

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Laurens County
Hon. Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No. 2022-001626

RECEIVED

Jan 30 2023

S.C. SUPREME COURT

The State,

Respondent,

v.

Michael Cliff Eubanks,

Petitioner.

Opinion No. 5933 (S.C. Ct. App. filed August 10, 2022)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

DAVID M. STUMBO,
Solicitor, Eighth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	8
I. The Court of Appeals correctly affirmed the trial court’s decision properly admitting the testimony of the State’s expert witnesses regarding the victim’s diagnosis of PTSD because the testimony was substantive evidence and its probative value significantly outweighed any possible prejudice. Further, there is no basis upon which this Court should overrule State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (Petitioner’s Questions I and II).	8
II. The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Petitioner. Additionally, contrary to the Court of Appeals’ holding, Petitioner opened the door to any testimony presented. Finally, even if the trial judge erred in admitting the testimony, the Court of Appeals properly concluded any error was harmless. (Petitioner’s Question III).....	12
III. The Court of Appeals properly found any argument regarding the State’s closing argument at trial was not preserved for review on appeal. Petitioner has not challenged the actual ruling by the Court of Appeals that a post-trial motion was required, so it is the law of the case. (Petitioner’s Question VI).....	16
IV. The Court of Appeals properly affirmed the trial court’s denial of Petitioner’s motion for a continuance to examine the cell phone because the State agreed not to address the cell phone searches or videos and because he had opportunity to have the phone tested since it was in his possession until right before trial. Petitioner has not challenged either of these rulings, so they are the law of the case. (Petitioner’s Question VII).....	18
V. The Court of Appeals properly affirmed the trial court’s decision not to exclude the juror because there was no concealment based on the questions asked and any possible concealment was unintentional. Additionally, as noted by the Court of Appeals the issue is not preserved for review. (Petitioner’s Question IX).....	20

VI. Petitioner’s Questions IV, V, VIII, X, XI, and XII are all
raised in a conclusory manner and should be deemed abandoned..... 23

CONCLUSION..... 24

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the trial court's decision properly admitting the testimony of the State's expert witnesses regarding the victim's diagnosis of PTSD because the testimony was substantive evidence, and its probative value significantly outweighed any possible prejudice. Further, there is no basis upon which this Court should overrule State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (Petitioner's Questions I and II).

II. The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Petitioner. Additionally, contrary to the Court of Appeals' holding, Petitioner opened the door to any testimony presented. Finally, even if the trial judge erred in admitting the testimony, the Court of Appeals properly concluded any error was harmless. (Petitioner's Question III).

III. The Court of Appeals properly found any argument regarding the State's closing argument at trial was not preserved for review on appeal. Petitioner has not challenged the actual ruling by the Court of Appeals that a post-trial motion was required, so it is the law of the case. (Petitioner's Question VI).

IV. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a continuance to examine the cell phone because the State agreed not to address the cell phone searches or videos and because he had opportunity to have the phone tested since it was in his possession until right before trial. Petitioner has not challenged either of these rulings, so they are the law of the case. (Petitioner's Question VII).

V. The Court of Appeals properly affirmed the trial court's decision not to exclude the juror because there was no concealment based on the questions asked and any possible concealment was unintentional. Additionally, as noted by the Court of Appeals the issue is not preserved for review. (Petitioner's Question IX).

VI. Petitioner's Questions IV, V, VIII, X, XI, and XII are all raised in a conclusory manner and should be deemed abandoned.

STATEMENT OF THE CASE

Procedural History

On July 21, 2017, the Laurens County Grand Jury indicted Petitioner on one count of third-degree criminal sexual conduct with a minor. On August 18, 2017, the Laurens County Grand Jury indicted Petitioner on one count of first-degree criminal sexual conduct with a minor. Thereafter, on July 27, 2018, the Laurens County Grand Jury indicted Petitioner on one count of second-degree criminal sexual conduct with a minor. (App. 15, 17, 19).

The case was called for a jury trial on July 31, 2018, before the Honorable Frank R. Addy Jr., and a jury. (App.36). Petitioner was subsequently found guilty as indicted by the jury. (App.800-802). Judge Addy sentenced Petitioner to twenty-five years imprisonment for first-degree criminal sexual conduct with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual conduct with a minor, and fifteen years imprisonment, suspended with probation for five year, for second-degree criminal sexual conduct with a minor to run consecutive to the twenty-five year sentence on the first-degree criminal sexual conduct with a minor. (App.813-815). On August 13, 2018, Petitioner moved for a new trial. (App.21) On September 11, 2018, by written order, Judge Addy denied the new trial motion. (App.9).

