STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Opinion No. 2022-UP-323 (S.C. Ct. App. Filed August 3, 2022)

APPELLATE CASE NO. 2019-000437

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 22, 2022. COA Cert. App. 4-13; 24.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in finding unpreserved Petitioner's argument that the trial court erred in allowing the solicitor to argue that the complainant's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 after the trial court found that instructing the jury on that statute was improper, because Petitioner did not object contemporaneously at trial but did object both prior to and after closing arguments and where the trial court ruled on the objections?

2.

Whether the Court of Appeals erred in affirming the trial court's ruling that defense counsel could not cross-examining the complainant about specific punishments she received for lying, because the line of questioning was not relevant, and if relevant, that the questions had a substantial likelihood of confusing the jury, where the lower court did not perform the required on the record Rule 403, SCRE, analysis but only gave a perfunctory ruling that the line of questioning was excluded pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

In May 2012, Petitioner was indicted by the Pickens County Grand Jury for one count of Criminal Sexual Conduct with a Minor in the First Degree. App. 460-461. An amended indictment was later true billed during the August 2014 Grand Jury term, revising the time frame[1] in which the allegation was said to have occurred. App. 457-458.

On November 17, 2014, Petitioner proceeded to trial on the amended indictment in front of the Honorable William P. Keesley and a jury. App. 30. Sam Tooker appeared on behalf of the State and Steven Sumner represented Petitioner. Id. After a two-and-a-half-day trial, the jury found Petitioner guilty as indicted. App. 383. Judge Keesely sentenced Petitioner to a term of imprisonment for thirty years. App. 388.

Defense counsel did not file a notice of intent to appeal Petitioner's conviction or sentence. App. 409. On August 1, 2017, Petitioner filed a PCR application alleging, *inter alia*, that trial counsel was ineffective for failing to file a direct appeal. App. 391-408. The State made its return on January 12, 2018. App. 408-415. An amended return and motion to dismiss was filed by the State on February 22, 2018. App. 416-425.

An evidentiary hearing was held before the Honorable Alex Kinlaw, Jr., on February 21, 2019. App. 426. R. Mills Ariail, Jr., represented Petitioner and Kelly Oppenheimer appeared on behalf of the State. Id. Judge Kinlaw's order granting a belated appellate review pursuant to White v. State[2] was filed on March 12, 2019. App. 447-455. A brief pursuant to White v. State, and a petition for writ of certiorari were filed on September 20, 2019. Respondent filed an

---

[1] The original indictment alleged a sexual battery occurred on or about December 16, 2011. The amended indictment provided a date range of January 1, 2010, to January 1, 2012.

[2] White v. State, 263 S.C. 110, 208 S.E.2d 35

informal return to the petition for writ of certiorari and a brief of respondent pursuant to White v. State on February 3, 2020.

By order dated February 4, 2020, this Court transferred the matter to the Court of Appeals for consideration. On August 3, 2022, the Court of Appeals granted certiorari and affirmed Petitioner's conviction and sentence in an unpublished[3] opinion. Cone v. State, Op. No. 2022-UP-323 (S.C. Ct. App. filed August 3, 2022), COA Cert. App. 1-3. Petitioner filed a petition for rehearing on August 16, 2022. COA Cert. App. 4-13. The State filed a return to the petition for rehearing on September 8, 2022, and an amended return to the petition for rehearing on September 20, 2022. COA Cert. App. 4-23 The Court of Appeal denied the petition for rehearing on September 22, 2022. COA Cert. App. 24. This petition for writ certiorari to the Court of Appeals follows.

[3] This case was decided without oral argument pursuant to Rule 215, SCACR

ARGUMENT

1.

The Court of Appeals erred in finding unpreserved Petitioner's argument that the trial court erred in allowing the solicitor to argue that the complainant's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 after the trial court found that instructing the jury on that statute was improper, because Petitioner did not object contemporaneously at trial but did object both prior to and after closing arguments and where the trial court ruled on the objections.

Relevant Facts

Petitioner met Mr. and Mrs. Miller, the parents of Minor, in the early 2000s through a shared interest in stockcar racing. App. 283, ll. 18; 20-25. The three adults eventually became good friends, with Mr. Miller describing the relationship between himself and Petitioner as "close as brothers." App. 284, ll. 1-4; App. 221, ll. 21. Petitioner spent many weekends overnight at the home of the Millers. App. 178; App. 285.

