STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County
Brian M. Gibbons, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

BRADLEY MARK CORLEW,

Appellant.

Appellate Case No. 2021-000989

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

P.O. Box 607
Lancaster, South Carolina 29721-0607
(803) 416-9336

ATTORNEYS FOR RESPONDENT

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II.

The trial court did not err in allowing a medical questionnaire with Daughter's written answers into evidence and Appellant was not prejudiced since the objected to sentence was cumulative to the forensic interview from nineteen days earlier.

III.

Appellant did not object to testimony describing photographs found on his phone, and when the trial court later in the trial sustained his objection to the photographs being introduced into evidence, Appellant did not move to strike prior testimony or ask for further relief, therefore Appellant received the relief requested. Any error is harmless in light of the overwhelming evidence of guilt.

IV.

The record fails to support Appellant's claim that Appellant was seated where the victims were completely unable to see him, and nonetheless Appellant's counsel acquiesced in Appellant's final seating arrangement.

STATEMENT OF THE CASE

Appellant was tried and the jury convicted him for criminal sexual conduct in the first degree, criminal sexual conduct in the second degree, and incest at the conclusion of the trial before the Honorable Brian M. Gibbons on August 30 – September 2, 2021. The two victims were Applicant's own daughter (Daughter) and his girlfriend and accomplice, Sarah Lacy's daughter (Sarah's daughter). Judge Gibbons sentenced Appellant to life imprisonment for first degree criminal sexual conduct, twenty years' imprisonment for the second degree offense, and ten years' imprisonment for incest.

STATEMENT OF FACTS

Chester Police Officer Keesha Tobias was the first witness for the State. She testified the Rock Hill Police Department contacted the Chester City Police Department, referring a possible domestic violence incident reported by Sarah Lacy (Sarah). Officer Tobias met with Sarah on August 22nd or 23rd – Sarah brought her four minor children with her. Sarah complained she was abused by her live-in boyfriend with her minor children in the home. When asked by the prosecutor, Officer Tobias testified Sarah said the abuser's name was Brad Corlew. R. pp. 78-80.

However, the conversation eventually changed from the discussion of mere domestic violence to some self-incriminating statements on Sarah's part, including reports of sexual abuse against the children. Sarah's children were taken into protective custody. R. pp. 80-81; pp. 86-87. Officer Tobias explained:

> [Sarah] said sexual abuse had taken place against her children, she, you know, openly admitted to that in a statement form and verbally on body cam. She said that some of her children and other children have been isolated in rooms without food sometimes. Sexual abuse. Physical abuse, attacking the children, beating the children for not doing something.

R. p. 87, lines 6-12. Sarah identified Appellant as the person committing the abuse. R. p. 57, lines 13-17. Officer Tobias learned Appellant had five children of his own and learned those children were now living with Heather Judd. R. pp. 91-93.

Appellant's daughter (Daughter) was thirteen years' old at the time of trial and she now lived with her grandparents. She is the oldest of five siblings. Appellant is her biological father. She did not have a relationship with her biological mother. Samantha Corlew, Appellant's wife who died in 2017, was like a mother to her. R. pp. 165-80. After Samantha died, the family moved from Chester to Florida to live with a relative. However, Appellant started a relationship with Sarah Lacy. She

and her children moved with Appellant and his children back to Chester. R. pp. 181-82.

Daughter testified Appellant and Sarah would have sex on the sofa in front of her and invite her to join in. She refused. They started bringing her in bed with them, with her in the middle so they both could probe her body, touching her breasts and vagina, both with and without clothes on. At first, the contact was outside her vagina, but later the contact included digital penetration. They made her touch Appellant's penis and Sarah's vagina. Appellant started having intercourse with Daughter. Sometimes Appellant became frustrated by the difficulty he encountered in achieving penile penetration of his daughter: "I mean, he would get mad at me sometimes because I couldn't take it and he said that 'you should be able to,' and stuff like that." R. p. 187, line 10 – p. 188, line 8. The intercourse happened a lot and additionally, Sarah inserted sex toys inside Daughter's vagina and butt. Appellant also used the sex toys on Daughter. R. p. 188. When asked if she considered telling anybody about the sexual abuse, Daughter explained, "I didn't really think about it, because like the way my dad made it sound was that it was like normal to do." R. p. 189, lines 10-16.

Daughter testified Sarah's daughter was also present sometimes, and she saw Appellant and Sarah use sex toys on Sarah's daughter too. Appellant tried vaginal penile penetration with Sarah's daughter but "she couldn't take it." R. pp. 189-90. Sarah took pictures and videos of Daughter's vagina. Daughter believed she sent the pictures to Appellant. R. p. 191. Appellant made Daughter put her mouth on his penis and he sometimes ejaculated in her mouth. He also put his penis in her butt. When asked how all this made Daughter feel, she answered she did not know, she was used to it. R. pp. 191-92.

