OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 37

October 15, 2007
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

Carmen L. Rice, Appellant.

Appeal from Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4300
Heard September 11, 2007 – Filed October 5, 2007

AFFIRMED

Deputy Chief for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

ANDERSON, J.: Carmen L. Rice (Rice) was convicted of murder and armed robbery and sentenced to life plus thirty years, concurrent. Rice challenges her conviction, claiming the trial court erred by (1) ruling the portion of a prior inconsistent statement concerning third-party guilt inadmissible; (2) admitting alleged hearsay testimony; (3) permitting an in-

court identification; (4) admitting business records under Rule 803(6), SCRE; and (5) failing to issue a curative instruction following the State's closing argument. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of October 25, 2001, Carmen Rice and Iris Bryant (Bryant) joined Bernard Brennan (Brennan) at the Varsity in Columbia, where Brennan was playing pool with his friend, Alton Page. Brennan told Page one of the women was his cousin from New York and the other was her friend from Beaufort. Eventually, Brennan, Rice, and Bryant went to Calloway's to eat.

After their meal, Brennan and the two women left Calloway's together. They drove in his Mercedes to an isolated section of Richland County, near the intersection of Fairfield Road and Interstate 20.

Later that night, Deputy Tom Lyons found Brennan's Mercedes in a ditch on Crawford Road. Brennan was still buckled in his seatbelt, the engine was running, and the vehicle was in gear. Brennan had been shot five times in the back and died as a result of the shooting. His wallet was missing.

The police learned Bryant was involved in the murder and robbery after receiving information from one of Bryant's friends. Bryant subsequently implicated Rice in the murder and robbery.

In her testimony at Rice's trial, Bryant confirmed she and Rice had planned to rob Brennan but denied any complicity in a plan to murder him. Bryant claimed Rice unexpectedly shot Brennan from the backseat with the weapon Rice was issued by her employer. After the shooting, Rice removed Brennan's wallet and wiped down the car. Then the two women fled.

Prior to trial, Bryant had given investigators multiple statements implicating other individuals in the robbery and murder. At Rice's trial, she confessed she lied in those previous interviews because she was afraid she would be charged with murder if she admitted being at the crime scene. Rice attempted to impeach Bryant's testimony with a prior inconsistent statement

Bryant made to Alana Quattlebaum, a fellow prisoner. The import of Bryant's statement to Quattlebaum was that a woman named Nikki, rather than Rice, actually killed Brennan. [1]

Brennan's friend, Alton Page, testified he could not identify either of the individuals he saw with Brennan on the night of the murder, but he recalled that one of them wore a "bright orange top."

Heidi Feagin was a waitress at Calloway's in October of 2001. Feagin served Brennan and the two women on October 25, and recognized Brennan as a "regular customer." She described one of the women as having a stocky or medium build and wearing a bright orange top. The other woman was thinner and younger. Before trial, Feagin was shown a photographic lineup of six women. The array included only Bryant's photograph. Feagin did not identify Bryant, but instead selected two other women as Brennan's companions.

The investigation ultimately led to Rice's indictment and trial for the armed robbery and murder of Bernard Brennan. The jury returned a verdict of guilty and Rice was sentenced to life imprisonment for murder and thirty years, concurrent, for armed robbery. At the time of Rice's trial, Bryant had been charged with murder and armed robbery.

ISSUES

1. Did the trial court err by ruling a prior inconsistent statement concerning third-party guilt inadmissible?

2. Did the trial court err by admitting hearsay testimony?

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[1] Rice sought to introduce testimony that Bryant's cousin, Tiki, committed the crimes. However, Bryant's initial statements to police did not mention Tiki, but instead named Nikki as the person involved. Trial counsel referred to her as "some other girl" and "some other person" in questioning Bryant about her prior statements to police. Whether Tiki and Nikki were the same person remains unresolved.

3. Did the trial court err by permitting an in-court identification that was allegedly unreliable?

4. Did the trial court err by admitting business records under Rule 803(6), SCRE, that were untrustworthy?

5. Did the trial court err by failing to give the jury an instruction curing the prosecutor's improper comment in closing?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006) cert. pending; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004). This court does not reevaluate 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. Wilson, 345 S.C. at 1, 545 S.E.2d at 827; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003).

I. Admission of Evidence

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

On appeal, we are limited to determining whether the trial court abused its discretion. State v. Douglas, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct.

App. 2006) cert. pending; State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v. Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) ("[T]he determination of the [trial] court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.").

II. Closing Arguments

A trial court is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily its rulings on such matters will not be disturbed. State v. Condrey, 349 S.C. 184, 195-96, 562 S.E.2d 320, 325-26 (Ct. App. 2002). This court will not disturb a trial court's ruling regarding closing argument unless the trial court commits an abuse of discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Jernigan, 156 S.C. 509, 524, 153 S.E. 480, 486 (1930). An appellate court must review the argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. Once the trial court has allowed the argument to stand, the defendant has the burden of proving the argument denied him a fair determination of guilt or innocence. State v. Copeland, 278 S.C. 572, 580, 300 S.E.2d 63, 68 (1982). Improper comments on closing do not require reversal if the appellant fails to prove he did not receive a fair trial because of the alleged improper argument. Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). To warrant reversal, the appellant must prove both abuse of discretion and resulting prejudice. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003); State v. Patterson, 367 S.C. 219, 232, 625

S.E.2d 245, 239 (Ct. App. 2006) cert pending; State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000) (citing State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000)); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999).

III. Harmless Error

The commission of legal error is harmless if it does not result in prejudice to the defendant. For the error to be harmless, we must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) (citing State v. Andrews, 324 S.C. 516, 479 S.E.2d 808, 812 (Ct. App. 1996)). "[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.' " State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)); State v. Adams, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003); see also State v. Kelley, 319 S.C. 173, 179, 460 S.E.2d 368, 371 (1995) (noting this court will not set aside a conviction for insubstantial errors not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached).

"Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." Pagan, 369 S.C. at 212, 631 S.E.2d at 267 (citing Arnold, 309 S.C. at 172, 420 S.E.2d at 842); State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002); State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial."). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Visual Graphics Leasing Corp., Inc. v Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993).

LAW/ANALYSIS

I. Third-Party Guilt Under Holmes v. South Carolina

Rice contends the trial court erred in ruling inadmissible portions of the prior inconsistent statement Bryant made to Quattlebaum suggesting evidence of third-party guilt. We disagree.

A. Issue Preservation

At the outset, we question whether the issue regarding third-party guilt is preserved for our review. When initially raised, trial counsel specifically stated, "I'm not going to argue third-party guilt that this other person did it" and "I don't plan to argue third-party guilt." Trial counsel stated he was offering the evidence solely to impeach Bryant's testimony. The trial court opined the statement suggested third-party guilt and asked trial counsel, "I assume no other evidence related to" the third party other than this statement is going to be presented. Trial counsel offered nothing further. Consequently, the trial court did not analyze third-party guilt in depth or rule on the issue.

