account the evidence of Lynch's flight. *Id.* at 173-74, 771 S.E.2d at 355.

The trial court did not err in denying Brenda's directed verdict motion. Unlike in *Pearson*, *Bennett*, and *Arnold*, in the present case Brenda's blood was found somewhere unexpected with no reasonable explanation provided. Brenda had not had access to the Isuzu in several weeks. However, the undisputed evidence was that her blood found in the car was at most a week old. Brenda's argument the blood on the steering wheel of the Isuzu was from the argument five weeks earlier was not supported by any evidence or testimony presented at trial and was directly contradicted by the uncontested testimony.

Further, unlike *Bostick*, in the present case the State produced ample evidence of a motive by Brenda. *See State v. Odems*, 395 S.C. 582, 587, 720 S.E.2d 48, 50 (2011) (noting that in *Bostick*, "the State never introduced a motive . . . into evidence"); *see also State v. Braxton*, 343 S.C. 629, 636, 541 S.E.2d 833, 837 (2001) ("Prior disputes between the victim and defendant may be relevant to establish the accused's motive for committing the crime and motive may have bearing on the identity of the accused as the perpetrator of the crime."); *State v. Williams*, 321 S.C. 327, 339, 468 S.E.2d 626, 633 (1996) (affirming the denial of a defendant's directed verdict motion when "circumstantial evidence existed from which the jury could conclude that [the defendant] had the motive, means, and opportunity to perform the homicides"); *State v. Thomas*, 159 S.C. 76, 80-81, 156 S.E. 169, 171 (1930) ("The rule that evidence tending to show motive or absence of motive on the part of accused is relevant and admissible, and that a wide latitude in the admission of this kind of evidence is permissible, are particularly applicable *** in cases of circumstantial evidence, motive being a circumstance bearing on the identity of the accused as the perpetrator of the crime." (alteration by court) (internal quotation marks omitted)); *State v. Lancaster*, 149 N.E.2d 157, 162 (Ohio 1958) ("In doubtful cases the element of motive may be quite material in the determination of the guilt or innocence of the accused." (internal quotation marks omitted)). Also in *Bostick*, while blood was found on Bostick's clothing, it could not be identified as Polite's although 99% of the population was excluded. 392 S.C. at 142, 708 S.E.2d at 778. Whereas Brenda's blood was positively identified as being on the steering wheel of the Isuzu, which she no longer had access to, she

was seen near the place the Isuzu was left around the time Randy disappeared, and she was also seen at Randy's home around the time of his disappearance even though the restraining order barred her from going there.

Although all of the evidence against Brenda is circumstantial, we find in viewing the evidence in the light most favorable to the State, the amount of that evidence rises to the substantial level. The following evidence implicates Brenda in Randy's murder: (1) Brenda and Randy violently fought several weeks before his disappearance, with Randy being admitted to the hospital for severe injuries; (2) Brenda was charged with assault and battery and Randy was the victim and sole witness; (3) Randy had obtained a restraining order against Brenda as a result of the fight and Brenda violated that order on several occasions; (4) Brenda confronted Randy and others about his dating Susan; (5) Randy's Isuzu was found away from his home after his disappearance; (6) a small amount of Brenda's blood was on the steering wheel and was a week old at the most, despite her not being allowed to have the Isuzu after the restraining order was obtained; (7) around the time of Randy's disappearance, Brenda got a ride from a stranger near where the Isuzu was found and was dropped off near Randy's trailer; (8) Brenda was seen at Randy's trailer around the time of his disappearance despite the restraining order; and (9) a grave-like hole was dug on Brenda's family's property less than a quarter mile from Randy's home. Combined together, viewed in the light most favorable to the State, these events arise to the level of substantial circumstantial evidence. Therefore, the trial court did not err in denying Brenda's directed verdict motion.

II. Confrontation Clause

Brenda argues the trial court violated her rights under the Confrontation Clause of the Sixth Amendment by admitting Randy's 911 call into evidence because it contained testimonial evidence and the unfairly prejudicial nature of the evidence outweighed its probative value. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence . . . will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "The

admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice." *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009) (internal quotation marks omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial judge's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004) (citations omitted).

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Dennis*, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (brackets and internal quotation marks omitted).

> [T]he distinction between testimonial and non-testimonial hearsay is significant only in the context of determining whether there has been a Sixth Amendment Confrontation Clause violation. The Supreme Court has held testimonial hearsay against a defendant violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the witness. Similarly, the South Carolina Supreme Court has recognized the Sixth Amendment is not implicated by non-testimonial hearsay. However, the fact that the Sixth Amendment is

> not implicated by non-testimonial hearsay does not mandate the evidence be admitted.

State v. Garner, 389 S.C. 61, 66, 697 S.E.2d 615, 617-18 (Ct. App. 2010) (citations omitted).

> A 911 call, . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.
>
> The difference between the interrogation in *Davis* and the one in *Crawford*[9] is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describ[ing] past events[.]" Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers;

[9] *Crawford v. Washington*, 541 U.S. 36 (2004).

> McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.
>
> We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*.

Davis v. Washington, 547 U.S. 813, 827-28 (2006) (second, third, and fifth alteration by court) (citations omitted).

We find Randy's call was not testimonial. At the beginning of the call, Randy stated he was calling because his wife tried to kill him. He gave his name and address and stated he would kill his wife if she came inside his trailer, where he was at the time. The 911 operator asked what his wife did to him. Randy answered that she hit him with a club and tried to kill him and he was now bleeding from the head. Randy indicated he was inside his trailer and did not know where Brenda was because she ran away after she hit him. He stated he had to break the window to get into his trailer because he had dropped his keys. The operator asked him what kind of club Brenda used and if they were fighting. He provided it was a wood club used by truck drivers and they were not fighting. He stated he and Brenda were leaving to go to the credit union at his work when she struck him. He also stated he did not know what was going on. The 911 operator asked if he hit Brenda with a hoe and he answered no, explaining Brenda attacked him with the club.

About four and a half minutes into the call, the 911 operator informed Randy Brenda was no longer outside the trailer because she was at the police station. Randy expressed uncertainty, asked for help again, and said he was bleeding. He insisted he did not know where Brenda was when the operator asked him to put his gun in the closet. The operator asked Randy where he and Brenda were going and he answered they were going to the credit union at his work. The operator asked him what kind of car Brenda drove and he answered a black Isuzu Rodeo. After some silence and no question by the operator, Randy stated Brenda just started hitting him and was trying to kill him, he ran, and he had to break the door to get

into his trailer because he dropped his keys. The 911 operator told him to step onto the porch. Randy told the operator he was going to go back inside to put his shoes on and then shortly thereafter help arrived and the call ended. Randy breathed heavily and sounded distressed throughout the call.