Over the course of the friendship, a sexual relationship developed between Mrs. Miller, Mr. Miller, and Petitioner. App. 179, ll. 1-8. The three would engage in "threesomes" which typically began with Mrs. Miller and Petitioner engaging in the sex act known as the "sixty-nine" position. App. 179, ll. 18; App. 200, ll. 16-18. The sex acts occurred regularly over the course of six to eight years and either took place in the Miller's master bedroom or the living room of the home. App. 179, ll. 1-8; App. 180, ll. 10-12. None of the bedrooms in the home had doors, but the bedrooms belonging to the children had sheets tacked up over the doorways. App. 194, ll. 1-3 & ll.15-25; App. 195, ll. 6-12.

Shortly before Christmas 2011, Mrs. Miller noticed her youngest daughter playing with a doll in a "sexually inappropriate" manner. App. 183, ll. 10-11. When she asked her youngest daughter where she had learned this behavior, she indicated from her older sister, Minor. App. 183, ll. 15-17. Mrs. Miller informed Minor there was something she wanted to discuss with her after Christmas and subsequently had a conversation with Minor on January 1, 2012. App. 183, ll. 21-23; App. 184, ll. 6-7. During the conversation, Minor claimed that she had been sexually abused. App. 185, ll. 2-4. Minor repeated the allegation to her father and a family friend, Robert Odom. App. 96-97.

Minor was referred to the Julie Valentine Center to undergo a forensic interview as well a medical exam. App. 207. During the forensic interview, Minor alleged that Petitioner would have her sit on top of him facing his feet while she was naked, and his pants and underwear were pulled down. (State's Exhibit 2 – Forensic Interview DVD). Petitioner would then have Minor perform oral sex on him while he "licked her butt." Id. Minor stated this first occurred when she was four or five and stopped when she was nine when she told her mother. App. 85, ll. 4-12. The medical exam did not reveal any acute or chronic changes to Minor's genital area and no sexually transmitted diseases were found. (State's Exhibit 3 – Stipulation regarding report of Dr. Mary Fran Crosswell).

Prior to the start of the presentation of evidence, the trial judge gave a preliminary instruction to the jury panel where he outlined both the juror's duties and his duties. App. 55-65. In explaining his role, he stated,

> *The law comes from me.* It's my job to decide what law applies to the case and to tell it to the jury at the end of the trial...at the end of the case, I'll tell you the law and you will determine the facts...I'm the judge of the law.

App. 57, ll. 7-9; ll. 11-12; ll. 15 (emphasis added).

Towards the end of his opening remarks, the judge admonished the jurors to not do any independent research into the case. He again clarified his role in the proceedings stating,

> Don't go look up the law. One of my favorite expressions is a little knowledge is a dangerous thing. You have to be able to understand the context, and the law has all kind of nuances and things in it. And that's why they put me here, to sort through all that. And if I'm wrong, there's a procedure for that. *But I tell you the law.* So don't go look up law.

App. 61, ll. 14-23 (emphasis added).

At trial, Petitioner took the stand in his own defense. App. 282. Petitioner denied the allegations and stated when confronted by Minor's father about the allegations, Petitioner had "no idea what he was talking about." App. 282, ll. 1-3; App. 289, ll. 20-25 – App. 290, ll.1-3; App. 29,1 ll. 1-7. Petitioner also testified to the sexual encounters that occurred at the home, inappropriate images, such as sex scenes, on the television that Minor may have seen, and the amount of time he spent around Minor. App. 286; App. 287-289; App. 290.

At the close of the evidence, the State requested that the trial court charge the jury that, pursuant to S.C. Code Ann. § 16-3-657, the testimony of a victim need not be corroborated because the State intended to argue that charge to the jury. App. 309, ll. 1-13. Counsel Sumner objected to the charge as an improper comment on the facts from the bench. App. 310, ll. 7-10. The trial court stated it would decide overnight whether it would charge the jury with S.C. Code Ann. § 16-3-657, but that it would not stop the State from arguing it to the jury because "[i]t's the law and it's proper to argue anything that's in the law." App. 310, ll. 15-18.

The following morning, the trial court ruled that it would not charge the section 16-3-657, noting in a thoughtful discussion that:

> That instruction has always bothered me and that language there is from charges I've given before... And it bothers me that I'm going to single out one witness and talk about one witness. I tell the jury that they may believe one witness against many or many against one. Which is the same thing... The last

> couple of times I have not charged this, I believe that's my recollection is I have not charged this, and my intent is not to charge it in this case. But if the state objects and the state request the charge and it's denied. Now, that doesn't stop you from arguing it. It's the law. You can argue it to the jury.