B. Impeachment by Prior Inconsistent Statement Containing Evidence of Third-Party Guilt

Rule 801(d)(1), SCRE provides that a prior statement by a witness is not hearsay and is admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony . . . ." "A prior inconsistent statement is admissible as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Caulder, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct. App. 1986) (citing State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982)).

However, in this case the admissibility of a prior inconsistent statement containing substantive evidence of third-party guilt requires further scrutiny. Our state supreme court has imposed strict limitations on the admissibility of testimony indicating third-party guilt. See State v. Mansfield, 343 S.C. 66,

81, 538 S.E.2d 257, 265 (Ct. App. 2000). Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt. Id. The evidence must raise a reasonable inference as to the accused's innocence. Id.

South Carolina's law concerning the admissibility of third-party guilt evidence was articulated in State v. Gregory:

> [E]vidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941); accord State v. Cooper, 334 S.C. 540, 549-50, 514 S.E.2d 584, 588 (1999); State v. Al-Amin, 353 S.C. 405, 427-29, 578 S.E.2d 32, 44-45 (Ct. App. 2003). If the testimony is inadmissible as substantive evidence of third-party guilt, it may, nevertheless, still be admissible for impeachment purposes. See Cooper, 334 S.C. at 549-50, 514 S.E.2d at 588 (citing State v. Fossick, 333 S.C. 66, 69, 508 S.E.2d 32, 33 n.1 (1998)).

The United States Supreme Court examined and clarified the rule announced in Gregory in its review of State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004). Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006). Holmes was convicted in state circuit court of murder, first degree burglary, first degree criminal sexual conduct, and robbery. He received a death sentence. State v. Holmes, 361 S.C. at 335, 605 S.E.2d at 20. Holmes

appealed, contending the trial court erred in excluding evidence of third-party guilt. Id. at 339, 605 S.E.2d at 22. The South Carolina Supreme Court, referencing the Gregory rule, found no error in the exclusion. Id. at 343, 605 S.E.2d at 24. In addition, the Court cited State v. Gay, 343 S.C. 543, 545, 541 S.E.2d 541, 550 (2001), and announced that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." Id. Applying the Gay standard, the South Carolina Supreme Court affirmed the circuit court and held Holmes could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." Id.

The United States Supreme Court vacated and remanded the South Carolina Supreme Court's decision. Holmes, 547 U.S. 319, ___, 126 S. Ct. 1727, 1735. In doing so, Justice Alito explained the South Carolina Supreme Court radically changed and extended the State v. Gregory rule by applying the additional rule from State v. Gay:

> In Gay, after recognizing the standard applied in Gregory, the [South Carolina] court stated that "[i]n view of the strong evidence of appellant's guilt-especially the forensic evidence . . . the proffered evidence . . . did not raise 'a reasonable inference' as to appellant's own innocence." Similarly, in the present case, as noted, the State Supreme Court applied the rule that where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded.
>
> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence. Here, for example, the defense strenuously claimed that the prosecution's forensic evidence was so unreliable (due to mishandling and a deliberate plot to frame petitioner) that the evidence should not have even been admitted. The South Carolina Supreme Court responded that these challenges did not entirely "eviscerate" the forensic evidence and that the defense challenges went to the weight and not to the admissibility of that evidence. Yet, in evaluating the prosecution's forensic evidence and deeming it to be "strong"-and thereby justifying exclusion of petitioner's third-party guilt evidence-the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence.

Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the Gregory rule and its analogues in other jurisdictions were designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues. The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact

> and that the South Carolina courts did not purport to make in this case.
>
> . . .
>
> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves.

Holmes, 547 U.S. at ___, 126 S. Ct. at 1733-35 (internal quotations and citations omitted) abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). The Holmes court concluded the rule applied in State v. Holmes violated a criminal defendant's right to " ' a meaningful opportunity to present a complete defense.' " Id. (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

Despite previously professing intentions not to argue third-party guilt, Rice raised the issue again after Quattlebaum testified, citing State v. Holmes, 605 S.E.2d 19, 361 S.C. 333 (2004).[2] Rice attempted to introduce evidence implicating Tiki by showing that a composite sketch of the suspect identified as Rice looked remarkably like Tiki. In addition, Rice maintained Bryant previously named Nikki as the murderer.

The trial court found the evidence failed to meet the standard in State v. Holmes or the "long line of cases" addressing third-party guilt. Accordingly, Quattlebaum could relate only that Bryant told her it was not Rice who had committed the crime. Quattlebaum was specifically prohibited from

[2] Rice was tried and convicted prior to the United States Supreme Court's decision in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006).

testifying that Bryant said Nikki (or Tiki) killed Brennan. The trial court concluded:

> [A]s part of a defendant's defense, it is not proper to just raise this, well somebody else could have done it . . . unless you have a specific chain of facts and circumstances to satisfy the standards for third-party evidence . . . .
>
> [T]hese inferences in front of the jury about some third person and vague references like that are specifically what's prohibited and it's been ruled not to be a part of a defendant's constitutional rights to maintain their innocence on something as to point vaguely to some third person. . . .
>
> You can impeach a witness and that's not the issue. The issue is, [sic] is whether you can bring up this third person who is not in front of the jury other than in this vague way. And there is, as I understand from defense counsel, no other evidence creating a chain of circumstances in facts that would indicate third-party guilt. . . .
>
> I'll let you ask her if she ever made the statement that it wasn't her [Rice], but without getting into this issue that it was somebody else who did it.

The trial court adhered to the Gregory rule and applied the proper standard for admission of third-party guilt evidence—there must be such proof of connection with the crime, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. The evidence Rice asserted in support of introducing the third-party guilt testimony implicated Nikki at times, and Tiki at times, with no clarification as to whether they were the same individual. The record is void of facts or circumstances, other than Bryant's inconsistent statements, linking anyone other than Rice to Brennan's murder. The proffered evidence casts a mere "bare suspicion" on Nikki or Tiki and fails to connect either to the murder by way of the facts and circumstances surrounding the crime.

Moreover, any error in the trial court's ruling was harmless. Quattlebaum confirmed that Bryant's prior statement: (1) indicated Rice had nothing to do with Brennan's murder; and (2) was inconsistent with Bryant's trial testimony, thus impeaching her truthfulness, as defense counsel had originally intended. Additionally, the jury heard multiple times from Bryant on direct and cross-examination that she, at one point, told police Nikki had been involved in the murder. The trial court appropriately permitted Quattlebaum's testimony about Bryant's prior statement, tailored for impeachment purposes only, and excluded the portion of the statement that substantively pointed to the guilt of a third party.

II. Hearsay

Rice argues that an investigating officer's testimony about Rice's objection to being fingerprinted was inadmissible hearsay. We disagree.