There was physical violence too. One time on vacation, Appellant threw Daughter across the room and slapped her for taking some quarters out of Sarah's purse. Appellant also hit Sarah. Daughter was used to it. R. p. 194. **On cross-examination,** defense counsel asked if Son was kept

out of school for an injury, and when Daughter confirmed this, defense counsel then asked who injured Son. Both Appellant and Sarah injured Son. R. pp. 217-18.

Sarah urinated and defecated on the floor in the house. All the children did the same because the parents told them to. Sarah urinated on Daughter's brother. R. p. 195.

Eventually, Appellant, Daughter, and her siblings left Sarah's to live with Heather Judd. None of the sexual conduct occurred at Judd's house. When she had to return to Sarah's house, Daughter cried. After Sarah went to the police, Appellant told Daughter not to tell anyone because they would get in trouble. She did not tell because she did not want to get Appellant in trouble. R. pp. 197-200. Appellant and Judd had an "emergency marriage."

Daughter liked living with Judd. The sexual abuse ended when they moved in with Judd. Daughter testified she loves Appellant. She did not disclose Appellant's abuse in the first interview because she did not want to be taken away by DSS. But when she went into emergency foster care anyway, she disclosed the sexual abuse in her second forensic interview. R. p. 206, p. 208. She explained on redirect examination she figured out by the time of the second interview that what happened to her was wrong. R. p. 223.

The second victim, Sarah's daughter, also thirteen years old at the time of trial, testified Appellant rubbed her breasts, touched her vagina, put his penis in her vagina, and ejaculated.[1] R. pp. 227-28. Sarah's daughter testified she would go into Appellant's bedroom to watch a movie, but instead Appellant would undress her. R. p. 228. Appellant digitally penetrated Sarah's daughter's butt and attempted penile penetration of her butt and her vagina. R. p. 229. Sometimes Sarah's daughter bled and Appellant would tell her to shower. R. p. 230. Sarah's daughter testified Appellant said to not tell her mother. He threatened to make her eat sardines or put her in the corner.

R. p. 230; p. 233.

Appellant used sex toys and dildos, some vibrating, on Sarah's daughter. Appellant sometimes cuffed Sarah's daughter or Sarah. Most of these items came from Adam and Eve. R. p. 231. Sarah's daughter testified Appellant showed her a DVD she thought was disgusting showing sex toys being "testing out" which came with an order from Adam and Eve. R. p. 233. Sarah's daughter testified sometimes the toilet was clogged and they went to the bathroom in a bucket and they would not empty it for two weeks to a month. R. p. 232. Asked how she was doing since being away from Appellant, Sarah's daughter answered, "I've been good. I've had a few memories but none that would bring it back for a long time." R. p. 233, lines 13-14. Asked if the incidents she described happened all the time, Sarah's daughter replied, "Almost always." R. p. 234, lines 11-16. On cross-examination, Sarah's daughter admitted Sarah told her what Sarah did to Appellant's daughter (Daughter). Sarah apologized to her daughter and said it was Appellant's fault. R. p. 236.

Sarah Lacy testified she met Appellant on a dating website. She testified she pled guilty to both solicitation of a minor and unlawful conduct towards a child and was sentenced to an aggregate fifteen year sentence. R. p. 245. Sarah admitted she participated in sexual acts with the children. She testified she penetrated Daughter with a dildo. Sometimes this was alone, sometimes this was with Appellant. Sarah also digitally penetrated Daughter and witnessed Appellant commit both digital and penile penetration on Daughter. Sarah explained she would "open up" Sarah's daughter with a dildo for Appellant so Appellant could put his penis inside Sarah's daughter. She testified this happened multiple occasions. R. pp. 246-48.

Sarah claimed this conduct was at Appellant's request, and she complied because she was afraid for the children and her own safety. This went on for about a year. R. p. 248. Sarah admitted

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[1] Sarah's daughter suffers from severe diabetes and cerebral palsy. R. p. 111.

she saw both Daughter and Sarah's daughter perform oral sex on Appellant multiple times. R. p. 248. She corroborated Sarah's daughter's testimony that as a result of sexual contact, Sarah's daughter bled one time. R. p. 249.

Sarah confirmed Appellant told her to urinate on the children and they also urinated on her. Appellant had Sarah record one of the children urinating on the floor. R. pp. 249-50. Sarah confirmed they purchased sex toys from Adam and Eve and testified "everyone" could watch pornography and "everyone" could use the sex toys. Appellant wanted Sarah to videotape herself having sex with the children and videotape the children having sex with each other. R. pp. 250-51.

Appellant and Sarah were in contact after she reported abuse to the police. They took a road trip together, and during the trip, Appellant disposed of evidence on her phone. When they returned to Chester, Sarah was arrested. They continued to write letters back and forth. R. pp. 255-56. In these letters, Appellant told Sarah not to let law enforcement "play" her and he was happy he did not have to break his loyalty with her, assuring her he did not tell law enforcement too much. R. pp. 256-61

On cross-examination, Sarah confirmed Appellant beat her. R. pp. 266-67. Sarah also testified on redirect that Appellant threatened that Heather Judd would have somebody beat Sarah in jail if she did not recant her allegations against Appellant. R. p. 272.