The trial court did not abuse its discretion in allowing the statement. At the beginning of the call, the operator questions Randy to determine if there was an ongoing emergency. The recording in this case falls in between those in *Crawford* and *Davis* but is closer to *Davis,* in which the evidence was non-testimonial. Although some of what Randy says is describing events that happened, those events had just happened, not several hours prior as in *Crawford*. Randy seems to be in a state of ongoing emergency, worrying his wife is going to enter the trailer at any moment to attack him again, unlike in *Crawford* in which the statements were made to officers in a police station. Like in *Davis,* Randy too is frantic. Although several minutes into the call, Randy learns Brenda is at the police station, he is still afraid she will come into the trailer at any moment. Randy's belief Brenda might still enter to trailer to hurt him despite the 911 operator's reassurance she is not on the property underscores that Randy is not calm and rational and is still operating as though the attack is still in progress. Further, Randy's statements after the operator assured him Brenda was at the police station and would not be coming back are the same statements he made earlier in the call before he was told Brenda was not outside the trailer. *See State v. Wyatt*, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995) (holding error in admission of evidence is harmless when it was merely cumulative to other evidence in the record).

Additionally, the trial court did not abuse its discretion in ruling the unfair prejudice did not outweigh the probative value. Although Randy sounded scared and said his wife tried to kill him, that was his continuing perception of the ongoing emergency. The State presented testimony at trial Randy was terrified of Brenda after the accident and the recording assisted in demonstrating why he feared for his life. The State also presented testimony about the extent of Randy's injuries and how he got those injuries. Accordingly, the tape was not more unfairly prejudicial than probative. Therefore, the trial court did not abuse its discretion in admitting the tape.

CONCLUSION

We find the trial court did not err in denying Brenda's motion for a directed verdict or her motion to exclude the recording of the 911 call. Accordingly, the trial court is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew S. McAlhaney, Respondent,

v.

Richard K. McElveen a/k/a Richard K. McElveen, Sr., Individually and d/b/a Battery Creek Marina, The Great Pumpkin, LLC, Linda McElveen, Richard K. McElveen, Jr., and Billy Joe Byrd, Defendants,

Of Whom Richard K. McElveen a/k/a Richard K. McElveen, Sr. is Appellant.

Appellate Case No. 2010-167969

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5328
Heard April 23, 2015 – Filed July 15, 2015

AFFIRMED

Blake Alexander Hewitt and John S. Nichols, Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Scott Wayne Lee, Law Offices of Scott W. Lee, PA, of Beaufort, for Appellant.

Robert V. Mathison, Jr., Mathison & Mathison, of Hilton Head Island, for Respondent.

FEW, C.J.: Richard K. McElveen, Sr. appeals the trial court's denial of his motion for a new trial, arguing the trial court erred in ruling the jury's award of punitive damages against him was not so grossly excessive as to shock the conscience of the court. We affirm.

I. Facts and Procedural History

This appeal arose from a custody dispute between McElveen and his former daughter-in-law—Molly McCullers McElveen (McCullers)—over her two children, who are McElveen's grandchildren. When the custody dispute began, Matthew McAlhaney was dating McCullers. In an attempt to gain an advantage in the custody dispute, McElveen made allegations that McAlhaney was a drug addict, a child abuser, and a child molester. McElveen wrote a letter to Governor Mark Sanford alleging McAlhaney was a drug addict and had abused the children, and McElveen and his wife met with an investigator from the Beaufort County Sheriff's Office and accused McAlhaney of sexually abusing the children. Based on McElveen's accusations, the sheriff's office arrested McAlhaney, and he spent a night in jail before being released. Several weeks later, McElveen emailed the investigator and alleged that "numerous folks . . . say [McAlhaney] is gay, a deviant or capable of anything."

After McAlhaney's arrest, McElveen told his neighbor that McAlhaney had been arrested for molesting one of the children. According to the neighbor, McElveen "seemed very thrilled, almost beaming about the fact that . . . McAlhaney had been arrested." In addition, McElveen told a furniture salesperson—who testified she lived near McAlhaney's mother and had never met McElveen—that McAlhaney supplied drugs to McCullers, abused one or both of the children, and was a "deviant soul." The solicitor's office investigated McElveen's allegations, but ultimately dismissed the charges against McAlhaney.

McAlhaney filed a lawsuit against McElveen for libel, slander, and abuse of process. A jury found in favor of McAlhaney and awarded him actual damages of $1,000 for libel, $61,000 for slander, and $25,000 for abuse of process. In addition, the jury awarded punitive damages of $3.25 million on the libel cause of action and $3.25 million on the slander cause of action. McElveen moved for a new trial absolute, claiming "the verdicts were so excessive . . . as to shock the conscience of the court and clearly indicate that the figure reached was the result of

passion, caprice, prejudice, partiality, corruption, or some other improper motives," or—in the alternative—for a new trial nisi remittitur on the ground that the verdicts were "unduly excessive."

The trial court denied the motion for a new trial. However, the court conducted a post-trial review of the punitive damages award and reduced it to a total of $375,000.

II. Law and Analysis

McElveen raises three arguments on appeal. First, he argues the trial court erred by not granting him a new trial based on the size of the punitive damages award. He also raises two issues regarding the trial court's charge to the jury.

A. Punitive Damages

The primary issue before this court is whether the award of punitive damages was so grossly excessive that the trial court abused its discretion in not granting a new trial absolute. In presenting this issue, McElveen does not rely on the due process-based duty of a trial court to conduct a post-trial review of an award of punitive damages.[1] *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583-87, 686 S.E.2d 176, 183-85 (2009) (noting courts must conduct a post-trial review of a punitive damages award to determine whether the award violates the defendant's due process rights). Rather, McElveen relies on the state-law procedural principle that the trial court should order a new trial absolute when the verdict is "so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption or other improper motives." *Rush v. Blanchard*, 310 S.C. 375, 379-80, 426 S.E.2d 802, 805 (1993). McElveen argues it was unnecessary for the trial court to engage in the due process-based review of the award because "the amount of the jury's punitive damages award is so large that the verdict could not properly be remitted," and thus the only appropriate remedy is a new trial.

Focusing our review, therefore, on the trial court's decision denying the motion for new trial absolute under state law, we may not reverse the decision unless the trial

[1] Neither party has appealed the trial court's decision to reduce the punitive damages award to $375,000.

court committed an abuse of discretion. *See Rush*, 310 S.C. at 380, 426 S.E.2d at 805 (providing the "decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal," and affirming the trial court's denial of a new trial absolute because the circuit court did not abuse its discretion); *see also RRR, Inc. v. Toggas*, 378 S.C. 174, 182-83, 662 S.E.2d 438, 442 (Ct. App. 2008) (finding the trial court's decision to deny a motion for a new trial absolute on the basis of excessive punitive damages was within its discretion), *aff'd*, 381 S.C. 490, 674 S.E.2d 170 (2009). We note that this standard of review is different from the de novo standard we use to review a punitive damages award under the due process clause. *See Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183 (holding an appellate court must conduct its due process review of a punitive damages award de novo).

The trial court conducted a thorough post-trial hearing on McElveen's motions regarding the punitive damages award. Discussing the evidence, the court noted "the jury found egregious conduct" and "they decided that Mr. McElveen . . . was malicious and wicked and . . . deserved to be punished." The court stated "the jury fe[lt] like [McElveen] accuse[d] someone—for ulterior motives[—]for being a child molester and ha[d] them incarcerated" and "you need to sustain the most powerful message delivered that that's bad conduct." The court found,

> The evidence was there to show [McElveen] engaged in a long series of efforts. . . . McAlhaney was only brought into it so that McElveen . . . could get custody of the grand kids and because of that he engaged in all these procedures that ended up with [McAlhaney] being incarcerated and locked up and being accused of committing heinous crimes.