Initially, we note this issue is likely not preserved. Trial counsel did not object when Officer Smith made the alleged hearsay statement. Instead, counsel made a motion to strike stating, "He's talking about what someone else did." Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Furthermore, an objection must be on a specific ground. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997); State v. New, 338 S.C. 313, 318, 526 S.E.2d 237, 239 (Ct. App. 1999). A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial court. New, 338 S.C. at 318, 526 S.E.2d at 239; see also Campbell v. Bi-Lo, Inc., 301 S.C. 448, 454, 392 S.E.2d 477, 481 (Ct. App. 1990) (holding where the ground for objection is not stated in the record, there is no basis for appellate review).

Rule 103(a)(1), SCRE, requires specificity where the ground for objection is not apparent from the context of the discussion contained in the record. New, 338 S.C. at 318, 526 S.E.2d at 239. Here, trial counsel never

actually made an objection, only a motion to strike. The trial transcript reflects very little discussion and does not make the ground for any objection apparent. Trial counsel never raised hearsay, and it appears more likely his concern was whether Officer Smith's testimony was based on personal knowledge. Because trial counsel never objected and specified his concern with the testimony on the record, the issue is not preserved for our review.

Rice's argument fails on the merits as well. Rule 801(c), SCRE, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is "1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. "An out of court statement by someone other than the person testifying which is used to prove the truth of the matter asserted constitutes hearsay and is inadmissible unless it falls within an exception." Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (citing Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001)). Conversely, a statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. Floyd v. Floyd, 365 S.C. 56, 82, 615 S.E.2d 465, 479 (Ct. App. 2005).

The leading case in South Carolina in regard to the principle that general testimony in regard to a law enforcement investigation is NOT hearsay is State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). Brown edifies:

> Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103, 112 S. Ct. 1193, 117 L. Ed. 2d 434 (1992). Additionally, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Love, 767 F.2d 1052 (1995), cert. denied, 474 U.S. 1081, 106 S. Ct. 848, 849, 88 L. Ed. 2d 890 (1986). Here, these statements were not entered for their truth but rather to explain why the officers began their surveillance. These statements are not hearsay and, therefore, the

> trial judge committed no error in allowing these statements into evidence."

Id. at 63, 451 S.E.2d at 894.

Additionally, the rule is elucidated in State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003), that testimony concerning a statement from a bystander to the police was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain and outline the investigation and the officer's reason for going to the defendant's home.

Evidence explaining why law enforcement is in a particular area has been held to be relevant information for the jury to consider. State v. Johnson, 318 S.C. 194, 456 S.E.2d 442 (Ct. App. 1995); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992).

In State v. Weaver, we held the testimony of a police officer about conclusions he made based on his investigation was not hearsay. 361 S.C. 73, 86, 602 S.E.2d 786, 792 (Ct. App. 2004) cert. granted, March 23, 2006. Although the officer's investigation included interviews with witnesses, the officer never repeated any statements made to him by individuals at the crime scene. Id.

As in Weaver, the testimony of Officer Smith in this case is not hearsay. Officer Smith did not testify as to what someone told him. He simply related what he learned as a result of his investigation:

> Q: Are you familiar with the efforts to take her fingerprints out at the jail prior to this for comparison against the car fingerprints?
>
> A: Yes, sir.
>
> Q: Did she voluntarily submit to that?
>
> A: She actually didn't, I believe, didn't want to do it at first when one of our detectives went there to my understanding.

Q: Was he not present? If not, I move to strike his answer. He's talking about what somebody else did.

Court: Y'all have been asking him all day about other stuff everybody else was doing. I'm going to allow it.

Q: Based on your investigation as the chief investigating officer who is responsible, as [defense counsel] pointed out, for the actions of those who investigated under you, did you learn as part of your investigation, that she fought the fingerprinting?

A: She didn't want to do it and basically was informed, you know, fingerprinting is something that's –they have to comply to in custody, so she had to take it.

The hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation. Because this testimony did not constitute hearsay, its admission was not an abuse of discretion. Even if Officer Smith had repeated an out of court statement in court, the purpose of the repetition, as the State noted, was not to prove the matter asserted, but to suggest Rice's state of mind about surrendering her fingerprints.

In the event testimony is improperly admitted, the error is reversible only when the admission causes prejudice. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). If Smith's testimony constituted inadmissible hearsay, the admission was harmless. The information he provided only served to show Rice did not want her fingerprints taken. Nothing in the record indicates the prints matched evidence found at the scene of the murder. The challenged evidence was non-prejudicial in light of its limited purpose of demonstrating that Rice did not want to cooperate with the investigation—not to prove that she committed the crime.

III. In-Court Identification

Rice alleges the trial court erred in admitting Heidi Feagin's in-court identification, maintaining it was unreliable and posed a substantial risk of

misidentification. Additionally, Rice complained the trial court erred in finding defense counsel, through cross-examination, opened the door allowing the State to elicit Feagin's identification. Both of Rice's contentions are without merit.

The admission of eyewitness identification is in the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000); State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003).

Reliability is the linchpin in determining the admissibility of identification testimony. Id. at 504, 589 S.E.2d at 785 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977); State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999).

The admissibility of an in-court identification is frequently challenged by a criminal defendant on the grounds that a pre-trial identification procedure was unduly suggestive. See e.g., Moore, 343 S.C. at 286, 540 S.E.2d at 447 ("An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification."). In those cases, the standard for determining the admissibility of both out-of-court and in-court identifications is whether the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Gambrell, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980). A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

A court must consider the totality of circumstances to determine whether an identification may be reliable even when the procedure has been suggestive. See Neil v. Biggers, 409 U.S. 188, 199 (1972). The factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of

certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id.

However, the requirement that a court review the totality of circumstances to determine whether an identification is reliable does not apply in the absence of a pre-trial identification procedure. State v. Lewis, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005). In Lewis, the South Carolina Supreme Court affirmed this court's holding that "the Neil v. Biggers analysis should not be extended to protect criminal defendants against identifications that occur for the first time in court without a pre-trial identification." Lewis, 363 S.C. at 42, 609 S.E.2d at 518.

In discussing its reasoning, the Court explained, "these extra safeguards [afforded by a Neil v. Biggers analysis] are not applicable to an in-court identification because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial." Lewis, 363 S.C. at 43, 609 S.E.2d at 518 (citing Ralston v. State, 309 S.E.2d 135, 136 (1983)).

> Accordingly, we conclude Neil v. Biggers does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations.

Lewis, 363 S.C. at 43, 609 S.E.2d at 518.

A diligent search of the evidentiary record reveals no evidence whatsoever of a witness identification involving Rice prior to Feagin's in-court identification. The extant record convinces the court of the vivacity and applicability of the Lewis rule to the case sub judice.

Here, the witness only identified Rice at trial, not at any time prior to trial. Therefore, the factors provided by Neil do not apply. The protections needed from suggestive pretrial identifications are not necessary in an in-court identification because of cross-examination and argument. Rice had the

opportunity to cross-examine Feagin regarding her in-court identification. This was the proper remedy. The trial court did not err when it allowed the witness to make an in-court identification of Rice.

Moreover, the record fully supports the trial court's ruling on the question of whether defense counsel "opened the door" to allow Feagin's identification.