After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. See State v. Eubanks, 437 S.C. 458, 878 S.E.2d 335 (Ct. App. 2022). On September 9, 2022, Petitioner served and filed a petition for rehearing, which was denied on October 20, 2022.

Factual Background

Petitioner, who was Victim's stepdad, lived with Victim, her mom Deanie, and a sibling. Petitioner also had children from another marriage who visited. In November of 2013, Deanie was involved in an automobile accident that left her with a broken neck. (App.596-598). Due to

the accident, Deanie had to undergo back surgery and was unable to work. (App.443). Initially, Deanie did receive disability provided by the State, but that was ultimately cancelled because the accident was not work related. (App.598). During this time, Petitioner quit his job and did not work for about 6 months which led to the family losing their home on Teague Road and having to move in with Deanie's parents on Beaver Dam Road. (App.443).

In May of 2017, one of the children attended a counseling session with Kimberly Little at Gilchrist Consultation and Counseling. (App.142). The child suffered from depression due to a series of family losses and bullying that had occurred at school. (App.172). During his session, he explained to Little he did not have a relationship with his father nor his stepfather, Petitioner, but he wanted a relationship with Petitioner. (App.173). According to the child, Petitioner and Deanie were not getting along in the home, and the Victim was the "peacekeeper" with whom Petitioner spent a lot of his time. (App.173). After her session with the child, Little decided to ask Deanie if she could meet with Victim "to make sure she was ok." (App.173).

On May 16, 2017, the Victim met with Little. Victim was fidgety, anxious and crying. (App.173). After Little's session with Victim, Little contacted DSS and law enforcement. (App.174). Agents from both agencies arrived and took statements from the Victim and Little. (App.174-175). Petitioner also showed up at Little's office with his mother but was intercepted by Deputy Ronald Richey (Richey). (App.175). Petitioner wanted to go inside, but Richey asked Petitioner to wait in the parking lot. (App.167-168). The case was turned over to DSS and Investigator Jared Hunnicutt (Hunnicutt).

On May 17, 2017, Deanie and Victim met with Hunnicutt at the Sheriff's station where statements were provided. (App.86). Hunnicutt also met with Petitioner on May 17, 2017, to receive his statement of events. (App.87). Hunnicutt informed Petitioner the Victim made

allegations of abuse and the scope of those allegations. (App.87). Petitioner willfully gave a statement. (App.818). In the statement Petitioner explained:

As far as I can remember, I have not touched her in any way that I can remember to make her feel this way. She has fell asleep at times with me and my daughter, . . . in the bed, but I have also picked her up and took her to her bed. And I have also fell asleep in my bed watching TV with me waking up with her next to me. I have no clue what goes on when I sleep. And I'm not saying that I did or didn't while I was asleep.

(App.345; App.818). Hunnicutt further explained that Petitioner mentioned catching the Victim masturbating, the Victim was very flirtatious with Petitioner and would do things other kids her age would not typically do, but Petitioner did not know what to do about the Victim's behavior. (App.91-92) Petitioner freely left the Sheriff's office after writing that statement. (App.93).

Later on that same day, May 17, 2017, Hunnicutt asked Petitioner if he would be willing to come back to the Sheriff's office to discuss in further detail his first statement and the allegations against him. (App.94). Petitioner arrived at the Sheriff's office with his parents and gave another statement, freely, detailing an encounter with the Victim at the barn that was not provided in the first statement. (See App.819) In Petitioner's second statement, Petitioner averred he was tearing down some pallets with the Victim at their barn and, at some point, the Victim crawled into Petitioner's lap and began "wiggling on his leg." (App.98). Petitioner stated he tried to push the Victim away, but she would not stop. Petitioner ejaculated and did not know what to do. (App.98). Petitioner indicated he knew it was wrong, that he tried to push the Victim away, but it still aroused him, and he ejaculated in his pants. (App.99). After providing this statement, Petitioner was arrested. (App.100).