Daughter's first forensic interview

Daughter was first interviewed on September 12, 2019. In the first interview, she identified Sarah as a sexual and physical abuser (State's Ex 1, Int. 1, 4:15-4:30), and her focus is on Sarah's crimes – Daughter did not disclose any sexual abuse by Appellant. Daughter disclosed she and Sarah fought in a hotel in Virginia, Sarah pulled out Daughter's younger sister's hair, and Sarah tied

up Son with twine.[2] (State's Ex 1, Int. 1, 7:45-8:10; 14:40 – 15:10). Sarah slapped and punched Daughter, and threw her on the floor. (State's Ex 1, Int. 1 25:30-26:00). Sarah tried to play with Daughter's genitals, used toys on Daughter, and tried to touch Daughter's genital area. (State's Ex 1, Int. 1 circa17:00; 19:30-19:45). Daughter also disclosed Sarah would walk around the house naked, urinate on Son, and defecate and urinate on the floor. (State's Ex 1, Int. 1 21:00-22:45). Daughter admitted Appellant and Sarah would physically fight and Appellant even punched Sarah in the face, but typified this violence as protecting her from Sarah and explaining it was not like Appellant punched Sarah for no reason. (State's Ex 1, Int. 1 30:45 – 31:45).

Daughter's second forensic interview

Two weeks later, on September 26, 2019, Daughter was interviewed again. Quickly Daughter apologized for lying in the first interview. (State's Ex 1, Int. 2, 0:30-1:00). Daughter explained Appellant told her not to tell on him. But Daughter explained she thought Appellant was a good man who made mistakes. He never did the things he did to her until he met Sarah. (State's Ex 1, Int. 2, 2:40-3:15).

She further detailed the sexual abuse Sarah inflicted, explaining Sarah used a fake "ding-a-ling" on Daughter and also digitally penetrated Daughter. Sarah told Daughter not to tell. Sarah used lubricant on Daughter. Sarah also made Daughter touch Sarah. (State's Ex 1, Int. 2, 12:15-12:45). She confirmed Sarah walked around the house naked. (State's Ex 1, Int. 2, 13:45-14:00). Sarah also sexually abused Sarah's daughter and Son. (State's Ex 1, Int. 2, 15:00-15:30). Daughter explained eventually Appellant began to "pitch in" as an accomplice to Sarah's sexual abuse. This is when they began to take pictures or videos sometimes. (State's Ex 1, Int. 2, 15:45-16:10).

[2] Appellant made the same accusation against Sarah in his interview with law enforcement. State's 6, Pt. 1 (15:00-15:30).

Appellant started having sex with Daughter. (State's Ex 1, Int. 2, 18:00-19:00). Daughter explained Sarah told her to go to sleep and then Appellant put his hands in Daughter's pants and touched the vaginal and anal areas, including digital penetration of the vagina. Appellant also used sex toys on Daughter. (State's Ex 1, Int. 2, 19:00-19:20). Further, Appellant made Daughter put her hand on Appellant's penis and made Daughter perform oral sex on Appellant. (State's Ex 1, Int. 2, 22:15-22:45).

Daughter also saw Sarah's daughter rub Appellant's penis and Appellant attempted penile penetration on Sarah's daughter. She observed Appellant digitally penetrate Sarah's daughter with a sex toy one time. Sarah was present sometimes for the sexual abuse and sometimes not. Sarah and Appellant also made Daughter watch them have intercourse although Daughter indicated she turned around. (State's Ex 1, Int. 2, 23:00 – 24:45). Sarah performed oral sex on Daughter once. (State's Ex 1, Int. 2, circa 32:15). Sarah urinated on two of the boys. (State's Ex 1, Int. 2, 45:45-46:15).

Daughter was still sympathetic towards Appellant, attempting to convince the interviewer that Appellant had changed since then. (State's Ex 1, Int. 2, circa 25:00). Daughter exclaimed it broke her heart that Appellant was in jail. (State's Ex 1, Int. 2, 42:45-43:00). She explained she did not disclose abuse because she did not want to put the family "through this." (State's Ex 1, Int. 2, 27:30 – 27:45).

State's Exhibit 2: Sarah's daughter's forensic interview

Sarah's daughter described watching Appellant beat Sarah. State's Exhibit 2 (4:30-5:15). She described an instance where Sarah and her children moved to a hotel and Appellant found them. State's Exhibit 2 (7:00-7:25). Sarah's daughter talked about Appellant punching a hole in the wall. State's Exhibit 2 (circa 13:00). Then the interview's focus changed to the sexual assaults. Sarah's daughter described digital penetration of her vagina by Appellant. State's Exhibit 2 (11:15-12:30).