App. 326-328.

The State then asked for permission to specifically reference the code section and statutory language during its closing. App. 328, ll. 8-10. Defense counsel again objected to the State, arguing the specific statute and statutory language stating "I would object to him opening on that point of law. I do respect the Court's ruling that either of us can argue it, and he can argue that. But I don't think that opening on the law is proper for anything other than the charge against Mr. Cone." App. 328, ll. 13-19. The court ruled that the solicitor could argue § 16-5-657, the "no corroboration" statue, overruling defense counsel's objection. App. 328, ll. 20-24. Defense counsel further stated "I don't want to waive this just purely for appellate purposes. I do object to him referencing that in his opening on the law for the reasons I've stated. And as long as you say the records are protected, I'm not going to object during his actual opening statement." App. 329, l. 23-App 330, l. 4.

After a short break, the State decided not to open on the law, and defense counsel presented his final argument. App. 331, ll. 1-2; App. 332, ll. 10-16. The State then presented its closing argument, during which it recited S.C. Code Ann. § 16-3-657 verbatim to the jury. App. 348, ll. 2-8; App. 351, l. 1-7. The court took a short recess before it charged the jury on the law. After the charge on the law, defense counsel renewed his objection to the State reciting S.C. Code Ann. §16-3-657 during closing arguments. App. 379, ll. 12-14.

Discussion

Preservation

The Court of Appeals found that Petitioner's argument on appeal regarding the impropriety of the State arguing the specific statutory language of S.C. Code Ann. §16-3-657 was unpreserved, because Petitioner failed to object contemporaneously and conceded the issue during trial. Respectfully, under the rules of error preservation, Petitioner's argument is preserved for review and should be addressed on the merits.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Jean Hoefer Toal et al., Appellate Practice in South Carolina (2016) 184. "However, [the error preservation requirement] is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

"There are four basic requirements to preserving issues at trial for appellate review." *S.C.* Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Id.

Generally, for an issue to be preserved, a party must make a "contemporaneous objection that is ruled upon by the trial court." State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). "However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021), reh'g denied (Feb. 3, 2022), cert. denied (June 21, 2022), cert. denied, 142 S. Ct. 2843 (2022) (internal citations and quotations removed).

The requirements of error preservation were met in Petitioner's case. Defense counsel's specific objection was to the State referencing the statute and the statutory language of S.C. Code Ann. §16-3-657. The objection was raised to and ruled upon by the trial court prior to closing arguments. Further, defense counsel renewed his objection after closing arguments. The court had ruled the State could argue the statute in closing arguments immediately before closing arguments began. Therefore, defense counsel was not required to object during the closing argument to preserve the error for review. See, State v. Jones, *supra.* As this Court noted in State v. Simmons, 432 S.C. 552, 562, 816 S.E.2d 566, 571-72 (2018) counsel was not required to be a jack-in the box, repeatedly objecting, to successfully preserve the issue for appellate review.

The Court of Appeals also found that defense counsel waived his objection, presumably when he stated, "I do respect the Court's ruling that either of us can argue it, and he can argue that." App. 328, ll. 13-19. This, however, was not a waiver of the objection, rather a recognition of the Court's ruling. Further, Counsel renewed his objection shortly after that statement and again objected after closing arguments. App. 329, l. 23-App. 330, l. 4; App. 379, ll. 12-14. A fair reading of the record supports the conclusion that Petitioner's argument regarding the

impropriety of the State's use of S.C. Code Ann. §16-3-657 during closing arguments is preserved for appellate review.

Merits

In finding the error unpreserved, the Court of Appeals did not address the merits of Petitioner's argument. Petitioner asserts this matter is preserved for appellate review and respectfully requests that this Court grant certiorari to address the merits of the issue which are discussed below.

The trial judge improperly allowed the solicitor to recite and argue S.C. Code Ann. § 16-3-675, the "no corroboration" statute, to the jury during closing arguments. Allowing the solicitor to argue the specific statute that was not included in the jury charge and that was enacted solely for judicial guidance lessened the state's burden of proof. The solicitor misstated the law in his closing argument by improperly arguing § 16-3-675 to the jury, indicating that the testimony of the victim is to be viewed and treated differently than the testimony of other witnesses. The solicitor framed the recitation of the statute by telling the jury it only had to decide if the alleged victim was lying or not. This argument effectively told the jury to ignore all other evidence and focus solely on whether the uncorroborated statement of the alleged victim was true.