The Victim testified Petitioner began sexually abusing her when she was "young" at around the age of six at the Teague Road home. (App.184). Initially, Petitioner would touch

Victim on her breasts, butt, and vagina with his hands. (App.186). Petitioner would digitally penetrate Victim's vagina. (App.187). Petitioner would also perform oral sex on Victim. (App.188). Then Petitioner would "use his boy part against [her] girl part" and would insert the "tip" into Victim's vagina. (App.189-190). The Victim testified when she was about eight years old, Petitioner would pick her up early in the morning while she was still asleep and take her to the couch in the living room. (App.184). Then, Petitioner would pull Victim's pants down and pull his pants down and start rubbing his penis against Victim's vagina. (App.185). The Victim also testified "[Petitioner would] put his boy part on the rag and white stuff would come out." (App.194).

The Victim further testified to instances that occurred at the barn where Petitioner would put boards up to block the view and would pull her pants down and position her so her "butt was on his boy part." (App.219). The Victim testified Petitioner would breathe hard and white stuff would go on the chair and floor. (App.221). The Victim explained multiple instances that occurred at various locations, including details of when Petitioner would put his "boy part" in her "girl part" and behind and expressed the pain that would occur. (App.221-225).

When the victim explained to her mother the abuse by Petitioner, her mother initially did not believe her and thought she was lying. Once the victim explained how Petitioner would start kissing her on the neck and ear, and then play with her breasts, and then continue from there, the victim's mother knew it had happened because it was how Petitioner started foreplay with her. (App.469). Deanie further testified and gave the court a walkthrough of Petitioner's signature bedroom foreplay. (App.470).

The Victim's brother testified he witnessed Petitioner grabbing the Victim's butt and they would cuddle under blankets on the couch and in the bedroom. (App.151-152). He also testified

Petitioner would take Victim to school but would not drive him to school, even though Petitioner went “right by [his school],” and Petitioner gave the Victim money for school but would not give him money for school because Petitioner needed it for his own lunch. (App.152-153). The brother described how Petitioner would enter the bathroom with Victim when Victim was not dressed. (App.150-151).

There was conflicting testimony surrounding Petitioner’s perceived preferential treatment of Victim compared to the other children in the family. Several family members of Petitioner testified they didn’t really see any difference in the way Petitioner treated the other children compared to the victim¹. However, the Victim testified she did receive special attention and Petitioner and Deanie would fight about Petitioner not treating all the children the same. (App.229). Petitioner’s biological daughter also testified to the special attention Petitioner would give the Victim compared to how he treated the other children. Petitioner’s biological daughter even testified about gifts the Victim would receive like clothing, shoes, and perfume. (App.415). Deanie testified that after Petitioner was arrested, she found clothing, jewelry, perfume, lotions, and a lot of cash that Petitioner had given the Victim that she did not know about. (App.477).

On June 1, 2017, the Victim was interviewed by Heather Bennett (Bennett) at Beyond Abuse, which is a Children’s Advocacy Center. (App.302-303). The Victim was twelve years old at that time. In her interview, the Victim asserted something happened to her at the Teague Road and Beaver Dam Road homes from when she was six years old until she was twelve years old. (App.303-304). On June 8, 2017, Dr. Lyle Pritchard performed a sexual assault medical examination on the Victim. (App.379). Dr. Pritchard testified that he did not find any signs of trauma and that it was a normal exam. (App.381). Pritchard also testified that 95% of exams in

¹ App. 537-541, 543-546, 555-559, 560-563, 568-570, 572-579, 582-584

cases where children have been sexually assaulted the exams render a normal finding. (App.381-383). Specifically, Dr. Pritchard testified it is not definitive of abuse or no abuse. (App.387).

Samantha Black, a therapist employed by the Beckman Mental Health Center, met with the victim on June 14, 2017, and “got her background, history, family abuse allegations, symptoms, and [] assessment measures.” (App.307). Based on Ms. Black’s assessment of the Victim, she thought the Victim should undergo a therapy known as trauma focused cognitive behavior therapy. (App.307). Dr. Eman Sharawy, the medical director of Beckman Mental Health Center, testified that she reviewed Black’s notes and records and then interviewed the Victim. After her interview and review, Dr. Sharawy diagnosed the Victim with posttraumatic stress disorder, PTSD. (App.330). Dr. Sharawy testified that the Victim was “very anxious, very avoidant” and further noted the Victim’s behaviors and symptoms. (App.331). Dr. Sharawy further testified the Victim’s therapy was decided from that meeting and she prescribed an anti-depressant for the Victim. (App.331).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's decision properly admitting the testimony of the State's expert witnesses regarding the victim's diagnosis of PTSD because the testimony was substantive evidence and its probative value significantly outweighed any possible prejudice. Further, there is no basis upon which this Court should overrule State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (Petitioner's Questions I and II).