Sarah's daughter also testified Son was made to touch Sarah's daughter's vagina. State's Exhibit 2 (13:30-14:00). She was made to touch Son's penis. State's Exhibit 2 (15:00-15:30).

Appellant touched Sarah's daughter's vagina and butt and this included digital penetration. State's Exhibit 2 (17:30-18:15). She was also made to rub Daughter. State's Exhibit 2 (19:30-19:45). Sarah's daughter disclosed Sarah told her Son was forced to "go down" on Sarah. State's Exhibit 2 (21:00-22:00). Sarah's daughter further recounted that the children were made to watch Appellant and Sarah have sex. State's Exhibit 2 (22:15-23:10). She testified one time, she was made to have intercourse with Son while at the same time Appellant and Sarah had intercourse. State's Exhibit 2 (24:30-25:00). Appellant also took pictures of Sarah's daughter with her clothes off. State's Exhibit 2 (26:00-26:15).

Sarah's daughter told the interviewer Appellant had pink and black dildos and a vibrator. Appellant used all of them on Sarah's daughter. State's Exhibit 2 (27:45-28:00). Daughter used the dildo on Sarah's daughter and rubbed Sarah's daughter. State's Exhibit 2 (28:15-28:30). Appellant also made Sarah's daughter put her mouth on Appellant's penis. State's Exhibit 2 (31:15-31:30).

Dr. Lamb examined both victims. Daughter had a normal exam, which is not atypical of sexual abuse. On the other hand, Sarah's daughter had a healed injury diagnostic of penetration into the vagina. R. p. 314. Dr. Lamb testified Sarah's daughter's injury was older than two weeks. Specifically, the injury was a laceration through the hymen, and it healed with a small piece of missing tissue. This injury to the hymen likely caused bleeding. R. pp. 314-15.

Investigator Brian Sanders of the Chester Police Department received information concerning domestic violence from the Rock Hill Police Department and interviewed Sarah on August 23. When allegations of sexual abuse arose, they arranged for her four children to be taken into emergency custody. R. p. 324, p. 327. Sarah was arrested on September 16. R. p. 326; p. 328.

Sarah reported that Appellant sexually abused both Daughter and Sarah's daughter. R. p. 334.

Appellant's statements to law enforcement

Investigator Sanders interviewed Appellant. Appellant accused Sarah of wanting them to have sex in front of the children and claimed he refused. Appellant took out the phone and showed explicit texts about the children he said Sarah sent him, and also showed videos of her defecating on the floor. He said Sarah touched her oldest daughter. R. pp. 339-41. Appellant provided law enforcement with a statement alleging abusive conduct by Sarah. R. pp. 345-46.

Appellant was interviewed twice. Two recordings of the same first interview on August 29, 2019 are contained on the flash drive admitted into evidence. One is separated into four parts, and one seems to be a single continuous recording. Respondent cites to the four part version of Appellant's January 2019 statement.

Appellant disclosed that Sarah beat the children. State's 6, Pt. 1, circa 14:45. Appellant related that one time Sarah hog-tied Son and face-timed Appellant to show him. State's 6, Pt. 1, 15:00-15:30. Another time, Sarah pulled out Daughter's sister's hair. State's 6, Pt. 1 15:45-16:15. Appellant testified that one time Sarah hit Daughter when Daughter mouthed off. Daughter kicked Sarah, then Sarah punched Daughter before Appellant intervened and told her not to hit his daughter. State's 6, Pt. 2 16:15-7:00. Appellant described other incidents of physical abuse, but then claimed nothing sexual occurred. State's 6, Pt. 2 19:45-20:00.

Appellant started contradicting himself. He told law enforcement that Sarah would talk about touching the children, either each other's children or any children. State's 6, Pt. 2 25:45-26:15. Appellant volunteered that Sarah would defecate on the floor. She would talk about touching her own children. Appellant then claimed he would "play along" although he denied in engaging in any sexual conduct with the children. State's 6, Pt. 2, 27:00 to end.

Appellant told law enforcement that Sarah had sex toys she left out all over the house and the children would carry the sex toys around. He denied ever touching the children and said, as far as he knew, that Sarah did not sexually abuse the children. State's 6, Pt. 3, 4:00-5:30; 10:30-11:00. She sent Appellant pictures of herself defecating or texts wishing she could urinate on him. State's 6, Pt. 4, 8:30-9:45 She would send videos of her masturbating while the children were around. State's 6, Pt. 4, 11:45-12:00. Appellant told law enforcement Sarah wanted to have sex with Appellant in front of the children, but he refused. Also, Sarah would be naked in bed with the children. State's 6, Pt. 4, 11:45-13:30. Appellant denied he ever touched any of the children, but admitted he "might have" role-played with Sarah when she talked about wanting to sexually abuse the children. State's 6, Pt. 4, 16:45-17:00.