South Carolina precedent has firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel "opens the door" to that evidence. State v. Young, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005) cert. granted, Jan. 2007; see also State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("Given that [defendants] maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry."); State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (ruling expert could testify that she believed the victim in this case because defendant opened the door by cross-examining expert about other cases in which she did not believe victim); State v. Dunlap, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003) (holding defense counsel's opening statement "opened the door to the introduction of evidence rebutting the contention that [defendant] was merely an addict"); State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant "opened the door" about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction.").

Furthermore, an appellant cannot complain of prejudice resulting from admission of evidence to which she opened the door. See State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431 (2003) (noting one who opens the door to evidence cannot complain of its admission); State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) ("Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission."); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct.App.1999) ("Beam cannot complain about the admission of evidence where he opened the door to the evidence.").

In the present case, during recross, defense counsel asked Feagin why she was able to assist in preparing composite sketches, "but now say you can't identify them because you didn't get a good look at them. How could you say all of those things if you didn't get a good look at them?" Feagin responded, "I didn't say I couldn't identify them because I couldn't get a good look at them. It's been a long time, I'm sure I can still identify them, it's just been a long time since I had a look at them."

In an in camera hearing, the State asked the court to allow Feagin's in-court identification of Rice on redirect in "response to new matter brought up by the defense attorney during his recross." The prosecutor emphasized "[I] never asked her if she could identify them. [Defense counsel] asked her about that. And she responded that she could. The jury heard it. . . ."

Rice countered that the State laid the foundation for Feagin's in-court identification on direct examination, but stopped short of extracting it. The trial court reviewed direct, cross, redirect and recross testimony and ultimately determined:

> There was no discussion at all that I'm seeing that touched on the issue of whether or not she [Feagin] could make an identification here and now. I'm not seeing that at all in direct or redirect. . . .
>
> I thought that was where they [the State] were going, they never did. . . . Nobody ever brought up, an any point, until your [defense counsel's] last question to her, whether or not she could make an identification of the person if she saw them. It just never got brought up. . . .

Based on the review of the transcript, the trial court concluded defense counsel opened the door allowing the State to elicit Feagin's in-court identification. Rice cannot complain about the admission of identification evidence when she opened the door to that evidence.

IV. Business Records

Rice asserts the trial court admitted her former employer's business records in error. Specifically, Rice claims the records constituted inadmissible hearsay because they lacked the level of trustworthiness required under Rule 803(6), SCRE. We disagree.

South Carolina adopted section 19-5-510 of the South Carolina Code, the Uniform Business Record as Evidence Act, prior to the promulgation of the South Carolina Rules of Evidence. The statute provides:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

S.C. Code Ann. § 19-5-510 (1985).

This section gives the trial court control to exclude or require additional proof if the authenticity or trustworthiness of the business record is suspect. See Kershaw County Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981).

Patterned after the South Carolina Act and the Federal Rules, Rule 803(6), SCRE, excepts records of regularly conducted activity from the hearsay exclusion.[3] Excepted records include:

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[3] Section 19-5-510 has been construed to preclude admission of subjective opinions or judgments within a business record. See McCaskill, 276 S.C. at 362, 278 S.E.2d at 773; State v. Key, 277 S.C. 214, 215, 284 S.E.2d 781, 783 (1981); State v. Patterson, 290 S.C. 523, 527-28, 351 S.E.2d 853, 855 (1986). The Federal Rules of Evidence do not contain this restriction. Consequently, Rule 803(6), SCRE, differs from the federal rule in that the word "opinions" in the first sentence is deleted and the phrase, "provided,

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 803(6), SCRE.

A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in either section 19-5-510 or Rule 803(6), SCRE. See State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994); see also Connelly v. Wometco Enterprises, Inc., 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994) (holding employment file, although relevant and otherwise admissible, was properly excluded from evidence where the employer failed to offer the file through its custodian or another qualified witness); State v. McFarlane 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (finding trial court properly refused to admit medical report when no one could testify to the identity, mode of preparation, or whether report was made in the regular course of business at or near the time of the accident). Business record entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly

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however, that subjective opinions and judgments found in business records are not admissible" is added to the federal rule to make it consistent with state law.

and fairly kept. South Carolina Nat'l Bank v. Jones, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990).

America's Best Security (ABS) business records tracked weapons and other equipment issued to employees. The records custodian for the company identified the admitted documents. She confirmed the records were kept in the normal course of the company's business and prepared according to the requirements of the law. The record indicating Rice's assigned equipment had not been returned was submitted on November 29, 2001, approximately one month after Brennan's murder and Rice's termination from ABS.

The admitted documents contained the following information: Rice was issued a weapon and qualified by SLED to shoot a .357 Magnum-type gun; her last working day was October 30, 2001; SLED was notified of Rice's termination from ABS; Rice was listed among employees terminated in the last ninety days on November 29, 2001; and Rice had not returned equipment assigned to her, including her weapon, as of November 29, 2001. Two ABS employees with supervisory authority over Rice corroborated this evidence. Furthermore, the testimony of the records custodian and corroborating witnesses underwent vigorous cross-examination.

The essence of Rice's challenge is that ABS is now bankrupt and some records were stored and possibly misplaced, rendering the entire record keeping process untrustworthy. However, Rule 803(6), SCRE, focuses on the source of the information or the method and circumstances of preparation as indicia of trustworthiness. No probative evidence suggests the sources of the information recorded in the ABS documents were not credible or the methods and circumstances of preparation were unreliable. The evidence Rice relies on simply identified problems in accessing the business records after the company stored them and does not cast suspicion on the records' trustworthiness.

Moreover, any error in admitting the ABS business records was harmless. The records were merely cumulative to the testimony of Rice's supervisors, who confirmed that Rice had not returned her weapon as of November 29, 2001. State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71

(Ct. App. 2006) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.") cert. granted June, 2007.

V. Curative Instruction

In closing argument, the prosecutor asked the jury to give the victim's wife peace and the victim justice. Rice contends the trial court erred by failing to give the jury an instruction curing the prosecutor's comment. We disagree.

The State urges that Rice failed to preserve this issue for appellate review by raising the issue in an off-the-record conference. An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). However, in State v. Hamilton, we held York was inapplicable when the initial off-the-record bench conference was later made a part of the record. 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In Hamilton, defense counsel requested a jury instruction on the prosecutor's comments during an off-the-record bench conference. Id. at 360, 543 S.E.2d at 595. The trial court denied the request and defense counsel moved for a mistrial. Id. at 361, 543 S.E.2d at 595. The State alleged any errors raised by Hamilton in the bench conference were off-the-record and not preserved. Id. at 360, 543 S.E.2d at 595. We held the initial off-the-record conference had subsequently been made part of the record by the acquiescence of the judge, prosecution, and defense counsel. The issue appellant raised concerning the prosecutor's comment was preserved for review. Id.

As in Hamilton, defense counsel in the case at bar put his objection to the prosecutor's comment on the record when the jury began its deliberation. Counsel specifically stated his requested relief—a curative instruction—and the basis for his objection—that the comment improperly injected passion or sympathy into the trial. Neither the trial court nor the State objected to

defense counsel putting his exception on the record. Therefore, Rice's objection to the trial court's failure to give a curative instruction is preserved.