The Court of Appeals correctly found the testimony of Ms. Black and Dr. Sharawy was properly admitted and did not impermissibly bolster or vouch for the child victim. The testimony was properly admitted under South Carolina law and there is no reason to alter this Court's prior decisions. Additionally, any issue related to bolstering or vouching is not preserved for review on appeal.

First, any argument that the testimony provided by Ms. Black or Dr. Sharawy impermissibly vouched for or bolstered the testimony of the victim is not preserved for review on appeal. During the discussion to exclude the testimony, the trial court ruled he would admit the testimony as long as "these witnesses stay away from any sort of vouching or statement about the veracity of the victim in this case." (App.314). The trial court continued after hearing more argument particularly about Ms. Black's testimony:

It is circumstantial evidence that explains some of the behavioral characteristics that we heard the victim testify to earlier. So long as we don't wind up in a vouching situation, and presumably the next witness will be qualified as an expert in this particular field. Again, the Court finds that the probative value of this evidence outweighs any prejudicial effect so long as we stay away from the vouching that was so troublesome in Kromah. That'll be my ruling.

(App.316-317). Importantly, the trial court ruled it admissible as long as the testimony did not vouch for the child or violate Kromah. Most significantly, immediately after counsel asked that his objection to the admission of the testimony be noted for the record, the trial court stated:

“Now, Mr. Wise, I would ask this. If you feel like they’re getting into vouching evidence, like I believe the child, I need to hear from you. Okay?” Counsel immediately responded “I understand.” (App.317). The trial court, therefore, clearly expected counsel to object in the event any testimony bolstered or vouched for the child. Because counsel never raised an objection during any of the testimony of Ms. Black or Dr. Sharawy, any argument that the specific testimony presented impermissibly bolstered or vouched for the child victim is not preserved for review on appeal. See e.g., State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

Initially, there is no reason to alter the existing case law in South Carolina. Petitioner seems to argue State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), created new rules of law that conflict with State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and other similar cases. However, this Court specifically acknowledged the viability of Schumpert in State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015), and more recently dispelled Petitioner’s argument in State v. Makins by indicating the Court “had not created any new law or standard regarding admissibility in Kromah or Anderson but instead applied the general rule that a witness

cannot bolster the credibility of another witness because doing so invades the province of the jury.” State v. Makins, 433 S.C. 494, 502, 860 S.E.2d 666, 670–71 (2021). The testimony allowed by Schumpert and other cases is properly limited by the long-standing rules which do not allow a witness to impermissibly vouch for or bolster another witness as well as by the hearsay rules of cases such as State v. Simmons, 423 S.C. 552, 567, 816 S.E.2d 566, 574 (2018).

This case is very similar to the case of State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004). In White, the appellant maintained testimony that the victim’s symptoms were consistent with those of a recent trauma sufferer was more prejudicial than probative and not allowed pursuant to Schumpert. While White involved an adult victim, the South Carolina Supreme Court explained that Schumpert clearly allowed testimony of the type admitted and further elucidated:

Expert testimony on rape trauma may be **more crucial** in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred.

White, 361 S.C. at 414–15, 605 S.E.2d at 544 (emphasis added). Additionally, the Court found the evidence not unduly prejudicial and found it probative to dispute the appellant’s claims.

In the instant case, the testimony that the child victim suffered PTSD as a result of trauma refutes Petitioner’s claims that the only touching that occurred was innocent touching and that nothing more happened with the child victim.² The fact that after the alleged abuse occurred and

² It is significant to note that neither Ms. Black nor Dr. Sharawy testified as to the cause of the trauma suffered by the child victim. Neither indicated they believed it was sexual abuse which

was disclosed that the child suffered behaviors consistent with PTSD, including being “very anxious, very avoidant” and “guarded and withdrawn,” having “nightmares, bad dreams,” and having “depressive symptoms, low mood . . .” (App.331). This testimony and diagnosis was not mere repetition of hearsay, but was instead the exact type of behavioral testimony described in Schumpert and White which directly refutes Petitioner’s claim that nothing traumatic happened to the child and instead supports the existence of sexual abuse.