The second interview occurred on September 16, 2019. Much of the same ground is covered, but importantly, Appellant admits he saw Sarah sexually assaulting Daughter, specifically Sarah was rubbing Daughter in the first residence they shared. He claimed his phone was in his hand to call the police on Sarah, but he did not do it. State's 6, Sept. Int. 44:30-46:40. This followed on the heels of law enforcement's question as to whether he was aware of the sexual abuse. Appellant answered, "Yes and no." State's 6, Sept. Int. 40:20-40:35. Then he said she was doing sexual things to the kids. State's 6, Sept. Int. 40:35-40:38. Appellant said Sarah would text, talking about wanting to have sex with their kids, and he admitted he would talk dirty with her. Sarah would talk about getting the girls pregnant – he said he would not do it. State's 6, Sept. Int. 47:00-48:30. Sarah would use dildos on them and have them use them on each other. State's 6, Sept. Int. 50:00-50:30.

Heather Judd is an employee of the Chester County Detention Center and Appellant's ex-wife. Judd and Appellant knew each other from some time ago and reconnected during June 2019. Appellant and his children soon moved in with Judd. R. pp. 119-22. When she had to work and

Appellant was on the road, Judd would drop Appellant's children off at the house to stay with Sarah. The children would cry because they did not want to be left with Sarah. R. pp. 123-25. Appellant and Judd married in Gatlinburg on August 30, but shortly afterwards, he left the household and moved into his truck. R. pp. 126-27. Judd also disclosed that Appellant traded his phone to Wal-Mart. R. p. 129.

Judd learned Appellant was with Sarah on September 6, but Appellant claimed he was trying to get evidence to show Sarah was lying about the allegations she made against Appellant. R. p. 130. Appellant sent letters to Judd claiming Sarah wanted Appellant to do bad things to the kids Sarah wanted to have sex with Appellant in front of the kids but Appellant would not do it. Appellant claimed he was a victim too. Appellant claimed Sarah let the children watch pornography, not Appellant. R. pp. 142-45. Appellant wrote Judd several letters and in one letter, Appellant explained:

> [Sarah] would lie and say she didn't hurt them, so I began to pretend to act like I liked her abusing them so she would be honest with me about doing it. If she felt like I liked it she would tell me, but I didn't like it. I would come home and yell at her and shit for doing it.

R. p. 141, lines 12-16. Despite Appellant's allegations against Sarah, Appellant still directed Judd to leave his children at Sarah's house when she went to work. R. p. 154.

Shauna Galloway-Williams testified as an expert in child sexual abuse dynamics. She explained one of the main reasons for delayed disclosure of sexual abuse by children is fear. Disclosure is also affected by the commission of abuse by authority figures that children assume are acting in their best interests. R. pp. 375-76.

Galloway-Williams explained how a child observing domestic violence would interpret that as an indirect threat when "a child is witnessing this person who may be harming them also being

aggressive or hurtful to other people." The child may internalize that to believe they would be harmed or another person will be harmed if they report the sexual abuse. R. p. 378, lines 11-21.

The perpetrators may engage in behaviors "in a way to normalize that for children, or essentially what we might consider grooming where you're introducing a child to sexual behavior, sexual knowledge over a period of time . . . ." R. p. 379, lines 13-19. Galloway-Williams further explained, "It may involve sexual jokes, sexual pictures, introducing children to pornographic images, normalizing a behavior that essentially wouldn't be normal for a child at that developmental age." R. p. 379, lines 19-22.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Jenkins, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). The first three issues in this appeal involve the trial court's decision to allow evidence: The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

The last issue concerns an alleged constitutional error, but as will be shown, little information is soundly known about this allegation. "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983); United States v. Ford, 548 F.3d 1, 7 (1st Cir. 2008) (finding one could draw different inferences from the defendant's gesture. On the cold record, the Court of Appeals could not recreate the gesture demonstrated to the district court. "Instead, this type of inquiry recommends our deferential review of the lower court's factual findings.").

ARGUMENT

I.

The trial court did not err in admitting evidence that was res gestae of the crimes, and all the charged conduct and contemporaneous extrinsic acts were part of the common scheme or plan to subject both Appellant's children and his accomplice's children to a continuous cycle of sexual assault and abuse to serve Appellant and his accomplice's insatiable appetite for sexual depravity.

Appellant complains the trial court erred in not limiting extrinsic acts committed by Appellant or his accomplice, Sarah. Appellant never renewed this in limine objection and never complained about evidence of most of the conduct Appellant now complains about on appeal. Further, the extrinsic acts, all occurring in the same time frame as the charged sexual abuse, provides context for the crime and is part of the common scheme or plan to normalize sexual behaviors within the household for continuous debauchery for Appellant and Sarah's prurient gratification. Most of the conduct involves the continuous course of conduct between Appellant, accomplice Sarah, and the two victims, Daughter and Sarah's daughter.