It is well settled that the prosecution's closing argument must not appeal to the personal biases of the jurors or be calculated to arouse the jurors' passions or prejudices. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (citing State v.Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The prosecution's closing argument should be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

An argument asking the jurors to place themselves in the victim's shoes tends to destroy completely all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice. State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

> The 'Golden Rule' argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's shoes is disallowed Golden Rule Argument.

State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004), rev'd on other grounds by 370 S.C. at 38, 633 S.E.2d at 901.

Prosecutors are bound to rules of fairness in their closing arguments. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). "While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle." State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 880 (2007).

When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 202, 621 S.E.2d 363, 367 (Ct. App. 2005) (citing McElveen v. Ferre, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989)). Failure to give a requested jury instruction is not prejudicial error when the instructions given afford the proper test for determining the issues. State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) (citation omitted). "An error not shown to be prejudicial does not constitute grounds for reversal." Brown v. Pearson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997); see also State v. Williams, 367 S.C. 192, 195-96, 624 S.E.2d 443, 445 (Ct. App. 2005).

Here, the prosecutor, while explaining demeanor evidence to the jury, made the following comment concerning witness Bryant:

> As an example of demeanor how you can tell when somebody's telling the truth, you saw her when she was telling you, begging for forgiveness for being too much of a coward to do something or to come forward and how she begged forgiveness and said she wanted Hilda to have peace. You saw that. You know that was raw truth. She want Hilda—she wanted to give Hilda peace. Ladies and gentlemen, I would ask you to give Hilda and Bernard justice as well.[4]

Defense counsel approached the bench and the trial court held an off-the-record conference. Defense counsel proceeded with closing argument. When the jury moved into deliberation, defense counsel reiterated the objection to the prosecutor's comment he had previously made off-the record:

> I objected to him making statements that the jury owed Hilda Brennan justice. I would ask that the jury be given a curative instruction on that. I believe that that comment improperly injected passion or sympathy into the trial of this case. And it

[4] Hilda is Bernard Brennan's widow.

> was improper statement or comment during the opening on the law by the prosecution in this case.

The trial court responded:

> I told you I think his actual words were—you asked him to bring—he didn't say that they owed them justice, but I did not think it was an improper comment at the time and certainly nothing that's not cured by the overall instruction to them.

A priori, we observe the trial court properly clarified that the prosecutor asked the jury to give the victim's wife peace and the victim justice. The court emphasized the prosecutor did not say "they owed them justice." Arguably, the prosecutor's comment was consistent with his duty, not to convict a defendant, but to see justice done. Viewed from that perspective, the prosecutor merely asked the jury to do the duty that was already required of them. The prosecutor's comment did not call for the jurors to put themselves in the victim's place and did not rise to the level of a Golden Rule argument.

If the prosecutor's request had reached that level of impropriety, the trial court's overall instructions to the jury effectively cured any potential prejudice. The judge stressed the State had the burden of proving Rice guilty beyond a reasonable doubt. He instructed the jury to consider only the competent evidence before them, based on the witnesses, exhibits made part of the record, and stipulations between counsel. The judge explained that, as jurors, they were sworn to accept and apply the law exactly as he stated it to them. It was their duty to decide the effect, the value, weight, and truth of the evidence presented during the course of the trial. He charged them to assess the credibility of witnesses who testified during trial and to evaluate the evidence to determine its truthfulness.

We conclude the trial court adequately set forth the proper test for determining the issues. Any error in failing to give a specific curative instruction was harmless.

CONCLUSION

We hold:

(1) the alleged prior inconsistent statement concerning third-party guilt was inadmissible under a State v. Gregory and Holmes v. South Carolina analysis;
(2) the investigating officer's testimony was NOT hearsay under Rule 801(c), SCRE, and was admissible as a conclusion based on the officer's investigation;
(3) the in-court identification of Rice by Heidi Feagin was admissible based on State v. Lewis because there was no pre-trial identification procedure;
(4) the evidence of the former employer's business records met the test of section 19-5-510 of the South Carolina Code of Laws, Uniform Business Records as Evidence Act, and Rule 803(6), SCRE; and
(5) the prosecutor's statement to give the victim's wife peace and the victim justice did NOT violate State v. Reese, or the Golden Rule argument.

Accordingly, the trial court's rulings are

AFFIRMED.

THOMAS, J. and GOOLSBY, A.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anita Blackwell, Appellant,

v.

Kasper F. Fulgum, Jr., Respondent.

Appeal From Greenville County
Aphrodite K. Konduros, Family Court Judge

Opinion No. 4301
Submitted September 1, 2007 – Filed October 9, 2007

AFFIRMED

Robert Scott Dover, of Pickens, for Appellant

Kenneth C. Porter, of Greenville, for Respondent.

SHORT, J.: Anita Blackwell appeals the family court's decision to award Kasper Fulgum, Jr. $9,411.00 in past due child support and $3,368.00 in attorney's fees. We affirm.[1]

FACTS

Anita Blackwell (Mother) and Kasper Fulgum, Jr. (Father) were formerly husband and wife, and during their marriage, they had two children. The two children (Daughter and Son) were born on April 8, 1985 and November 14, 1986, respectively. In a February 28, 2001 order (the Original Support Order), the family court awarded, by agreement of the parties, custody to Father and ordered Mother to pay Father $760.00 per month for child support.

Mother paid the required child support until June 15, 2003, whereupon she then reduced her child support payment to $386.00 per month. Mother believed she was justified in reducing her child support by one-half because Daughter had reached eighteen years of age and graduated from high school at the end of May.[2] Father immediately responded by sending a letter to Mother indicating that she was in default of the child support order, and informing her that she needed to submit current financial information to either his attorney, her attorney, or the Greenville County Family Court to seek a reduction in child support. After receiving no response from Mother, Father had his attorney send Mother a second letter. This letter again informed Mother that it was not proper for her to reduce the child support

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

[2] It appears Mother was mistakenly paying $772.00 per month in support and not the required $760.00 per month. Therefore, $386.00 per month represents a one-half reduction in support. This is likely due to the fact that the Original Support Order dictated that Mother pay $772.00 per month from August of 2001 through November of 2001 and then pay $760.00 per month thereafter. The parties agree Mother overpaid father in the amount of $180.00.

without a court order and offered to work with Mother on establishing a proper reduction in child support. Mother's current husband responded with a letter informing Father any order amending the Original Support Order must reflect a $386.00 per month child support obligation on the part of Mother or else Father would have to send his financial information to Mother.

Mother continued paying $386.00 (or the corrected $380.00) per month to Father until March 15, 2005. However, beginning in September 2004 and continuing through January 2005, Mother ceased making support payments to Father and paid directly to Son because she believed Son was no longer living with Father. Mother ceased payments to Father again in April 2005 because she again believed Son was living elsewhere.