Additionally, the testimony by Ms. Black and Dr. Sharawy did not impermissibly bolster or vouch for the child victim’s allegations of sexual abuse. As noted before, neither tied the symptoms of trauma or PTSD to sexual abuse. Additionally, as the Supreme Court of Virginia noted in a similar case in which testimony of PTSD was admitted: “[the doctor’s] testimony merely tended to corroborate the victim’s testimony, in the same way that a doctor’s testimony describing a rape victim’s physical injuries tends to corroborate the victim’s testimony.” Ward v. Commonwealth, 264 Va. 648, 653, 570 S.E.2d 827, 831 (2002). Accordingly, the trial court did not err in admitting the testimony by Ms. Black and Dr. Sharawy.

resulted in the PTSD or the symptoms of trauma. They merely explained the symptoms and indicated the child victim exhibited those symptoms consistent with a recent traumatic experience.

II. The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Petitioner. Additionally, contrary to the Court of Appeals' holding, Petitioner opened the door to any testimony presented. Finally, even if the trial judge erred in admitting the testimony, the Court of Appeals properly concluded any error was harmless. (Petitioner's Question III).

The Court of Appeals correctly found any issue regarding the admission of the existence of Petitioner's stash of pornography was harmless. The testimony was relevant because it was evidence of how Petitioner desensitized the victim to the sexual abuse which was occurring—quintessential grooming. Further, contrary to the Court of Appeals' decision, Petitioner did open the door to the testimony by the questioning of the child and the clear inferences he sought to create that the child may have seen a search but did not see any actual videos because they were not reported.

As an initial matter, Petitioner's argument regarding Rule 404(b), SCRE, is not preserved for review. Petitioner at no point during trial objected to the testimony as "improper character evidence" under Rule 404(b), SCRE, and therefore this issue is not preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003).

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

A defendant may open the door to otherwise improper evidence through defendant's own introduction of evidence or witness examination. State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). "Where one party introduces evidence as to a particular fact or

transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially.” State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (citations omitted). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (“[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially.”). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). “Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge.” State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted).

Prior to trial, the State indicated it did not intend to go into the pornography owned by Petitioner, including pornography seen on a cell phone. (App.107). Nevertheless, Petitioner in cross-examination of the Victim introduced the subject of pornography by questioning the Victim about videos she saw on Petitioner’s cell phone. (App.253-257). Additionally, he specifically opened the door to testimony about the remainder of Petitioner’s collection of pornography by asking questions designed to make it appear to the jury the only time the child saw pornography or was exposed to pornography was when it was on Petitioner’s cell phone. (App.253-259). His questions were designed to have the jury believe the child inadvertently saw Petitioner doing a search for pornography on his phone and nothing more. He tried to

specifically discredit the child's testimony about seeing pornography with Petitioner by indicating she had been willing to report seeing a search but would not report seeing the videos.

The State questioned the child victim about watching pornography and about Petitioner's collection of pornography. She indicated he watched it—though the testimony is uncertain whether the videos watched were from the tub or somewhere else—when he would lay on the bed with her, he showed her what was in the tub of pornography that he kept in the barn and he had her move it in the closet to better conceal the pornography. (App.281-283; 287-291). Petitioner opened the door to the discussion of the pornography by asking the child about the video and search on the iPhone. The State needed to explain to the jury that it was not just an isolated incident in which the child victim was exposed to the pornography by Petitioner, but that he watched it while she was in the room and also that he showed her what he collected and where he kept it.

The information was relevant because the child was knowingly exposed to adult pornography by Petitioner as a means of desensitizing her to what was about to happen to her. She explained the first time she saw something was right before the physical touching began occurring and that she told her mom because she thought it was wrong. However, when she watched further videos after the touching started happening, she did not tell her mom. (App.254). The exploration of this grooming was directly relevant to the charges, especially when Petitioner placed his intent in regards to the barn incident directly at issue.

Additionally, the admission of the tub as well as the testimony from the victim was entirely harmless as found by the Court of Appeals. The jury knew Petitioner owned a container of legal, adult pornography. The testimony from the child victim regarding whether she ever saw any of that pornography was, at best, inconsistent and generally indicated he did not watch it

with her but she saw other pornography while on the bed with him. The testimony about watching the other pornography on the bed, as well as seeing the search and pornography on Petitioner's phone, was properly admitted. The admission of the fact Petitioner owned legal pornography would not have altered this jury's decision.

III. The Court of Appeals properly found any argument regarding the State's closing argument at trial was not preserved for review on appeal. Petitioner has not challenged the actual ruling by the Court of Appeals that a post-trial motion was required, so it is the law of the case. (Petitioner's Question VI).