How the issue arose

On August 11, 2021, the trial court heard the State's motion to admit extrinsic bad act evidence at trial. The prosecutor's argument for admission was principally under the res gestae theory, but the prosecutor also relied on Rule 404(b), SCRE. The prosecutor explained: "I actually even kind of hesitated to even file this motion, but in an abundance of caution, I felt that I should bring all of it to the Court's attention in order for us to have a good clean slate whenever we go into the courtroom. This case is so multilayered in regards to the type of abuse that was actually suffered by all the children." R. p. 6, lines 10-18. The prosecutor explained Appellant and Sarah's residence "clearly became a sort of lifestyle to normalize sexual behaviors between both of the defendants and

their sexual activities, as well as having the children join in on the sexual activities as well." R. p. 6, line 23 – p. 7, line 4. The prosecutor explained it would be impossible to parse out the varying occurrences of abuse because: "It was all going on together." The prosecutor noted the two victims were eyewitnesses to some of the abuse on the other. R. p. 7, lines 5-12. Making an argument that contemplated a possible severance motion, the prosecutor advised, "[I]t would really fracture the case for the State if we had to just specifically talk about one victim at a time." R. p. 7, lines 16-22. Later the prosecutor observed, "I don't necessarily think that it even gets into necessarily a common scheme or plan because they materially witnessed each other's abuse." R. p. 8, lines 20-22.

The only argument defense counsel offered in response to res gestae was the legally inaccurate assertion "that res gestae is nothing but a back doorway to get to 404(b) . . . ." Then defense counsel argued under State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), there needed to be a logical connection and the evidence needed to be subject to a Rule 403, SCRE analysis. R. p. 9, lines 6-21. Then muddying analysis, defense counsel discussed the outcry hearsay exception and its limits, which was not the subject of the motion. R. pp. 9-10. Doing violence to the rules of evidence and the concept of hearsay (which is limited to concerns about statements by an out of court declarant), defense counsel argued the children **witnessing** abuse to the other children could only testify as to time and place. R. p. 10, lines 8-11. Making it unclear whether the topic was the admission of extrinsic acts or in actuality, joinder of charges, defense counsel expressed concern about "combining both of these cases." R. p. 10, lines 16-22. The prosecutor explained there were no hearsay concerns because "both of these children experienced and personally witnessed what the defendant was doing to each of them." R. p. 12, lines 8-11.

Whether defense counsel was aware that the topic was res gestae or whether the topic was joinder, defense counsel summarized, "So trying to parse that out, I don't know how you're going to

do it, if you try to put both of them together." R. p. 12, lines 19-23. The trial court took the matter under advisement. R. pp. 12-13.

The trial court made its preliminary ruling during an August 18 pretrial hearing. First the trial court asked if either party wanted to be heard further. The prosecutor noted the research it submitted to the trial court regarding res gestae and common scheme or plan. The prosecutor noted suppression of evidence would cause the prosecution to be unable to present a full picture to the jury because the two victims were witnesses to each other's abuse. The prosecutor noted that pursuant to Perry, there was a logical connection between the acts. R. p. 18. Defense counsel advised the trial court that defense counsel did not have any additional argument. R. p. 19, lines 2-3.

The trial court ruled as follows:

> . . . I'm going to allow the evidence in over the defense's position, you're protected in the record, Mr. Frick. You know, if this matter does go to trial obviously you can make your contemporaneous objection without having to stand up every single time something is said. I mean, you're protected in the record right now. I'm allowing the State to go into that to establish that what they call a common scheme or plan, but certainly you're entitled to an objection as to under a 403 analysis whether it's substantially more probative than prejudicial, and, you know, you can simply do that at trial by just noting your objection for the record to protect your client.

R. p. 19, lines 4-15.

Error preservation: the objection was for something else, the objection to extrinsic evidence was never renewed.

First the issue is not preserved for review. Sophistically, Appellant claims he preserved the issue when State's Exhibits 1 & 2 were introduced at trial. See R. p. 136. However, it was not the objection to the prosecution's in limine res gestae and Rule 404(b) motion Appellant renewed. Instead, Appellant's counsel appeared to be renewing the objection to the forensic interviews based

on the hearing held on August 18, 2018, in which the trial court was required to review the admissibility of the forensic interviews under S.C. Code § 17-23-175. R. pp. 19-52. Appellant's counsel argued he was concerned about outside influences suggesting answers for the children in the interview. R. p. 51, line 23 – p. 52, line 11. The trial court overruled Appellant's counsel's objection. R. p. 38, lines 12-19. This coaching objection appears to be what was renewed, and not the objection to the State's motion to admit extrinsic acts.

"[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "The same ground argued on appeal must have been argued to the trial judge." Id. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App.2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially

prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. 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. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). "We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence." Floyd, 295 S.C. at 521, 369 S.E.2d at 843.[3]

In the present case, during the in limine motion for extrinsic acts, defense counsel only made passing reference to sexual misconduct involving children other than the two victims, and defense counsel did not request any redactions for any of the interviews. R. 28, lines 18-22. Defense counsel did not complain or request suppression of evidence of physical abuse or sexual abuse perpetuated by Sarah. Further, defense counsel never offered a legitimate argument against res gestae, the principal grounds argued in support of admission by the prosecution. The renewal of the previous objection by defense counsel upon admission of the forensic interviews seems based on the prior coaching objection during the §17-23-175 hearing, and certainly, the trial court cannot be expected to interpret that objection as an objection to the res gestae/Rule 404(b) evidence. Therefore the issue is not preserved for review.