The trial court stated, "Plaintiff[is] obviously harmed when he's incarcerated and accused of being a child molester. Locked up. Small town. It's in the paper. Everybody knows and once you are accused of that it just stays with you and you are stigmatized for life, even if you are subsequently exonerated."

In its order denying McElveen's motion, the trial court found "the jury could have easily found the harm was the result of intentional malice and trickery and that [McElveen] sought to discredit [McAlhaney] in order to prevail in a contentious custody dispute." The trial court stated "evidence was . . . presented that the

conduct was not an isolated incident, but rather involved repeated occasions ranging from a letter to the governor to defaming [McAlhaney] as a child molester to a furniture salesperson." The court found McAlhaney presented evidence "from which the jury could and did find that McElveen['s] conduct was intentional, deliberate and malicious and was thus reprehensible." The court concluded its order by finding its due process review required the punitive damages be reduced:

> [T]he punitive verdicts . . . on the libel and slander causes of action . . . clearly indicate that they are so inflated as to [be] violative of principles of fundamental fairness and due process.

However, the court ruled a new trial was not warranted under the state-law procedural principle upon which McElveen relies in this appeal:

> I find that the punitive awards are not so grossly excessive that they clearly mandate the granting of a new trial absolute, and do not cross the threshold between an unduly liberal verdict versus a grossly excessive verdict.

We find the evidence in the record supports the trial court's analysis and decision. First, we are not convinced McElveen is correct that the jury intended to award $6.5 million in punitive damages. During the post-trial hearing, the trial court indicated the punitive damages verdict could be interpreted as a total of $3.25 million. In a conversation with counsel, the court noted McElveen's net worth "approached two million, not even quite two million." Referring to the punitive damages award, the trial court then stated, "[$]3.25 million he's in bankruptcy tomorrow. So the award was too---while his ability to pay is just a factor, he can't pay it so it has to be reduced." McElveen's counsel then stated, "Actually, there[are] two 3.25 million dollar punitive verdicts." The trial court responded, "Well, that depends on how you read it. I told you all to send declaration form."

It is not clear what the trial court meant by "declaration form." What is clear, however, is the trial court recognized the amount of the punitive damages verdict was ambiguous from the verdict form.[2] At one other point in the post-trial

[2] In its final order, however, the trial court stated, "I find that the punitive damages awards should be reduced from $6,500,000 to $375,000."

proceedings, the trial court stated it "cut" the punitive damages verdict "from three million."[3]

The two punitive damages verdicts against McElveen were for libel and slander. On the facts of this case, the libelous and slanderous conduct was intertwined as part of the same plan the jury found McElveen executed to gain a strategic advantage in his custody dispute by falsely accusing McAlhaney of heinous crimes. It is possible the jury intended to award only $3.25 million in punitive damages, but wrote the same amount in both of the places on the verdict form the court provided. Apparently, neither side requested the trial court ask the jury before it was discharged about its intent as to the total amount of punitive damages.[4]

This court has recently recognized the time to clarify ambiguities in a jury verdict is before the jury is discharged. *See Allegro, Inc. v. Scully*, 409 S.C. 392, 419-20 n.10, 762 S.E.2d 54, 69 n.10 (Ct. App. 2014) ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused."), *cert. granted*, (Apr. 22, 2015). In this case, the uncertainty of the jury's intent as to the amount of total punitive damages is significant. If the jury considered McElveen's conduct as one course of action and intended to make one punitive damages award of $3.25 million, the ratio of actual damages—$87,000—to punitives is far more reasonable than if the jury had intended to award $3.25 million on the libel cause of action alone. In the latter scenario, the ratio of punitive to actual damages is 3,250 to 1. In the former scenario, the ratio—37.36 to 1—is still high under the due process clause, but far less likely to shock the conscience of the court and require a new trial absolute under state law.

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[3] The trial court made this statement during a hearing to reconstruct the record of the last day of trial, conducted while the appeal was pending pursuant to an order of this court.

[4] The portion of the trial in which the verdict was published is not in our record because the court reporter was unable to produce a transcript from the final day of trial.

Turning to McElveen's conduct, the purpose of punitive damages is "punishment" for wrongful conduct, and punitive damages "are allowed . . . as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964) (citation omitted). McElveen's conduct was not simply wrongful; it was atrocious and intolerable. *Cf. Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (defining the tort of "outrage" as "conduct . . . so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community'" (citation omitted)). The record supports the trial court's statement that McElveen's conduct occurred on "repeated occasions," and our review of the record indicates it went on for at least one year. We agree with the trial court's finding that the parties presented evidence "from which the jury could and did find that McElveen['s] . . . conduct was intentional, deliberate and malicious and was thus reprehensible." We must view the facts in the light most favorable to the nonmoving party—McAlhaney. *See Toggas*, 378 S.C. at 182-83, 662 S.E.2d at 442 (providing that when reviewing a trial court's denial of a motion for a new trial, this court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party"). In this light, the jury found McElveen maliciously lied on repeated occasions by accusing McAlhaney—a man he knew to be innocent—of the most heinous crimes, and he did so with disregard for the consequences to McAlhaney, McCullers, and even to McElveen's grandchildren. Moreover, he did all of this for the purpose of improperly gaining a strategic advantage in, and illegally influencing the outcome of, family court proceedings regarding the welfare of the children. Finally, he did it for his personal benefit—not for the good of the children. As the trial court so aptly understated, we "need to sustain th[is] most powerful message . . . that that's bad conduct." We hold the trial court did not abuse its discretion in denying McElveen's motion for a new trial.

B. Other Issues

McElveen raises two additional issues, as to which we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court improperly charged the jury regarding statutory immunity: *See Clark v. Cantrell*, 339 S.C. 369, 389-90, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury

instructions unless the trial court abused its discretion. . . . When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues."); *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) ("An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party."); *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) ("One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. . . . An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights.").

2. As to whether the trial court improperly charged the jury regarding punitive damages: Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 308, 578 S.E.2d 16, 24 (Ct. App. 2002) (finding a jury charge issue unpreserved because the appellant failed to object to the charge), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005).

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stephen Douglas Berry, Appellant.

Appellate Case No. 2013-000435

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5329
Heard April 14, 2015 – Filed July 15, 2015

AFFIRMED

League B. Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

LOCKEMY, J.: Stephen Douglas Berry appeals his conviction for second-degree criminal sexual conduct (CSC) with a minor. Berry argues the trial court erred in (1) allowing subsequent bad act testimony and (2) failing to suppress expert testimony regarding the victim's behavior and symptoms of post-traumatic stress disorder. We affirm.

FACTS/PROCEDURAL BACKGROUND

Berry was indicted by the Union County Grand Jury for second-degree CSC with a minor in July 2012. A jury trial was held February 5-8, 2013.

At trial, the victim testified she met Berry at New Life Baptist Church where he served as a youth pastor. In May 2010, Berry and his daughter, a friend of the victim, moved to a home near the then fifteen-year-old victim. The victim testified that after church one Sunday in May 2010, she accepted a ride to her home from Berry. Instead, Berry took her to his previous residence telling her he had to pick up some items. The victim stated that once inside, she went to Berry's daughter's room. According to the victim, Berry then came up behind her, hugged her, and touched her behind. After a brief conversation, the victim testified Berry again approached her, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. The victim stated she pushed Berry away, but he came back and pulled her pants and underwear down and placed his finger inside her vagina. Thereafter, the victim testified that after briefly walking away, Berry began walking toward her again while unbuttoning and unzipping his pants. The victim stated Berry turned her around and attempted to sodomize her. The victim further explained that after she was able to prevent him from doing so several times, Berry went to another part of the room and masturbated.