The Court of Appeals correctly found any issue related to the closing argument by the solicitor at trial was not properly preserved for review on appeal. Most significantly, while Petitioner asserts an exception applies to the preservation rules, it is a limited exception and the Court of Appeals found the exception still required Petitioner to raise the issue in a post-trial motion. Petitioner has not contested this ruling, so it is the law of the case.

Petitioner concedes trial counsel did not object to any of the comments by the solicitor during closing argument he now asserts warrant reversal. Instead, he maintains the Court should overlook the preservation requirements based on an exception that the comments were so vicious and inflammatory as to result in clear prejudice. See Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977)).

The Court of Appeals acknowledged the exception but found based on this Court's opinion in Dial v. Niggel Assocs., Inc., 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998), even a claim regarding clear prejudice under Toyota must be raised in a post-trial motion to be considered on direct appeal. As found in Dial: "Under Toyota, the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." Id. at 257, 509 S.E.2d at 271. Petitioner has not challenged the Court of Appeals ruling that he failed to preserve the issue because he did not raise it in either a contemporaneous objection or via a post-trial motion. As a result, this unappealed ruling is the law of the case. See See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (explaining an unappealed

ruling, whether right or wrong, is the law of the case)(quoting Atl. Coast Builders & Contractors, L.L.C. v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)); State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (noting an unchallenged ruling, right or wrong, becomes the law of the case).

On the merits, the nature of the closing arguments in the cases cited by Petitioner are significantly different from the commentary from the solicitor in this case. None of the comments were racial, the most common reason for applying the Toyota exception. As the United States Supreme Court has concluded: “it ‘is not enough that the prosecutors’ remarks were undesirable or even universally condemned.’ . . . The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986).³ In the instant case, the commentary by the solicitor was derived from the testimony and record before the jury. Further, it was not of a racial nature nor was it so inflammatory that it infected the trial with unfairness. As a result, the issue should have been raised to the trial court to be preserved and this Court should not reverse Petitioner’s convictions because of the closing argument.

³ The comments in this case are not nearly as inflammatory and “dehumanizing” as those used in Darden. There, the closing argument included the prosecutor’s desire that someone blow the defendant’s face off with a shotgun, called defendant an animal, and argued only the death penalty could prevent the defendant from performing future similar acts. Darden, 477 U.S. at 180.

IV. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a continuance to examine the cell phone because the State agreed not to address the cell phone searches or videos and because he had opportunity to have the phone tested since it was in his possession until right before trial. Petitioner has not challenged either of these rulings, so they are the law of the case. (Petitioner's Question VII).

The Court of Appeals correctly found the trial court did not abuse its very broad discretion in denying Petitioner's request for a continuance to examine his cell phone which was within his sole possession up until a week prior to trial and could have been examined at any point prior to it being delivered to the State. Additionally, the Court of Appeals properly found Petitioner has not demonstrated any possible evidence sufficient to warrant the grant of the continuance. Neither of these rulings have been directly challenged by Petitioner and are, therefore, the law of the case. See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (explaining an unappealed ruling, whether right or wrong, is the law of the case)(quoting Atl. Coast Builders & Contractors, L.L.C. v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)); State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (noting an unchallenged ruling, right or wrong, becomes the law of the case).

The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006). As this Court stated:

When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Babb, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989) (quoting State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)).

Petitioner had possession of the cell phone until several days before trial. (App.109-111, 373). Prior to turning it over, the phone was in Petitioner's possession and the only reason he explained he did not have it analyzed was because SLED would be cheaper than hiring his own expert to do it. (App.111). Further, Petitioner never indicated his expert would be able to examine the phone, which was damaged and could not be accessed by SLED's experts. Finally, as the trial court correctly determined any issue related to the phone would be a collateral issue and not a central issue in the case. See e.g., State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding no abuse of discretion in denying a continuance to have a comforter tested for DNA because Meggett "had a significant period of time to obtain the testing and his failure to do so was a result of his own inaction").

V. The Court of Appeals properly affirmed the trial court's decision not to exclude the juror because there was no concealment based on the questions asked and any possible concealment was unintentional. Additionally, as noted by the Court of Appeals the issue is not preserved for review. (Petitioner's Question IX).