Res Gestae/common scheme or plan

The prosecutor explained in stark and clear terms the environment that Appellant engaged and perpetuated a multitude of sexual assaults on both victims:

[3] The present case is not a constitutional issue and the ruling was clearly not final. See generally State v. Jones, 435 S.C. 138, 866 S.E.2d 558 (2021) (finding renewing objection is not warranted

> [Y]ou will hear the testimony of not only [Daughter], his own daughter, but also of [Sarah's daughter], the ten year old, who's going to tell you they started having sex in front of them; Brad, the defendant, and Sarah. It became a way of life. She would leave – Sarah would leave her sex toys and dildos out, they used those on the children. It was a way of life. It was a repetitive way of life. They were isolated, they were under his control. They didn't go to friends' houses, they didn't go to church, some of them were kept out of school. They lived in that home on a daily basis being exposed to all kinds of sexual acts. It became normal. It became their way of life. And children are resilient, they learn to live with it, but it's still a brutal crime.

R. p. 67, line 12 – p. 68, line 1. All the extrinsic acts were admissible as res gestae, because it provides context to the crime. The presence of dildos and pornography, the physical abuse and neglect, the defecation and urination, the acts in front of or involving other children were all contemporaneous with the charged acts and part of the grooming of the two oldest daughters, Daughter and Sarah's daughter.

Further, this investigation began with Sarah's complaint that Appellant physically abused her, followed by Appellant's complaint that Sarah physically abused and neglected the children. Sarah's original complaint against Appellant also led to conversation that was incriminating as to Sarah and furthered and enlarged the investigation as to the welfare of the children. Thus, this evidence helps explain the necessity for conducting forensic interviews of all the children, including the forensic interviews for Daughter and Sarah's daughter which were admitted into evidence at trial.

"The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582

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following a court ruling on a constitutional issue because the ruling is final).

(1999). This Court held that to constitute part of the res gestae of an offense, it is important the extrinsic acts have a close temporal proximity to the charged crime. State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008).

"Even though a defendant is not charged with every crime committed during a criminal transaction, every aspect of it relevant to the crime charged may be presented at trial." Altman v. State, 495 S.E.2d 106, 108 (Ga. Ct. App. 1997); State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) ("When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.") (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)).

This Court noted the following:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other' [and is thus] part of the res gestae of the crime charged."

Preslar, 364 S.C. at 474, 613 S.E.2d at 385 (citations omitted).

When evidence is relevant under the res gestae theory, the trial court must still undergo a Rule 403 balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. McGee; Rule 403, SCRE.

In the instant case, the extrinsic acts consisted of conduct either Daughter or Sarah's daughter observed or were subjected to. The acts were contemporaneous to the charged acts. The physical

abuse explains why neither child disclosed the sexual abuse they suffered until forensic interviews precipitated by Sarah's accusations and admissions. Further, Son's sexual abuse was witnessed by Daughter and Sarah's daughter, and what they witnessed served to normalize sexual behavior in the household, as did the sexual behavior between Appellant and Sarah. Son's sexual acts with Sarah's daughter constitutes part of the charged conduct as Son would be considered an innocent agent in his sexual conduct directed by the parents towards Sarah's daughter. The pornography further establishes the normalization of sexual activity in the household. Further Sarah's conduct, including urination, defecation, and nudity would be acts by her and not Appellant, but does further normalize sexual behavior due to the ensuing exposure of genitals and normalization of the excretion off fluids: urine, defecation, and ultimately ejaculate.

Rule 404(b) SCRE: Common scheme or plan

Further, in the instant case, both the charged and uncharged conduct constitutes individual manifestations of the same common scheme or plan to sexualize and normalize sexual activity within the household between the adults and the children. The common scheme was to create a cascade of debauchery within the household for Appellant and Sarah's joint venture for degenerate gratification.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

Most of the extrinsic acts constitute evidence of continuing illicit conduct between Appellant, Sarah, and the two vicitms, Appellant's daughter and Sarah's daughter. In State v. Richey, 88 S.C. 239, 70 S.E.2d 729 (1911), Richey was charged with carnal knowledge of a girl under fourteen years of age. The Supreme Court found evidence that he continued this relationship beyond the age of fourteen years of age admissible, holding: "acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties." Id. at 242 70 S.E. at 730.

In State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999), this Court favorably quoted Supreme Court precedent that held the common plan or scheme exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties." (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)); see also State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant.").