The victim testified that one week later, Berry invited her to his new home. Once inside, the victim stated Berry placed his finger inside her vagina. She testified she resisted several times and "eventually gave in because there was no use in even trying to stop it."

The victim testified to more incidents of sexual abuse by Berry at his home and at her home. She testified these incidents occurred at least once a week during the 2010-2011 school year. The victim then explained that in the fall of 2010 Berry put his penis inside her vagina while she was watching a movie at his home and told her she "wasn't a virgin anymore." Over defense counsel's objection, the victim testified Berry continued to digitally penetrate her at various times for four months after she turned sixteen. The victim stated the incidents which took place after she turned sixteen occurred without her consent.

The State called Kim Roseborough, a psychotherapist and social worker, as a witness. The trial court found Roseborough qualified to testify as an expert in the field of child sexual abuse assessment and treatment. Roseborough testified she

counseled the victim following the victim's disclosure of sexual abuse. According to Roseborough, she "noticed several things about [the victim's] demeanor, including many symptoms related to trauma." Roseborough testified the victim was avoidant, agitated, depressed, angry, and had feelings of guilt and hopelessness. The State asked Roseborough whether, based on her experience and training, the victim's disclosure was consistent with the disclosure of sexual abuse. Citing *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), Berry's counsel objected, arguing that asking Roseborough to comment in such a manner would require her to comment on whether she believed the victim. Following a discussion with counsel outside the jury's presence, the judge sustained the objection. Later in Roseborough's testimony, Berry's counsel objected to testimony regarding the typical symptoms exhibited by children who have been sexually abused and are suffering from post-traumatic stress disorder (PTSD). The court overruled the objection off the record. Later in the trial, Berry's counsel placed his prior objection on the record, arguing Roseborough was not qualified to diagnose PTSD. Roseborough testified it was her opinion that the victim suffered from PTSD and referred her to a psychiatrist.

The jury found Berry guilty, and he was sentenced to fifteen years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "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." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

LAW/ANALYSIS

I. Bad Act Evidence

Berry argues the trial court erred in allowing the victim to testify as to the acts of sexual abuse committed after she turned sixteen. Berry maintains these acts exceeded the scope of the indictment for second-degree CSC with a minor. Berry also contends (1) the victim's testimony regarding the acts was not relevant; (2) the acts were not criminal in nature; (3) the testimony was inadmissible under Rule

404(b) SCRE; and (4) the testimony's probative value was outweighed by its prejudicial effect.

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *see also* Rule 404(b), SCRE (evidence of other crimes, wrongs, or acts is not admissible to prove character of person in order to show action in conformity therewith). To admit evidence of prior bad acts, the circuit court must first determine whether the proffered evidence is relevant. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "'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 401, SCRE. If the trial court finds the evidence is relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) of the South Carolina Rules of Evidence. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. Rule 404(b) precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. *See* Rule 404(b), SCRE.

"Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009). Pursuant to Rule 403, "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." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998).

Berry first argues the victim's testimony regarding abuse that occurred after she turned sixteen is not relevant because any acts which occurred after she turned sixteen were not criminal. We disagree. The victim testified Berry digitally penetrated her without her consent after she turned sixteen. As a result, Berry's actions were criminal.

Berry also argues the trial court erred in allowing testimony that the abuse continued beyond the dates set forth in the indictment. Berry notes testimony that

exceeds the scope of the indictment is only permitted if it satisfies one of the exceptions found in Rule 404(b), SCRE. Berry asserts that assuming the victim's testimony was relevant; it was inadmissible because it did not relate to an exception set forth in Rule 404(b), SCRE. He contends the trial court erred in finding the victim's testimony was admissible as evidence of a common scheme or plan. The State argues the victim's testimony established the basis for the delay between the victim turning sixteen and the date she reported the abuse. The State also contends the victim's testimony was properly admitted as evidence of a common scheme or plan.

We believe the trial court properly admitted the victim's testimony as evidence of a common scheme or plan. *See Clasby*, 385 S.C. at 155, 682 S.E.2d at 896 ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this [c]ourt and the [c]ourt of [a]ppeals have held prior bad acts are admissible to demonstrate a common scheme or plan.") (quoting *State v. Gaines*, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008)). The victim's testimony in this case established the incidents of abuse occurred in the same manner and in the same locations as the conduct that formed the basis of the charge of CSC with a minor brought against Berry. *See State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (recognizing that the common scheme or plan exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties"); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (concluding that victim's testimony regarding prior attacks by defendant, which were not the subject of an indictment, was properly admitted under the common scheme or plan exception in trial for CSC with a minor, second degree where testimony showed "the continued illicit intercourse forced upon her by [defendant]"); *State v. Weaverling*, 337 S.C. 460, 471, 523 S.E.2d 787, 792-93 (Ct. App. 1999) (finding victim's testimony regarding pattern of sexual abuse he suffered by the defendant was properly admitted as part of a common scheme or plan exception in trial for CSC with a minor and disseminating harmful material to a minor where the "challenged testimonial evidence of [defendant's] prior bad acts show[ed] the same illicit conduct with the same victim under similar circumstances over a period of several years").

Finally, Berry maintains that assuming the victim's testimony is relevant and falls within an exception in Rule 404(b), SCRE; it is still not admissible because any probative value is substantially outweighed by the danger of unfair prejudice. The trial court stated that after balancing the probative value of the victim's testimony and its prejudicial effect, it found the probative value was not substantially

outweighed by any prejudicial effect. Berry argues it is unfairly prejudicial to allow testimony regarding non-criminal acts to bolster evidence of alleged criminal acts. We disagree. As discussed above, Berry's actions were criminal. Furthermore, the victim's testimony need not be criminal to be admissible to demonstrate a common scheme or plan. Rule 404(b), SCRE, specifically applies to "[e]vidence of other crimes, wrongs, or **acts**." Rule 404(b), SCRE (emphasis added). We agree with the trial court's finding that the probative value of the victim's subsequent bad act testimony was not substantially outweighed by any prejudice resulting from its admission. The testimony regarding the continuous and similar illegal conduct in this case was probative to establish the CSC with a minor charge. *See Clasby*, 385 S.C. at 158-59, 682 S.E.2d at 898 ("Given there was no physical evidence to corroborate [the victim's] testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.").

Accordingly, we find the trial court did not abuse its discretion in admitting the victim's testimony regarding Berry's subsequent bad acts. The victim's testimony was relevant, probative, and evidence of a common scheme or plan.

II. Expert Testimony

Berry argues the trial court erred in admitting testimony from Roseborough, the State's expert witness, regarding behaviors observed in the victim and the symptoms of PTSD. He contends Roseborough's testimony constituted vouching or bolstering and was a violation of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

Rule 702, SCRE, which governs the admission of expert testimony, provides:

> If scientific technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *Kromah*, 401 S.C. at 358, 737 S.E.2d

at 499. "The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Consequently, "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500.