The Court of Appeals correctly found juror Bailey did not intentionally conceal any information during voir dire and the trial court did not err in refusing to dismiss Bailey from the jury panel. Initially, the issue is not preserved for review on appeal. Also, Bailey did not conceal any information and, to the extent any concealment could be found, it was an unintentional concealment based on the facts and circumstances explained by Bailey during the trial court's examination.

This Court has laid out a two criteria test to assess whether a juror's failure to disclose a potential bias warrants granting a defendant a new trial; and if either of the criteria is missing, the trial judge may not remove the juror. State v. Coaxum, 410 S.C. 320, 329-330, 764 S.E.2d 242, 246 (2014); cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial."). First, the trial judge must determine whether the concealed information was done intentionally by the juror. Sparkman, 358 S.C. at 496, 596 S.E.2d at 377; State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). Next, if the answer to the first question is yes, then the trial judge must consider whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Id. A juror's unintentional withholding of information, including material information, does not support an inference of partiality or bias.

Ultimately, a decision as to whether to dismiss a juror and replace the juror with an alternate juror falls within the sound discretion of the trial judge. State v. Bell, 374 S.C. 136,

147, 646 S.E.2d 888, 894 (Ct. App. 2007); see Simmons, 360 S.C. at 43, 599 S.E.2d at 452 (recognizing decisions regarding the removal of veniremen rest in the sound discretion of the trial judge).

In the case *sub judice*, the trial judge and parties learned just after opening arguments that Bailey sold a home to a relative of the victim and was formerly related—through his ex-wife—to a relative of the victim. The record clearly indicates Mr. Bailey did not intentionally conceal the information regarding his prior marriage and the real estate transaction with Petitioner’s relatives; in fact, when he realized it, he candidly revealed it to the bailiff. (App.138-139). See Woods, 345 S.C. at 588, 550 S.E.2d at 284 (“Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror’s failure to respond is reasonable under the circumstances.”). In this case, the question asked if any juror “is” related by blood or marriage—it did not ask whether any juror is or was related. Further, it asked if the juror had a “any close social or otherwise any kind of relationship with the alleged victim.” Neither question directly relates to the situation faced by Bailey. Thus, the record shows that Mr. Bailey did not intentionally withhold the information during voir dire.

“[I]f either of the criteria is absent, the judge may not remove the juror on that basis.” Coaxum, 410 S.C. at 330, 764 S.E.2d at 246; State v. Burgess, 391 S.C. 15, 19–20, 703 S.E.2d 512, 514–15 (Ct. App. 2010); see Sparkman, 358 S.C. at 497, 596 S.E.2d at 378 (“Because [the juror’s] concealment was unintentional our inquiry is over, however, we fail to see how [the defendant] was prejudiced given that the trial judge questioned the jury after the verdict.”); State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247–48 (2002) (finding that a juror’s “scant acquaintance” with the defendant’s family would not have prejudiced the State had the juror

remained on the jury). The trial judge properly questioned Juror Bailey after his voluntary disclosure of the very remote connections to the victim and her family and correctly determined no cause existed for excusing him because he demonstrated he could be fair and impartial in the exercise of his duties.

VI. Petitioner's Questions IV, V, VIII, X, XI, and XII are all raised in a conclusory manner and should be deemed abandoned.

Petitioner has raised twelve total issues in this appeal. Six of his issues are raised in such conclusory fashion that they should be deemed abandoned and not considered by this Court. As a result, this Court should deny the petition as to questions IV, V, VIII, X, XI, and XII.

All of these issues raised by Petitioner allege error on the part of the Court of Appeals but do little more. “Mere allegations of error are not sufficient to demonstrate an abuse of discretion.” First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”).

Further, every issue is raised in a purely conclusory manner without analysis or application of any cited authority—some of the issues do not even cite authority for the issue being raised as error. See Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (an exception was deemed effectively abandoned where the argument relating to the exception consisted solely of a “bald conclusion”); R. & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (“An issue is deemed abandoned if the argument in the brief is only conclusory.”); see also, State v. Gomez, 290 Kan. 858, 866, 235 P.3d 1203, 1209–10 (2010) (“To preserve an issue for appellate review, a party must do more than incidentally raise the issue in an appellate brief. The party must present an argument and support that argument with pertinent authority or show why the argument is sound despite a lack of supporting authority or in the face of contrary authority. Otherwise, the argument will be deemed abandoned.”).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

DAVID M. STUMBO,
Solicitor, Eighth Judicial Circuit

BY:


William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 30, 2023