In January 2005, Father filed a rule to show cause motion, and the family court, on January 24, 2005, issued an order for Mother to appear on February 11, 2005 to show cause why she should not be held in contempt. This order specifically and separate from the issue of contempt additionally ordered Mother to show cause why she should not pay a reasonable amount of attorney's fees and costs. Mother failed to appear at the rule to show cause hearing, and Father was awarded $14,668.00 in child support and $865.00 for attorney's fees and costs. Mother was held in contempt and sentenced to one year incarceration which could be purged upon payment of the child support and attorney's fees. On April 18, 2005, the family court vacated this contempt order in response to Mother's motions to alter and amend and for relief from the judgment. The family court found Mother's notice of the proceedings was defective and ordered a new trial de novo on the rule to show cause action.

As a result of the second proceeding concerning Father's rule to show cause motion, the family court did not find Mother in contempt, but did order her to pay $9,411.00 in child support and $3,368.60 for Father's attorney's fees. The family court found that Mother was not entitled to unilaterally reduce her child support payments by one-half and was responsible for the full amount of support until March 11, 2005, which was the date she filed her

motion for temporary relief seeking a reduction in her support obligation due to a substantial change in circumstances. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence." Abercrombie v. Abercrombie, 372 S.C. 643, 646, 643 S.E.2d 697, 698 (Ct. App. 2007). Despite this broad scope of review, we remain mindful that the family court saw and heard the witnesses and generally is in a better position to determine credibility. Id.

LAW/ANALYSIS

I. Child Support Arrearage

It appears Mother contends because the family court failed to find her in contempt, it was error to enforce the Original Support Order against her. Because Mother failed to separate her arguments into individual issues on appeal, it is somewhat unclear exactly which arguments she has put forth. However, we will endeavor to address each issue raised.

We first note section 20-7-420 (17) of the South Carolina Code (Supp. 2006) provides the family court with jurisdiction to continue orders for support until the eighteenth birthday of the supported child. At which point, under South Carolina law, a parent's obligation to pay child support generally ends by operation of law. Purdy v. Purdy, 353 S.C. 400, 403, 578 S.E.2d 30, 31 (Ct. App. 2003). However, the above statute further provides a means for the family court to extend support beyond the child's eighteenth birthday if the child is still in high school "and is making satisfactory progress toward completion of high school, not to exceed the nineteenth birthday unless exceptional circumstances are found to exist or unless there is a preexisting agreement or order to provide for child support past the age of eighteen years . . . ." S.C. Code § 20-7-420 (17) (Supp. 2006). The statute continues on to provide the court with authority to extend support beyond the child's

eighteenth birthday if there are physical or mental disabilities of the child or upon a showing of other exceptional circumstances.

In light of the above statute, it would appear at first blush that the now appealed from family court order erred in requiring Mother to pay the full amount of support as noted in the Original Support Order until Daughter was almost twenty years of age.[3] However, where one of multiple children reaches majority, a parent's child support obligation will not be affected absent a family court order modifying the amount of support owed. Bull v. Smith, 299 S.C. 123, 126, 382 S.E.2d 905, 907 (1989). See also Stroman v. Williams, 291 S.C. 376, 380, 353 S.E.2d 704, 706 (Ct. App. 1987) (holding that "[w]here a support order 'provides for payments for the benefit of two or more children, the marriage or emancipation of one minor child does not automatically affect the liability of the father for the full sum prescribed in the order.'"). Where one of multiple children becomes emancipated, the family court does not extend the parent's support obligation on behalf of the emancipated child. The court simply continues the existing support agreement for the benefit of the other minor child[ren] until such time as the court, upon request of the supporting parent, can calculate a proper reduction in the support obligation based on a showing of changed circumstances.

When a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion. Browning v. Browning, 366 S.C. 255, 263, 621 S.E.2d 389, 392-93 (Ct. App. 2005). Perhaps in its discretion, the family court found that mother had a good faith belief that she was entitled to a reduction based upon the emancipation of Daughter, and therefore, decided against finding her in contempt. Regardless of the contempt, Mother owed Father support under the unmodified terms of the Original Support Order. We find no error by the family court in failing to find Mother in contempt and ordering her to pay the child support arrearage.

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[3] The appealed from order requires Mother to pay the full $760.00 per month in child support until March 11, 2005 and then one-half of that through Son's June 2005 graduation. On March 11, 2005, Daughter would have attained the age of nineteen years and eleven months.

Mother next appears to raise an estoppel argument. Mother claims Father should not be permitted to collect the child support arrearage because she was prejudiced by Father's eighteen month delay in filing his rule to show cause action. Mother claims she was prevented from seeking a modification because it was not until Father filed his motion to show cause that she was put on notice that he was refusing to accept her one-half child support payments. We find this argument unpersuasive and untenable. We first note that Mother was free to petition the court for a change in her support obligation at any time, but she instead opted to unilaterally reduce her support payments in violation of the family court order. Further, in both a letter from Father and a letter from Father's attorney, Mother was informed that her actions were in violation of the family court order and the means by which she could remedy this problem. In light of these facts, we find any argument made by Mother based on estoppel or unconscionability to be without merit.

Mother next argues the family court erred in its award of child support arrearage because it failed to credit her for the support she paid directly to Son. The Original Support Order stated: "The Mother shall make semi-monthly child support payments to the Father in the amount of $380.00." The general rule is that it is the obligation of the divorced spouse to pay the specified amounts according to the terms of the decree and said spouse should not be permitted to vary these terms as a matter of convenience. Foster v. Foster, 294 S.C. 373, 375, 364 S.E.2d 753, 754 (Ct. App. 1988). The family court correctly noted "[t]he Mother was required to send the support to the custodian parent regardless of where the child was residing unless an order was entered, either by consent or otherwise." We find no error in the family court's failure to credit Mother for payments made directly to Son.

Lastly, Mother contends equity and fairness dictates we hold the child support arrearage in abeyance pursuant to section 20-7-933 of the South Carolina Code (Supp. 2006). She goes on to suggest the legislative intent of this abeyance provision is for conditions such as those encountered in this case. We disagree. Mother requests that this court hold her support arrearage

in abeyance permanently; however, the very definition of "abeyance" is that of "temporary inactivity" or "suspension." Black's Law Dictionary 4 (7th ed. 1999). Further, we are not persuaded by Mother's assertion that the legislature's intent in enacting the abeyance provision of the statute was to protect parents who unilaterally reduce their support payments in violation of a family court order. We deduce no support for holding the arrearage in abeyance.

II. Attorney's Fees

Mother contends the family court erred in awarding Father attorney's fees and in failing to award attorney's fees to her. We disagree.

"Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." S.C. Code Ann. § 20-7-420(A)(38) (Supp. 2006). An attorney's fees award is within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Davis v. Davis, 372 S.C. 64, 88, 641 S.E.2d 446, 458 (Ct. App. 2006).