While a solicitor has broad latitude in making arguments to the jury, the practice is not without limits. See State v. Cartwright, 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018) (noting that the law provides limits to a party's jury argument, as enhanced by Due Process protections). *A solicitor cannot inject material outside of the evidence or the judge's charge* but must confine their argument to the evidence in the record and the reasonable inferences that may be drawn from the evidence. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)

(emphasis added). Further, it is the exclusive role of the trial judge to declare the law, and in doing so, inform the jury of all the law that applies to a given case. S.C. Const. Art. V § 21. While no party is banned from arguing the general law applicable to a case, a party cannot misstate or misinterpret the law *and is confined to arguing the principles that will be later charged to the jury.* See U.S. v. Williams, 526 F.3d 1312 (11th Cir. 2008) (emphasis added).

During the charge conference, the trial court properly concluded that it would not charge the "no corroboration" statute but then permitted the solicitor to argue the statute during closing arguments. App. 327-328. This was error. In directly citing the legislative code and repeating the statute verbatim, the solicitor injected improper legal considerations into the jury's deliberations. The "no corroboration" statute was not intended to be a jury consideration but purely judicial. State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 482 (2016). In reciting the statute to the jury, the solicitor gave the impression that the Legislature singled out Minor's testimony to be believed over all others.

Allowing the solicitor to argue the specific statutory reiteration would be akin to allowing the solicitor to argue that the rules of admissibility meant that the evidence the State presented was trustworthy simply because it was admitted. A solicitor could not argue to the jury that a statement, admitted pursuant to a Jackson v. Denno[4] hearing, was found by the judge to be voluntary by a preponderance of the evidence and therefore the jury should find the statement voluntary. Nor could a solicitor argue to a jury that in admitting a prior bad act, the judge ruled the prior bad act occurred through clear and convincing evidence.

This is not to say that the solicitor could not have argued that there is no need for corroboration in general terms. As this Court recently noted in State v. Burdette, 427 S.C. 490,

---

[4] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

503, 832 S.E.2d 575, 583 (2019), while it was improper for the court to charge inferred malice the State and defense were "free to argue the existence or nonexistence of malice based on the evidence in the record." The solicitor was free to argue the principle contained in the statute, but citing the legislative enactment and stating the statute verbatim created error in this case.

A review of this Court's holdings in cases[5] dealing with the propriety of a trial judge charging § 16-3-657 are instructive in analyzing the propriety of a solicitor arguing the statute to a jury when it will not be included in the charge on the law. In Schumpert, this Court ruled that when the jury charge, which included the no corroboration charge, was reviewed as a whole, it contained no reversible error. This Court did not, at that time, make a specific ruling about the propriety of charging the statute, but then Justice Finney found that the "no corroboration" charge was not meant to be given to a jury, in part because it singled out the testimony of one witness over other. Schumpert at 510, 435 S.E.2d at 864 (1993) (Finney, J., dissenting).

This Court again examined the propriety of charging the "no corroboration" statute in Rayfield. In again holding the charge as a whole was proper, this Court expanded the legislative intent of the statute finding that it was the intent of the legislature to signal to both the judge and the jury that a defendant can be convicted solely on the basis of a victim's testimony. Rayfield at 117, 631 at, 250 (2006). However, then Justice Pleicones dissented, arguing, that "Section 16–3–657 prevents courts...from finding a lack of sufficient evidence to support a conviction because the alleged victim's testimony is uncorroborated." Rayfield at119, 631 S.E.2d at 251 (2006) (Pleicones, J., dissenting) citing James Cranston Gray, Jr., Criminal Law—Rape Reform in South Carolina, 30 S.C. L.Rev. 45, 55–60 (1979) (discussing the no-corroboration rule as governing judicial review of the sufficiency of the evidence); cf. Ludy v. State, 784 N.E.2d 459,

---

[5] State v. Schumpert 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Rayfield, 396 S.C. 106, 631 S.E.2d 355 (2006); State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016)

463 (Ind. 2003) (holding that the no-corroboration rule is a legal standard for a court reviewing a conviction).