In *Kromah*, our supreme court held forensic interviewers should avoid (1) stating the child was instructed to be truthful; (2) offering "a direct opinion on the child's veracity or tendency to tell the truth"; (3) indirectly vouching for the child, "such as stating the interviewer has made a 'compelling finding' of abuse"; (4) indicating "the interviewer believes the child's allegations in the current matter"; or (5) opining "child's behavior indicated the child was telling the truth." 401 S.C. at 360, 737 S.E.2d at 500. The *Kromah* court held forensic interviewers may testify regarding, among other things, the following: (1) "the time, date, and circumstances of the interview"; (2) "any personal observations regarding the child's behavior or demeanor"; or (3) "a statement as to events that occurred within the personal knowledge of the interviewer." *Id.*

A. Preservation

The State maintains any argument regarding vouching or a violation of the directives in *Kromah* is not preserved for our review.

During Roseborough's testimony, Berry's counsel objected to the State's question of whether "the circumstances of [the victim's] disclosure . . . [were] consistent with the disclosure of sexual abuse." Berry's counsel referenced *Kromah* and stated:

> In this case, Your Honor, the court expressly addressed this forensic interviewer's comments regarding her assessment of the demeanor of essentially in this case what is a child victim's demeanor and how it relates to whether that child was believable in a disclosure of sexual abuse. It is an extensive recitation of how that forensic interview [sic] was certified as an expert in forensic interviewing and how even though the person was qualified as an expert that does not allow that person to comment on anything involving the credibility of a witness.

> It further does caution that there are certain statements that should be avoided at trial, one of which is any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter.
>
> It is our concern, Your Honor, that should Ms. Roseborough testify, as the State has ask [sic] her to do, that her disclosure, to mean the victim's disclosure is . . . consistent or inconsistent with the disclosure of sexual abuse.
>
> That is asking Ms. Roseborough to comment in a manner that would require her to comment on whether she believes [the victim's] allegations in this matter involved in this case when our Supreme [sic] has determined this an improper comment.

The trial court sustained the objection. The trial court continued to sustain the same objection based on *Kromah* and prohibited the State from exploring areas which could result in vouching or impermissible bolstering of the victim.

Thereafter, the State questioned Roseborough regarding symptoms of trauma seen in child sexual abuse victims and the symptoms of PTSD. Berry's counsel objected and an off the record conference was held. Later, counsel placed her objection on the record, stating her objection went to Roseborough's qualifications to diagnose PTSD because she was a social worker and not a medical doctor. The trial court overruled the objection.

Subsequently, the following exchange occurred:

> The State: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?
>
> Roseborough: Yes.
>
> Q: And what are those or some of those?
>
> A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be

> distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.
>
> Q: And in regards to any of your treatment of [the victim], did you make observations and form opinions as to specific symptoms of trauma suffered by her?
>
> A: Yes.
>
> Q: And what were those?
>
> A: Over time [the victim] became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---
>
> Defense Counsel: Your Honor, I'm going to object.
>
> The Court: I overrule your objection. Go ahead.
>
> Roseborough: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

The State argues Berry's counsel did not address vouching, bolstering, or *Kromah* in her objection regarding Roseborough's testimony as to trauma symptoms and PTSD. Therefore, the State contends Berry's argument on appeal is not preserved. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground

is raised on appeal). Berry maintains the specific ground of his objection was apparent from the context, given the line of questioning contained in the above exchange and the previous discussion of *Kromah*. We agree with Berry and find his argument is preserved for our review.

B. Merits

We find the trial court did not abuse its discretion in allowing Roseborough to testify regarding behaviors she observed in the victim and the symptoms of PTSD. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). Furthermore, we find Roseborough's testimony did not impermissibly vouch for or bolster the victim's testimony.

Our courts have examined behavioral testimony in several cases. Initially, in *State v. Hudnall*, 293 S.C. 97, 359 S.E.2d 59 (1987), our supreme court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The court held this evidence was admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. *Id.* at 100-01, 359 S.E.2d at 61-62. In *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), our supreme court considered expert testimony regarding rape trauma syndrome. The supreme court overturned its holding in *Hudnall*, and found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862.

This court addressed similar behavior testimony in *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In *Weaverling*, an expert testified regarding behavior and characteristics of a sexually abused victim. This court found "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." *Id.* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo.1993); *State v. Lujan*, 967 P.2d 123 (Ariz. 1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. *Frenzel*, *supra.* It assists the

> jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. *Id. See also Lujan, supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors-like reactions of child victims of sexual abuse-expert testimony on general behavioral characteristics of such victims should be admitted).

Weaverling at 475, 523 S.E.2d at 794.

Roseborough's testimony explained the common behaviors and characteristics of a child sexual trauma victim. We find such testimony is admissible under *Schumpert* and *Weaverling*. Furthermore, Roseborough's testimony regarding behaviors she witnessed in the victim was proper because it was based on her personal observations.

As to Berry's argument that Roseborough's testimony constituted vouching or bolstering and was a violation of *Kromah*, we disagree. The supreme court in *Kromah* explained: "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.'" 401 S.C. at 358, 737 S.E.2d at 499-500 (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). This court recently found:

> Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is, telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror. *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.' *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514-15, 745 S.E.2d 124, 128 (Ct. App. 2013).

We find Roseborough's testimony did not invade the province of the jury or serve as a comment on the credibility or veracity of the victim. Roseborough testified to observed behaviors; testimony which is specifically allowed under *Kromah*. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to "any personal observations regarding the child's behavior or demeanor"). Roseborough never indicated in her testimony whether she believed the victim was telling the truth regarding the sexual abuse.

CONCLUSION

The trial court did not abuse its discretion in admitting subsequent bad act testimony and allowing expert testimony regarding the victim's behavior.

SHORT and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samantha Jamison, as Personal Representative of the Estate of Jayden Joenelle Jamison-Barber, Deceased, Respondent,

v.

Ansley L. Hilton, M.D., individually and as Agent, Servant or Employee of Rock Hill Gynecological and Obstetrical Associates, P.A.; Christopher B. Benson, M.D., as Agent, Servant or Employee of Rock Hill Gynecological and Obstetrical Associates, P.A., and Rock Hill Gynecological and Obstetrical Associates, P.A., Defendants,

Of whom Rock Hill Gynecological and Obstetrical Associates, PA, is the Appellant.

Appellate Case No. 2013-001711

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

Opinion No. 5330
Heard April 14, 2015 – Filed July 15, 2015

AFFIRMED

Thomas C. Salane and R. Hawthorne Barrett, both of Turner Padget Graham & Laney, PA, of Columbia, for Appellant.

James W. Boyd, of James W. Boyd, Attorney, and David Bradley Jordan, of Jordan & Dunn, LLC, both of Rock Hill, for Respondent.

LOCKEMY, J.: In this medical malpractice action, Rock Hill Gynological and Obstetrical Associates, PA, (the Practice) argues the trial court erred in denying its motion for judgment notwithstanding the verdict as to Samantha Jamison's allegations of negligence in the death of her son, Jayden. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Practice assumed the pre-natal care of Samantha Jamison a little over halfway through her pregnancy in July 2008. Jamison came to the Practice with pregnancy risks due to her chronic hypertension.