Generally, we would be inclined to determine an award of attorney's fees in accordance with the factors outlined in the case of E.D.M. v. T.A.M..[4] However, if the case before us presents an added dimension of an uncooperative spouse who hampers a final resolution of the issues in dispute, we will not reward an adversary spouse for such conduct. Anderson v. Tolbert, 322 S.C. 543, 549, 473 S.E.2d 456, 459 (Ct. App. 1996). Of particular concern are those occasions which force one parent to seek sanctions against the other parent for violating court orders. Id. at 550, 473 S.E.2d at 459.

[4] In determining whether to award attorney's fees, the family court should consider each party's ability to pay his or her own fees, the beneficial results obtained, the parties' respective financial conditions, and the effect of the fee on the parties' standards of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

In the instant case, it was Mother's conduct in unilaterally reducing her child support obligation which violated the court order and precipitated Father's rule to show cause motion. Mother's refusal to cooperate with Father's offer to negotiate a proper reduction in child support necessitated the filing of his motion and ultimately, Mother's need to hire an attorney. Further, the initial ruling on the rule to show cause motion was vacated because the family court found Mother's notice of the proceedings was defective, not because of any misstatements by Father. Therefore, contrary to Mother's assertions that Father's misstatements prolonged the case, even had Father not misspoken during the initial hearing, a second hearing would have been required. Because the family court vacated the initial order and ordered a new trial de novo, the misstatements by Father had no bearing upon the second hearing. The court would have been required to address any discrepancies between Father and Mother's accounts of the support arrearage to determine the amount owed regardless of any misstatements made by Father in the first hearing.

Lastly, we note that since the initial order regarding the rule to show cause was vacated, Mother did not, as she contends, receive a reduction in child support arrears from $14,668.00 to $9,411.00. This second hearing, which was a new trial de novo, resulted in her having to pay $9,411.00 in child support arrearage. We fail to discern a manner in which she could entitle this a beneficial result. We find no error with the family court's finding that "Mother required the bringing of this action and her actions weighed heavily in the attorney's fees award."

III. Time Allotted to Pay Support Arrearage and Attorney's Fees

Mother contends the family court erred in requiring her to pay the child support arrearage on or before March 1, 2006 and the attorney's fees on or before January 15, 2006. She contends this amount of time was improper and constituted an abuse of discretion. We disagree.

"Questions concerning child support are ordinarily committed to the discretion of the family court, whose conclusions will not be disturbed on appeal absent a showing of an abuse of discretion." South Carolina Dept. of

Social Services, County of Siskiyou v. Martin, 371 S.C. 21, 24, 637 S.E.2d 310, 312 (2006). With the record before us, we cannot find an abuse of discretion on the part of the family court. The family court was in a position superior to this court from which to evaluate the appropriate time frame allotted for payment and was free to impute income to Mother who was voluntarily unemployed. See Patel v. Patel, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) ("It is proper to impute income to a party who is voluntarily unemployed or underemployed.").

CONCLUSION

We find the family court did not err in its award of child support arrearage and attorney's fees and that the time allotted for payment was not an abuse of discretion. Based on the foregoing, the family court's order is

AFFIRMED.

STILWELL, J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Milton Hiott, Appellant

v.

State of South Carolina, Respondent

Appeal From Bamberg County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4302
Heard September 12, 2007 – Filed October 11, 2007

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia, for Respondent.

WILLIAMS, J.: In this case, we hold the PCR court has authority to issue Rule 11 sanctions against a post-conviction applicant pursuant to the South Carolina Rules of Civil Procedure.

FACTS

Milton Daniel Hiott (Hiott) was convicted of incest and sentenced to ten years imprisonment. Hiott did not appeal his conviction or sentence.

Hiott filed an application for post-conviction relief (PCR). Hiott alleged trial counsel was ineffective for failing to prepare for trial, failing to request a Blair[1] hearing, and failing to file a direct appeal. Additionally, Hiott argued he was entitled to relief based on vindictive prosecution, a Brady[2] violation, prosecutorial elicitation of false testimony, prosecutorial misstatement of a crucial fact, violation of Rules 3(c) and (d), SCRCrimP, the State's presentation of direct indictments at trial, and unconstitutional vagueness of indictments.

Hiott presented testimony regarding most of these assertions. However, he failed to present testimony supporting his claims for counsel's failure to request a Blair hearing, violation of Rules 3(c) and (d), the presentation of indictments, or vagueness of indictments.

The PCR judge denied Hiott's application and pursuant to Rule 11 of the South Carolina Rules of Civil Procedure[3] fined Hiott $3,000 for

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[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] Rule 11 provides: "The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion or other paper is signed in

presenting frivolous claims and testimony. Subsequently, Hiott filed a Rule 59(e) motion to alter or amend the judgment, which was denied.

Hiott filed a petition for writ of certiorari. We granted the petition and ordered the parties to brief the issue of whether the PCR judge had authority to issue Rule 11 sanctions.

STANDARD OF REVIEW

Any evidence of probative value is sufficient to uphold a PCR judge's finding. Pierce v. State, 338 S.C. 139, 144-45, 526 S.E.2d 222, 225 (2000). A PCR judge's decision will be reversed if it is controlled by an error of law. Id. If the case raises a novel question of law, this Court is free to decide the question without deference to the lower court. State v. McClinton, 369 S.C. 167, 169, 631 S.E.2d 895, 896 (2006).

The issue of whether a PCR court has authority to sanction a PCR applicant under Rule 11 is one of first impression. Thus, we are free to make our determination without deference to the PCR court.

LAW/ANALYSIS

The Uniform Post-Conviction Procedure Act[4] (the Act) contemplates the applicability of the South Carolina Rules of Civil Procedure in PCR actions. Section 17-27-80 of the South Carolina Code (Supp. 2006) states, "**All** rules and statutes applicable in civil proceedings are available to the parties." (emphasis added).

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violation of this Rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

[4] S.C. Code Ann. § 17-27-10 et seq. (Supp. 2006).

The cardinal rule of statutory construction is to determine and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The best evidence of legislative intent is the text of the statute. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002) (internal quotations and citations omitted). If the terms of the statute are clear, the court must apply those terms according to their literal meaning. City of Columbia v. Am. Civil Liberties Union of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 2d 747, 749 (1996).

The plain language of section 17-27-10 requires all rules that apply in a civil case apply to PCR actions. A PCR action is a civil action. Council v. Catoe, 359 S.C. 120, 125, 597 S.E.2d 782, 784 (2004). Consequently, Rule 11 would apply to PCR proceedings because PCR actions are civil.

Moreover, section 17-27-150(A) of the South Carolina Code (Supp. 2006) states, "A party in a noncapital [PCR] proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge . . . grants leave to do so . . . ." Section 17-27-150(B) states, "A party in a capital [PCR] proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure."

Section 17-27-150 indicates the legislature's express intent to afford PCR applicants limited use of the discovery process as stated in the South Carolina Rules of Civil Procedure. If the legislature sought to limit the applicability of Rule 11 to PCR proceedings as it sought to limit the discovery process, the legislature would have inserted constricting language to that effect in the Act. Additionally, the South Carolina Rules of Civil Procedure support the conclusion that Rule 11 is applicable to PCR actions.