Finally, this Court reexamined the propriety of charging S.C. Code Ann. §16-3-657 in Stukes. There, this Court found the dissent from Rayfield to be persuasive and held that the "no corroboration" charge was not proper. This Court reasoned that,

> By addressing the veracity of a victim's testimony in its instructions, the trial court *emphasizes the weight of that evidence in the eyes of the jury.* The charge invites the jury to believe the victim...*Specifying this qualification applies to one witness creates the inference the same is not true for the others.*

Stukes, at 499, 787 S.E.2d at 483 (2016). (emphasis added).

The trial judge, anticipating Stukes, properly declined to charge the "no corroboration" statute to the jury. However, the court permitted the solicitor to achieve an end-run around the Stukes' reasoning by allowing the solicitor to argue the specific statue to the jury during closing arguments. First, the legislative intent of §16-3-175 is to signal the *judicial bench* that it should not direct a verdict or overturn a conviction when there is no corroboration of a victim's statement. Stukes, at 499. The statute is not appropriate for a jury and should not be a part of jury deliberations.

Second, this law does not help the jury in fulfilling its function of "*deciding the facts and determining whether the state has proved the charged offense beyond a reasonable doubt.*" Rayfield, at 120, 631 S.E.2d. at 251. (emphasis added). As then Justice Pleicones noted in his dissent in Rayfield, placing the statute before the jury actually "has the potential for creating more problems than solutions," for it might cause confusion when read with the general charge on witness credibility. Id. Citing *State v. Grant,* 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980).

Third, arguing the "no corroboration" statutory citation to the jury creates a "strong possibility of biasing the jury against the defendant." Rayfield, at 120, 631 S.E.2d. at 251. The

statute singles out the alleged victim's testimony and appears to "express an opinion on the alleged victim's credibility." Id. See also, State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d. 805, 818 (2001) (stating prosecutors cannot vouch for a witnesses' credibility).

A solicitor's words carry the prestige of the government in the view of a jury. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (stating that improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit or implicit assurances of a witness' veracity). In allowing the solicitor to specifically cite and argue the "no corroboration" statute, the trial judge effectively lowered the state's burden of proof. Just prior to reciting the code section and statute the solicitor stated,

> "Now I'll give you this in a minute but if *you determine that she's telling the truth, that Minor is telling the truth, the elements are satisfied. So your decision then becomes is she telling the truth?* So there was sexual batter [sic], as is testified, and she was less than eleven years of age at the time as the testimony shows."

App. 350, ll. 20-25 (emphasis added). The solicitor then proceeded to say that "there is a section in our law" which says that a victim's testimony does not require corroboration in prosecutions for criminal sexual conduct. The solicitor further stated that if he was wrong about the law, the trial judge would correct him during his charge. App. 351, ll. 1-9.

Later in his closing the solicitor reiterated,

> So first, what do we have? And again, let me say this too. The question seems to be is the victim telling the truth? *I mean that's what this boils down to, is the victim telling the truth in this case?* Like I said before your verdict has got to speak the truth. Veritas dico, to speak the truth. *So is the victim telling the truth?* What did her emotions say? When she talks to her mom she's crying, she's trembling, she's communicating things physical that people don't communicate with words. She's not saying, oh, yeah, this happened, he did this to me. I mean people lie in courts, put people don't lie with emotions. She's crying and she's trembling."

App. 353, ll. 8-19 (emphasis added). The solicitor's argument told the jury to merely determine whether the alleged victim was telling the truth because her testimony need not be corroborated. The solicitor effectively told the jury that the case "boiled down" to the truthfulness of the victim's statement, regardless of the other evidence. Further, the solicitor improperly suggested that the judge would correct him if he misstated the law when he was already aware that the judge would not be including S.C. Code Ann. § 16-3-675 in the charge on the law that was ultimately given to the jury.

Petitioner testified that he did not sexually abuse Minor, and his testimony mirrored that of Minor's mother regarding their relationship, the setup of the house, and where the sex acts between the adults usually occurred. App. 282-291. However, in arguing the "no corroboration" statute, the solicitor indicated to the jury that they were to value the testimony of Minor over that of Petitioner or any other witness. The solicitor argued that the *legislature* did not require corroboration of a victim's statement, thereby "inviting the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak." Stukes at 499. The standard in the criminal courts of this state is not "what is true" but "beyond a reasonable doubt."