On August 9, 2008, Jamison went to the emergency room complaining of lower abdominal pain. Dr. Gregory Miller, a physician with the Practice, attended to Jamison at the hospital. After noting Jamison's elevated blood pressure, Dr. Miller conducted a series of tests that ruled out preterm labor. Lab results, including blood work and a urinalysis, revealed no medical grounds for intervention or immediate treatment. Dr. Miller discharged Jamison and told her to keep her next scheduled office visit at the Practice.

Jamison returned to the Practice for a checkup on August 25, 2008, and again saw Dr. Miller. Jamison's only complaint that day was of swelling in her left ankle. Based on an examination and the results of tests he conducted, Dr. Miller found no complications or dangers with Jamison's pregnancy. Dr. Miller did not order a non-stress test. Jamison had no complaints of decreased fetal movement when she saw Dr. Miller on August 25, 2008. Dr. Miller nevertheless instructed Jamison to start doing "kick counts" to monitor the timing and frequency of her baby's movement.

On the morning of September 5, 2008, Jamison became concerned about feeling the baby move less frequently and went to the Practice. Jamison arrived at the office around 8:40 a.m. and waited approximately one hour to be seen. The first available professional was nurse practitioner Robin Pruitt, who examined Jamison. The examination included taking Jamison's blood pressure and checking the fetal heartbeat. Based on the results of the examination, Pruitt ordered a non-stress test. The non-stress test began around 10 a.m. and took roughly thirty minutes.

After the non-stress test, the nurses told Jamison they were going to do a biophysical profile, which would evaluate the baby's movement, among other things. A sonographer performed that test in the office. The biophysical profile ran for approximately ten minutes, during which time the baby had a normal heart rate. After the ten minutes had elapsed, Dr. Ansley Hilton looked over the preliminary results. Dr. Hilton determined the baby was in a breach presentation and was not moving as much as a 32-week old fetus normally would be expected to move. Dr. Hilton then stopped the test around 11 a.m. because she wanted to send Jamison to the hospital in case any emergency treatment was necessary. Dr. Hilton instructed Jamison to go straight to the labor and delivery section of the hospital, which was approximately five minutes away from the office. Before releasing Jamison, Dr. Hilton confirmed that Jamison had transportation to the hospital and knew how to get to labor and delivery. Dr. Hilton then called labor and delivery to explain the situation and inform them that Jamison would be arriving soon. During her phone call to the hospital, Dr. Hilton also discussed Jamison's case with Dr. Christopher Benson, another physician with the Practice who was on call at the hospital that morning. After that conversation, Dr. Benson got everything ready at the hospital for an emergency cesarean section (c-section) in case one had to be performed.

According to Jamison, the admissions process at the hospital, which did not involve any of the Practice's employees, took around thirty minutes. A hospital employee then took Jamison to a room where other hospital staff members examined her. The nurses involved in that examination called Dr. Benson to notify him that Jamison had arrived, but that they could not find a fetal heartbeat. Dr. Benson got to the room within two minutes of receiving the call and performed an ultrasound. He was also unable to find a fetal heartbeat, and he informed Jamison that the baby was deceased. Later that day, a C-section was performed. No cause of death has been determined.

Jamison filed a summons and complaint in 2011, listing the following defendants: (1) Dr. Hilton, (2) Dr. Benson, and (3) the Practice. The complaint alleged Drs. Hilton and/or Benson committed malpractice that led to the pre-delivery death of Jamison's son, Jayden. All of the defendants filed and served a timely answer denying the allegations.

The case was called to trial on April 8, 2013. Jamison presented the testimony of two experts. Dr. Edward Karotkin opined Jayden died sometime between 11 and 11:48 a.m. on September 5, 2008, and his death was foreseeable based upon

evidence he was not growing appropriately in the weeks prior to his death and his abnormal fetal heart rate on the morning of September 5th. According to Dr. Kartokin, Jayden would have survived had a C-section been performed prior to 11:45 a.m. on September 5th. Jamison also called Dr. Douglas Phillips as an expert witness. Dr. Phillips opined Drs. Hilton and Benson both breached the applicable standard of care in treating Jamison. According to Dr. Phillips, Dr. Hilton failed to adequately inform Jamison that she needed to get to the hospital as soon as possible for an immediate C-section. Dr. Phillips opined Dr. Benson failed to take an active role to have Jamison admitted to the hospital and transported to labor and delivery in a timely manner. Dr. Phillips also testified Dr. Miller was negligent in failing to order a non-stress test and biophysical profile during Jamison's August 25, 2008 office visit, and Practice employees did not ensure Jamison received timely care on the morning of September 5, 2008.

Following Jamison's case-in-chief, the defendants moved for a directed verdict arguing there was no expert testimony that the defendants caused Jayden's death. The trial court denied the motion.

Drs. Hilton and Benson both testified they could not determine what caused Jayden's death. Similarly, all of the experts who testified were unable to offer opinions as to the cause of death. The defendants' two experts opined Drs. Hilton and Benson did not breach the applicable standard of care and did not cause Jayden's death. At the close of their case, the defendants renewed their directed verdict motions, which the trial judge again denied.

The case was submitted to the jury on April 12, 2013. The verdict form consisted of three questions. In response to the first two questions, the jury found neither Dr. Hilton nor Dr. Benson committed any negligence that proximately caused damages to Jamison. Responding to the third question, however, the jury found the Practice was negligent. The jury awarded Jamison $90,000 in damages.

Thereafter, the defendants made oral motions for a new trial or, in the alternative, for judgment as a matter of law. The trial court denied those motions from the bench. On April 25, 2013, the Practice filed a Rule 59(e), SCRCP, motion which the trial court denied in an order filed on July 15, 2013. The Practice appealed.

STANDARD OF REVIEW

A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486,

496 (Ct. App. 2006). When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

LAW/ANALYSIS

The Practice argues the trial court erred in denying its JNOV motion because there was no legal or evidentiary basis for a finding of liability against the Practice. The Practice contends the defense verdicts in favor of Drs. Hilton and Benson prevented any finding of vicarious liability for the Practice, and the record does not support a verdict against the Practice based on acts or omissions of employees other than Drs. Hilton and Benson.

Conversely, Jamison contends the Practice's argument that there is no evidence of malpractice by any of the defendants that proximately caused her damages is unpreserved.[1] Additionally, Jamison argues her expert witness, Dr. Phillips, testified as to the negligence committed by other employees of the Practice.

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[1] Jamison asserts the Practice's proximate cause argument is not preserved because it was not raised in the Practice's directed verdict motion. We disagree. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Counsel for the Practice made the following motion at trial:

> Yes, Your Honor, we would like to make a motion for a directed verdict based on the grounds that the plaintiff has not proved her case. Basically, Dr. Phillips, while he testified to the standard of care, ultimately on cross examination opined under oath here in court that anything [sic] that they did or didn't do caused the baby

I. Law

A plaintiff must prove the following facts by a preponderance of the evidence to establish a cause of action for medical malpractice:

> (1) The presence of a doctor-patient relationship between the parties;
>
> (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances;
>
> (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures;
>
> (4) Such negligence being a proximate cause of the plaintiff's injury; and
>
> (5) An injury to the plaintiff.

Brouwer v. Sisters of Charity Providence Hospitals, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (citing 27 S.C. Jur. *Med. & Health Prof'ls* § 10 (2014)). "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct." *Carver v. Med. Soc. of S.C.*, 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct. App. 1985).