The South Carolina Rules of Civil Procedure "govern the procedure in **all** South Carolina courts in **all** suits of a civil nature . . . ." Rule 1, SCRCP (emphasis added). Furthermore, the South Carolina Rules of Civil Procedure apply to PCR actions "to the extent that they are not inconsistent with the Act." Rule 71.1(a), SCRCP.

When interpreting language of a court rule, the same rules of construction employed in interpreting statutes apply. State v. Brown, 344 S.C. 302, 307, 543 S.E.2d 568, 571 (Ct. App. 2001). "Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Id. (internal quotations and citations omitted). Given the plain language of Rules 1 and 71.1 and that Rule 11 is consistent with the Act, ample justification exists to conclude Rule 11 applies to PCR actions.[5] See Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (holding PCR actions are governed by the usual rules of civil procedure); Sutton v. State, 361 S.C. 644, 647, 606 S.E.2d 779, 780 (2004) ("A PCR action is a civil action generally subject to rules and statutes that apply in civil proceedings.") *overruled on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005); Gamble v. State, 298 S.C. 176, 177, 379 S.E.2d 118, 118 (1989) (holding the South Carolina Rules of Civil Procedure apply to all civil actions, a petition for PCR is a civil action, the Act specifically incorporates the applicable rules of civil practice, and Rule 41(a) of the South Carolina Rules of Civil Procedure applies to PCR petitions).

We are cognizant that "[c]ourts treat PCR differently than traditional civil cases." Wade, 348 S.C. at 263, 559 S.E.2d at 847. However, given the plain language of the Act and the South Carolina Rules of Civil Procedure, we conclude the PCR court has authority to issue Rule 11 sanctions against a PCR applicant.

[5] Hiott does not argue the PCR judge abused his discretion by imposing sanctions. The sole issue on appeal is whether the PCR judge had authority to issue Rule 11 sanctions. Thus, we do not address whether the PCR judge abused his discretion in sanctioning Hiott. Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (stating issues not argued in a party's brief are deemed abandoned).

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.

CURETON and GOOLSBY, AJJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kathleen M. Bartlett, Appellant,

v.

James P. Rachels, Respondent.

Appeal From Lexington County
Kellum W. Allen, Family Court Judge

Opinion No. 4303
Submitted September 1, 2007 – Filed October 11, 2007

AFFIRMED

James W. Corley, of Columbia, for Appellant.

James P. Rachels, of Ridgecrest, CA, *pro se*.

HEARN, C.J.: Kathleen M. Bartlett (Wife) appeals the family court's order finding her former husband, James P. Rachels (Husband), was not in

contempt of court for allegedly violating a provision of the parties' 1996 divorce decree and denying her request for attorney's fees. We affirm.[1]

FACTS

The parties married on June 28, 1986, and were divorced on January 30, 1996. In 2006, Wife sought to hold Husband in contempt for his "deliberate and willful failure to pay a percentage of his military pension to [Wife]," as ordered in the divorce decree.

The provisions of the decree at issue provide:

> a. [Wife] . . . shall be entitled to receive military retired pay upon the retirement from the United States Navy of [Husband] . . . .
>
> b. [Wife] is entitled to Twenty-two and one-half percent (22½%) of the military retired pay of an E-7 rank as a distribution of marital property and directs the Defense Finance and Accounting Center [DFAC] . . . to pay Twenty-two and one-half percent (22½%) of an E-7 retired pay directly to [Wife] upon [Husband's] retirement from the Navy.
>
> c. This Order may be served on the Secretary of the Defense, Secretary of the Navy, or designee as authorized under 10 U.S.C. Section 1408[.]

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

At the hearing, Wife testified regarding her understanding of the retirement provision: "My lawyer at the time told me that all I would have to do is write into [DFAC]." However, she also acknowledged that Husband had written a letter to her lawyer a few months after the divorce, stating he would receive a pension only if he completed twenty years of active duty, and notifying her DFAC "will not garnish my pension [as stated in the decree] due to the amount of time of our marriage. However, I can request an allotment be sent directly to [Wife] at the time of my retirement."

Following the parties' divorce, Husband remained on active duty until retiring in 2005 with twenty years of service. On October 2, 2005, one month before his retirement, Husband again sent Wife a letter concerning the retirement provision: "Our divorce decree has a section dealing with my retirement pension that is very ambiguous. I think it is important that we clear up this ambiguity before I retire. . . . Please call me ASAP so we can discuss this issue." Husband stated that Wife's counsel responded: "Neither Mrs. Bartlett nor I see any reason to compromise."

Wife nonetheless applied to DFAC for garnishment. But on December 15, 2005, DFAC denied Wife's application, stating: "Under the USFSPA [Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408] we can honor a request for payments from retired/retainer pay as property only in those cases where the parties were married for at least 10 years during which the member performed at least 10 years of creditable military service."

In regard to Husband's failure to pay Wife her portion of the pension, the family court held that the divorce decree "appears ambiguous and imprecise and this court cannot hold [Husband] in deliberate willful contempt for that reason." Wife now appeals.

STANDARD OF REVIEW

In an appeal from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). However,

this broad scope of review does not require us to disregard the family court's findings or to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

I. Contempt

"An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court . . . may be proceeded against for contempt of court." S.C. Code Ann. § 20-7-1350 (Supp. 2006). For purposes of contempt, an act is willful if "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Spartanburg County Dept. of Social Services v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988).

"Before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). "The moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Eaddy v. Oliver, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001).

On appeal, a decision regarding contempt should be reversed only if no evidence supports it or the trial court has abused its discretion. Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Browning v. Browning, 366 S.C. 255, 263, 621 S.E.2d 389, 393 (Ct. App. 2005).

Wife contends the family court abused its discretion because the record lacks evidence supporting the court's conclusion. However, there is no language in the agreement requiring Husband to specifically request a

voluntary allotment on behalf of Wife. The agreement clearly instructed DFAC, not Husband, to submit a portion of Husband's pension to Wife. In addition, Husband made attempts to contact Wife, to address DFAC's refusal to garnish his pension on behalf of Wife, and to resolve ambiguities in the order. Because Husband's failure to request a voluntary allotment or submit a portion of his pension to Wife was not in direct contravention to any specific requirement in the order, the family court did not abuse its discretion in failing to hold Husband in contempt.

II. Attorney's Fees and Costs

Wife also argues the family court erred by failing to award attorney's fees and costs. However, "[a]n award of attorney's fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). In awarding attorney's fees the family court should consider the following factors: (1) each party's ability to pay his or her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

Considering the aforementioned factors, the family court did not abuse its discretion by refusing to award attorney's fees and costs. First, Wife's attorney did not obtain a beneficial result. Second, Wife fails to present any compelling evidence in regard to the other factors indicating that she should have been awarded attorney's fees. Accordingly, we find no error.

CONCLUSION

The order of the family court is

AFFIRMED.

ANDERSON, J. and THOMAS, J. concur.