By arguing the "no corroboration" statute, when it would not be charged to the jury, the solicitor entered the purview of the judge, usurping the judge's role to declare the applicable law, and interjecting into deliberations an improper legal consideration. The solicitor appropriated the prestige and power of the legislature to circumvent the trial judge's charge on the law, prejudicing Petitioner and denying him a fair trial.

2.

The Court of Appeals erred in affirming the trial court's ruling that defense counsel could not cross-examining the complainant about specific punishments she received for lying, because the line of questioning was not relevant, and if relevant, that the questions had a substantial likelihood of confusing the jury, where the trial court did not perform the required on the record Rule 403, SCRE, analysis but only gave a perfunctory ruling that the line of questioning was excluded pursuant to Rule 403, SCRE.

Relevant Facts

The State called Minor to the stand. Before defense counsel had fully asked his first question, the State objected and asked that the jury be excused. App. 89, ll. 1-4. After excusing the jury and Minor from the courtroom, the solicitor objected to the line of questioning he thought defense counsel was about to pursue. App. 89, ll. 20-25. According to the State, the father of Minor inflicted certain punishments on her that resulted in DSS being contacted and a temporary plan being set up. App. 89, ll. 24-25 – App. 90, ll. 1. The State objected to any questioning about the corporal or physical punishment Minor received as not relevant and subject to a Rule 403 analysis. App. 90, ll. 1-9.

Defense counsel agreed that it would be improper to bring up the DSS investigation, but stated he intended to elicit testimony about the specific corporal punishment Minor received. App. 90, ll. 11-24. Specifically, he intended to ask Minor if she reported that her father would try to drown her when she was having behavioral problems, and that when she would lie, he would put her under a shower of very cold water with her clothes on. Id. Defense counsel argued the information was relevant in that it went to Minor's veracity. App. 90, ll. 25 – App. 91, ll. 1-2.

He contended that if Minor underwent severe treatments for lying, it would be very unlikely that she would recant a false accusation for fear of punishment. App. 91, ll. 3-15. Defense counsel argued that since the case came down to credibility, the line of questioning went to her veracity and was proper. App. 92, ll. 13-17.

The solicitor agreed that defense counsel could ask if Minor was afraid of getting in trouble if her story changed but argued defense counsel could not get into the specifics of the punishments. App. 91, ll. 16-22. The court conducted a proffer of Minor's testimony, where defense counsel asked, among other questions,

> Q. Minor, did your father ever put you in the shower and turn the water on cold when he felt like you were not telling the truth?
>
> A. Yes, sir,
>
> Q. Did your father ever tell you when you would come near the television to shut your eyes and close your ears because he didn't want you to see something that was on the television?
>
> A. Yes, sir.
>
> Q. Minor, you mentioned this for Mr. Tooker, and that is that you have told this story regarding Justin Cone to a lot of different people. Is that true?
>
> A. Yes, sir.
>
> ...
>
> Q. And your parents were with you during a large number of these conversations?
>
> A. Yes, sir.

App. 93, ll. 12-20; App. 94, ll. 2-5; App. 95, ll. 6-8. After the proffer of Minor's testimony, the court ruled the line of questioning was not relevant. The court stated,

> "The question about her being pushed in the shower and put under cold water, *the courts finds that not relevant. If it is relevant it's excluded under 403.* Now, I

could see how it could become relevant, but based on the proffer that was given, I do not see that it is."

App. 95, ll. 11-16. The court conducted no further analysis and made no further rulings on the matter.

Discussion

The Court of Appeals found that the questions defense counsel had for Minor regarding prior forms of punishment she received for lying were not relevant, and if relevant, they had a substantial likelihood of confusing the jury. Respectfully, the evidence was highly relevant, as it went to Minor's credibility and veracity. Further, the trial court did not specify why it ruled the evidence inadmissible pursuant to Rule 403, SCRE, and it was improper for the Court of Appeals to conduct its own analysis.

Relevance

Relevant evidence is "any 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. "Since it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony, as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." State v. Brewington, 267 S.C. 97, 100–01, 226 S.E.2d 249, 250 (1976) (internal citations and quotations omitted). Further, "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." Id.

The only evidence of the criminal sexual conduct alleged in Petitioner's case was the testimony of Minor. There were no witnesses and no physical evidence. The case came down to the credibility and veracity of the witnesses who testified. Whether Minor was telling the truth

was the only fact at issue. Any evidence bearing on Minor's credibility and veracity was relevant. The questions defense counsel sought to ask Minor regarded the extreme and unusual punishment she had received for lying. Not only did the testimony "have a legitimate tendency to throw light" onto Minor's truthfulness, but it also informed the jury as to why Minor would maintain her story, even if it was made up. Respectfully, the testimony defense counsel sought to elicit was relevant and should have been admitted.