> to die, so on that basis of the fact that he had - ultimately had no opinion that the defendants, any of the defendants cause [sic] the baby's death is subject for a directed verdict and on that - on that ground.

We find the motion properly identified the Practice's argument concerning the lack of expert testimony establishing causation.

"When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 546, 694 S.E.2d 1, 5 (2010) (quoting *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996)). "When expert testimony is the only evidence of proximate cause relied upon, the testimony 'must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection.'" *Id.* at 546-47, 694 S.E.2d at 5 (quoting *Ellis* at 125, 473 S.E.2d at 795).

II. Allegations Against Other Employees

While a majority of the testimony at trial focused on the actions of Drs. Hilton and Benson, there was some testimony regarding the actions of Practice employees other than Drs. Hilton and Benson.

A. August 25, 2008 Office Visit

On August 25, 2008, Jamison had an office visit with Dr. Miller. Her only complaint that day was swelling in her left ankle. Jamison did not report any decreased fetal movement at that time. Dr. Miller examined Jamison and found no complications or dangers with the pregnancy. According to Dr. Miller, he did not order a non-stress test because he did not believe one was indicated by the applicable medical standards. After the office visit on August 25th, Jamison did not return to the Practice until September 5th.

Jamison's expert, Dr. Phillips, opined that Dr. Miller breached the applicable standard of care by not ordering a non-stress test and biophysical profile either during the office visit on August 25, 2008, or within one week of that visit. Dr. Phillips believed those tests were necessary due to Jamison's chronic hypertension. However, Dr. Phillips could not testify with any degree of certainty what the tests would have shown had they been run. Dr. Phillips did not opine that the alleged breach of care by Dr. Miller proximately caused Jayden's death. He testified Dr. Miller was not "directly" responsible for Jayden's death and agreed that the opinion stated in his deposition ("I don't think Dr. Miller caused the baby to die") was still his opinion at trial.[2]

[2] Jamison's other expert, Dr. Karotkin, did not express any opinions regarding Dr. Miller's treatment of Jamison.

B. Wait Time on September 5, 2008

Although she did not have an appointment, Jamison went to the Practice on the morning of September 5, 2008, because she was concerned about feeling less fetal movement. She arrived before 9 a.m. and signed the intake sheet, which indicated she was the twentieth patient on the waiting list. There is no evidence Jamison asked to be seen immediately or that she was in any acute distress. Jamison testified she informed the staff when she arrived that she had called to say she was coming in, but she did not specifically testify as to what she told them upon her arrival.

Jamison waited about an hour before the first available care provider saw her. The nurse practitioner who saw Jamison ordered a non-stress test, which revealed a fetal heartbeat within normal limits. Nevertheless, the nurse practitioner decided to conduct a biophysical profile to obtain more information about the baby. All of the medical experts at trial agreed the baby was alive when Dr. Hilton stopped the biophysical profile and told Jamison to go immediately to the hospital shortly before 11 a.m.

Dr. Phillips testified it was a breach of the applicable standard of care not to move Jamison to the front of the waiting list based on her complaints of decreased fetal movement. Dr. Phillips further opined it was a breach of the standard of care to make Jamison wait more than an hour before seeing a care provider when she presented with that complaint. Dr. Karotkin testified Jayden's death was preventable and he would have lived had a C-section been performed prior to the morning of September 5th. According to Dr. Karotkin, there was evidence in the weeks prior to Jayden's death that he was not growing appropriately and there were some abnormal fetal heart rate tracings in the office on the morning of September 5th, indicating he was in distress and needed to be delivered quickly. Furthermore, Dr. Karotkin testified that while there was not a lot of evidence as to "what the nature of the episode was," Jayden was deprived of oxygen after 11 a.m. on September 5th, which caused his heart rate to fall and deprived his organs of oxygen and blood flow.

Viewing the evidence in the light most favorable to Jamison, we find there was some evidence of negligence by the Practice. During the direct examination of Dr. Phillips, the following exchange occurred:

> Q: Doctor, do you have a conclusion to a reasonable degree of medical certainty as to whether or not that delay in treatment caused or contributed to Jayden's death, the death of Samantha's son?
>
> A: Yes, it did.

Dr. Phillips explained:

> Jayden would've lived because there wouldn't have been the delay in doing those two tests, and there wouldn't [sic] been subsequent delay in getting the patient to the hospital as there was in this particular case. You had delays with the testing; you had delays from the time the patient left the hospital (sic) to the time she arrived in labor and delivery. Those delays were sufficient enough for a normal heartbeat that was present at 158 beats per minute in the office to end up with no heartbeat when she finally got there and they attempted to find the heartbeat after she got there on admission. So those delays, the delay from the leaving the office to getting to labor and delivery as well as the delays in performing those two tests resulted in the demise of Jayden.

Based on the expert testimony in the record, we affirm the trial court's denial of the Practice's JNOV motion. Looking especially at Dr. Phillips' testimony regarding delay in treatment, we find there was some evidence of negligence on behalf of employees of the Practice other than Drs. Hilton and Benson.

CONCLUSION

We affirm the trial court's denial of the Practice's motion for JNOV as to Samantha Jamison's allegations of negligence in the death of her son.

SHORT and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Stewart, Appellant.

Appellate Case No. 2012-213655

Appeal From Chesterfield County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5331
Heard April 14, 2015 – Filed July 15, 2015

REVERSED AND REMANDED

Jarrett O'Connor Coco, of Nelson Mullins Riley & Scarborough, LLP, 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, all of Columbia, and Solicitor William Benjamin Rogers, Jr., of Bennettsville, for Respondent.

SHORT, J.: Thomas Stewart appeals his convictions for murder and possession of a weapon during the commission of a violent crime. He argues the trial court erred in (1) finding the State's use of preemptory challenges did not violate *Batson*

v. Kentucky[1]; (2) overruling his objection and failing to correct the State's remarks to the jury that use of a deadly weapon implied malice because the jury was charged with the lesser included offenses of murder and self-defense; and (3) allowing the State to enter unfairly prejudicial character evidence. We reverse and remand.

FACTS

Stewart was involved in an extra-marital affair with Bellanie Clyburn for eight years.[2] In April 2009, Clyburn violently attacked Stewart's wife, Melissa, with a lug wrench. Clyburn pleaded guilty to assault and served several weeks of jail time. She was released from jail mid-December 2009, and Stewart spent several days with Clyburn after her release. On December 29, 2009, Clyburn filed a petition for a restraining order against Stewart and signed an affidavit for an arrest warrant for Stewart for trespassing.

During the morning of January 1, 2010, Stewart went to Clyburn's house. Stewart testified he and Clyburn argued, and she stabbed him with a knife.[3] Stewart also said Clyburn sprayed him with pepper spray. Stewart testified he was able to get a knife, and Clyburn attacked him outside the house as he was trying to get away.[4] As a result of the struggle, Clyburn was stabbed 39 times and later died from her injuries. After the fight, Stewart fled to a nearby park, and police arrested him there shortly afterwards. Police found two knives and a can of pepper spray in Clyburn's yard.

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[1] 476 U.S. 79 (1986).

[2] The trial transcript and the State's brief spelled her name "Bellany," but the indictments and the petition for a restraining order that she signed, spelled her name "Bellanie."