Rule 403, SCRE Analysis

The Court of Appeals further found that, even if relevant, the questions defense counsel sought to ask Minor were properly excluded under Rule 403, SCRE, because the questions had a substantial likelihood of confusing the jury. Respectfully, a Rule 403 analysis was not conducted by the trial court, and pursuant to the Court of Appeals holding in State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), the matter should be remanded to the trial court to conduct a proper, on-the-record balancing test.

In Spears, *supra*, the Court of Appeals explicitly declined to conduct a de novo Rule 403 balancing test when the trial court failed to perform the requisite on the record analysis. Spears at 258, 742 S.E.2d at 883-84. That decision was in line with this Court's holding in Colf that held that when a balancing test is required, *it must be conducted by the trial court.* See State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (emphasis added). This Court wrote,

> The Court of Appeals *should not have undertaken* the Rule 609(b) balancing test itself, but should have remanded the question to the trial court. In *Cavender*, the Fourth Circuit noted *that it is precisely this absence of specific facts and circumstances that causes such cases to defy appellate review.* It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision.

Colf, at 628–29, 525 S.E.2d at 249 (internal citation omitted) (emphasis added).

As the Court of Appeals noted in Spears, other courts have found that remand is proper where the factors used by the trial court, or the specific facts and circumstances supporting the trial court's ruling, do not appear in the record. Remand in these instances was proper because an appellate court was not able to effectively review the circuit court's decision to admit or exclude evidence when the reasoning of the trial court was not given. See State v. Taylor, 196 Ariz. 121, 817 O.2d 488, 492-93 (1991); State v. McFarland, 228 W.Va. 492, 721 S.E.2d 62, 73 (2011).

However, "[t]hough an on-the-record Rule 403 analysis is required, this Court will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). In King, the trial court ruled on a Rule 404 and Rule 403, SCRE, matter stating

> Well, to my mind logically, and correct me if I'm wrong if you got some authority, but that goes to the sense he's charged with possession with intent to distribute drugs found right there, *it's establishing his nexus or contact with that and she's been there, seen that and all that. To my mind, it's fair.*

King at 157, 561 S.E.2d at 647. The Court of Appeals found that, although the trial court had not given a thorough on-the-record analysis pursuant to Rule 403, SCRE, it had given a "compressed" analysis that contained "some indicia of his [the trial court's] consideration of whether admission of the testimony was fair to King (i.e., more probative than prejudicial)." Id.

In Petitioner's case, no such compressed ruling occurred, thus remand for the trial court to conduct a full Rule 403, SCRE, balancing test on the record would be proper. In ruling on the State's objection pursuant to Rule 403, SCRE, the trial court stated

> All right. The question about her being pushed in the shower and put under cold water, the Court finds that not relevant. If it is relevant, it's excluded under 403. Now, I could see how it could become relevant, but based on the

proffer that was given, I do not see that it is. The part about the television is relevant and it's admissible.

App. 95, ll. 11-17.

There is nothing contained in the court's ruling that indicates which factor in Rule 403, SCRE, was the basis for his ruling. The trial court did not articulate if the testimony was substantially more prejudicial than probative, if the testimony would confuse the issues, or if the testimony would mislead the jury. The trial court merely stated that the testimony was excluded under Rule 403 without offering any specific facts and circumstances to support its ruling and without expressing what factors it analyzed.

Respectfully, the ruling in Petitioner's case was not a compressed Rule 403, SCRE, analysis with some indicia of the trial court's awareness that he undertook some analysis, but a perfunctory ruling on the matter which precludes full appellate review of the matter. See United States v. Ciesiolka, 614 F.3d 347, 357 (7th Cir.2010) (stating that a "perfunctory analysis is insufficient" and holding that "the district court abused its discretion in failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice"). There was nothing in the record that could support a finding that the trial court excluded the evidence under any specific factor listed in Rule 403, SCRE. Simply naming the rule under which the evidence was challenged was not a compressed analysis that indicated what the trial court was based its ruling upon. Petitioner respectfully requests that this matter be remanded to the trial court for a proper, on-the-record analysis pursuant to Rule 403, SCRE.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 24th day of October, 2022.