[3] The arresting officer testified Stewart told him he entered Clyburn's house with a knife; Clyburn pepper sprayed him after they had an argument; Clyburn managed to get the knife from him and run outside; and he ran outside after her and attacked her again. Stewart told the officer he "lost it over love," and wanted to know how much "time he was looking at."

[4] A witness testified she saw Stewart stabbing Clyburn, and Clyburn was trying to get away from Stewart but he kept pulling her back. The witness did not see Clyburn attacking Stewart. She heard Stewart say, "I'm going to kill you," while he was stabbing Clyburn.

A trial was held December 3-6, 2012. The jury found Stewart guilty of murder and possession of a weapon during the commission of a violent crime. The court sentenced him to life in prison plus five years to be served consecutively. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

I. Preemptory Challenges

Stewart argues the trial court erred in finding the State's use of preemptory challenges did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986). We agree.

In *Batson*, 476 U.S. at 89, the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that African American jurors as a group will be unable to impartially consider the State's case against an African American defendant. In *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), the Supreme Court held the Constitution also prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. Additionally, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). When one party strikes a member of a cognizable racial group or gender, the trial

court must hold a *Batson* hearing if the opposing party requests one. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

In *State v. Giles*, our supreme court explained the proper procedure for a *Batson* hearing:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted).

Merely denying a discriminatory motive is insufficient; however, the proponent of the strike need only present a race or gender neutral reason. *State v. Casey*, 325 S.C. 447, 451-52, 481 S.E.2d 169, 171-72 (Ct. App. 1997). "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). The explanation "need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." *Giles*, 407 S.C. at 21-22, 754 S.E.2d at 265. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Evins*, 373 S.C. at 415, 645 S.E.2d at 909. The opponent of the strike must show the race or gender-neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly-situated member of another race or gender. *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91.

During jury selection, the State used all five of its peremptory strikes, four of which were to strike African American jurors. The impaneled jury was composed of two African Americans and ten Caucasians. Stewart objected, and the court

held a *Batson* hearing. The four African American jurors struck by the State were Jurors 33, 101, 117, and 126.

The State gave its reasons for striking the jurors. The State asserted it struck Juror 33 because law enforcement informed the State he had prior domestic issues involving his then girlfriend, who was now his wife. The State excused Juror 101 because he had a prior arrest for possession of cocaine and, although the charge was nolle prossed, it was prosecuted by the Solicitor's Office. The State dismissed Juror number 117 because she was unemployed and knew Clyburn. Juror number 126 was excused because she was late and appeared disinterested.

Stewart argued the State's reasons for striking the four jurors were pretextual. He asserted the court asked the jury panel if any of them had any charges against them, and Juror 33 did not answer. As to Juror 101, Stewart asserted the State did not strike Juror 131, who had a charge for assault and battery with intent to kill that was nolle prossed, or Juror 105, who had a conviction or an arrest for bad checks and simple assault. Therefore, Stewart maintained Jurors 131 and 105, both Caucasians, were similarly-situated to Jurors 33 and 101. Stewart argued the State struck Juror 117 for being unemployed and having gone to school with Clyburn, yet the State did not strike Juror 128 even though Clyburn's family frequented her workplace. Finally, Stewart argued he was not aware Juror 126 was late to court. However, the Court stated it observed Juror 126 was late returning from a break.

The court denied Stewart's *Batson* motion. It ruled the State's reason for striking Juror 101 was permissible because case law supports dismissing a juror who had a previous negative relationship with law enforcement. The court applied the same reasoning to Juror 33, considering his past domestic issues involving law enforcement. As to Juror 126, who was late and appeared disinterested, the court ruled this was a valid reason and a permissible strike. Further, as to Juror 117, although the court ruled the fact that the juror was unemployed was not a valid reason, it found the State's reason, the juror had gone to school with Clyburn, was a valid reason for the strike.

Stewart argues the trial court did not comply with the third step in *Batson*. He asserts the court was required to proceed to the third step unless discriminatory intent was inherent in the explanation provided by the State, which it was not.

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 822. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge can find the explanation was mere pretext, even without a showing of disparate treatment. *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. "The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. *Evins*, 373 S.C. at 416, 645 S.E.2d at 909-10. "This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "[W]here the assignment of error is the failure to follow the *Batson* hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." *Id.* at 312-13, 631 S.E.2d at 297.

In *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991), our supreme court held a solicitor may strike a juror based on their demeanor and disposition. The court found the State's explanation that it struck two African Americans from the jury because they reported late for jury duty was racially neutral, even though a Caucasian juror, who also reported late, was seated and was appointed as the foreperson. *Id.* Here, Stewart did not allege there was a similarly-situated juror to Juror 126, who was late and appeared disinterested, that the State did not strike. Therefore, we find the State's strike of Juror 126 was permissible.

As to Jurors 33 and 101, Stewart asserted the State did not strike Juror 131, who had a charge for assault and battery with intent to kill that was nolle prossed, or Juror 105, who had a conviction or an arrest for bad checks and simple assault. Although Stewart showed the State did not strike similarly-situated Caucasian jurors, the court found the State's reasons for striking Jurors 33 and 101 were permissible because case law supports dismissing a juror who had a previous negative relationship with law enforcement. The court seemed to find it relevant that Juror 33 had past domestic issues involving law enforcement. However, even

though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."); *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated); *id.* ("In this case, an examination of the circumstances shows that the solicitor's originally neutral reason was proven to be a pretext because it was not applied in a neutral manner."). Therefore, we find the State's strikes of Jurors 33 and 101 were not permissible.

Likewise, as to Juror 117, Stewart asserted the State struck Juror 117, but did not strike Juror 128 even though Clyburn's family frequented her workplace. The trial court found the State's reason that the juror had gone to school with Clyburn was a valid reason for the strike.[5] Although we find a difference between a juror having attended school with Clyburn and Clyburn's family frequenting a juror's workplace, we note they are similar enough to have warranted further review by the court. *See State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013) ("For the purpose of demonstrating potential jurors are similarly situated under *Batson*, potential jurors are not required to be 'identical in all respects.'" (quoting *Miller-El*, 545 U.S. at 247 n.6)); *id.* ("[I]n determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared."). Therefore, we find the trial court should have further reviewed the State's strike of Juror 117.

Because we find the trial court improperly denied Stewart's *Batson* motion, we reverse and remand for a new trial.

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[5] The State's reason for striking Juror 117 was two-fold: she was unemployed and she knew Clyburn. The trial court ruled that the fact that Juror 117 was unemployed was not a valid reason to strike her. We find this was error because our courts have held unemployment is a race-neutral reason for striking a juror. *See Haigler*, 334 S.C. at 632, 515 S.E.2d at 92 (finding unemployment is a race-neutral reason for a strike).

II. Remaining Issues

Stewart argues the trial court erred in overruling his objection and failing to correct the State's remarks to the jury that use of a deadly weapon implied malice because the jury was charged with the lesser-included offenses of murder and self-defense. Stewart also argues the trial court erred in allowing the State to enter unfairly prejudicial character evidence. Because we find the trial court erred in denying Stewart's *Batson* motion and reverse and remand on that issue, the court need not consider Stewart's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we find the trial court erred in denying Stewart's *Batson* motion and reverse and remand this case for a new trial.

REVERSED AND REMANDED.

LOCKEMY and McDONALD, JJ., concur.