In State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003), the Court of Appeals observed, favorably citing both Weaverling and McClellan, that common scheme or plan evidence is admissible when there is a pattern of continuous illicit conduct because the pattern "clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion." This Court affirmed the admission of prior bad act evidence, finding "a clear pattern of escalating sexual abuse" satisfying the requirements of the common scheme or plan exception. State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 122 (Ct. App. 2008).

In the instant case, the two victims, Sarah's daughter and Daughter were subjected to intercourse, digital penetration, and penetration with objects. All this is proper charged conduct. Further illicit conduct includes being made to view sexual activity between Appellant and Sarah, viewing Sarah walking naked in the house, the presence of pornography, and the availability of sexual toys within the household. This is all conduct clearly geared toward grooming the victims and normalizing sexually charged conduct within the household. Sarah urinating or defecating on the floor, physically abusing the children, making Son urinate on her, and engaging in sexual activity with Son, or engaging in sexual activity when Appellant is not present are Sarah's, not Appellant's, extrinsic acts, and therefore beyond the scope of Rule 404(b), SCRE. The charged and uncharged conduct all occured in the same time frame, the several months to a year Appellant, Sarah, and all their children lived together. Further, defense counsel never objected to acts by Sarah being allowed into evidence.

Appellant complains about conduct involving Son. Evidence established Appellant and Sarah made Sarah's daughter and Son engage in sexual activity with each other concurrently with Appellant and Sarah engaging in sexual activity. First, Appellant's actions constitute criminal sexual conduct with a minor through an innocent agent, and therefore represents proper testimony of continuous illicit conduct between parties. "One may commit a crime through the agency of another." State v. Johnson, 255 S.C. 14, 176 S.E.2d 575 (1970) (manager could be guilty of selling merchandise in violation of Sunday Closing Law even though cashier sold the items where the cashier was doing exactly what she was employed to do). Further, Son's involvement in the acts in the victims' presence or his acts with the victims represents further grooming and yet another manifestation of normalizing sexual behavior for Sarah's daughter and Appellant's daughter, or maintaining a sexually charged atmosphere within the household.

In Tutton, this Court observed:

> Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is self-evident – where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in in a similar fashion. . . . Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well. In Weaverling and McClellan, **the sheer volume of repeated occurrences**, together with the close similarities in the assaults, evidenced a pattern of continuous illicit conduct.

State v. Tutton, 354 S.C. at 328-29, 580 S.E.2d at 191 (emphasis added). In the instant case, no doubt the sheer multitude of sexualized activity constituting both charged conduct and extrinsic acts evidenced a clear pattern of continuous illicit conduct.

Rule 403 analysis

"Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted).

In the instant case, two people with shared depraved and lascivious interests got together to

sexually assault their oldest children. Each one allowed the other unfettered access to sexually assault their own children. Of course, each one also sexually assaulted their own children. Sarah and Appellant used sexual toys to "open" up their eldest daughters. Sarah described a multitude of times both daughters were forced to have oral sex. The intercourse and other sexual assaults occurred, as Sarah's daughter described "almost always." The sexual assaults included both vaginal and anal penetration committed by penile penetration, digital penetration, and penetration with objects. Many acts were committed in joint participation of both adults. Appellant was committing numerous instances of incest and allowing another adult to sexually assault his daughter. There is simply little shock value to add from the uncharged conduct, but the extrinsic acts are probative because they provide the context and demonstrate that the acts were all part of the same common scheme or plan.

Further, Son's victimization may have been uncharged conduct, but Son did not testify at trial. The testimony supporting the charged and uncharged acts came from the same three witnesses, Daughter, Sarah's daughter, and Appellant's accomplice, Sarah.

In State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996), this Court found multiple prior robberies the accomplice testified were committed together admissible because like the charged case, they all took place in the same part of Orangeburg, on or near the Highway 21 bypass. Additionally, they were all committed by a black man with his face partially concealed. Id. at 181, 470 S.E.2d at 406. Notably, this Court found the chance of unfair prejudice was small because if the jury found the accomplice credible, the jury would have no reason to consider the other robberies. Id.

Likewise, if the jury found the three witnesses' testimony credible, the jury had no reason to consider the extrinsic acts testified to by the same three witnesses since they provided extensive

testimony supporting the charged conduct. The danger of unfair prejudice in the instant case was negligible.

While Appellant selects a handful of extrinsic acts and insists without much explanation they are extremely prejudicial, any uncharged acts pale in comparison to the overwhelming evidence of guilt. There is physical evidence of sexual assault as to Sarah's daughter. Further, Daughter saw Sarah's daughter assaulted, Sarah's daughter corroborated much of Daughter's testimony, and Sarah corroborated both victims' accounts. Appellant confirmed he was aware of Sarah's sexual assaults of his own daughter, admitted to role playing with Sarah in texts discussing sexually assaulting their children, and at one point told Judd he acted as if he was alright with the abuse so Sarah would tell her about it. Any error is undoubtedly harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

II.

The trial court did not err in allowing a medical questionnaire with Daughter's written answers into evidence and Appellant was not prejudiced since the objected to sentence was cumulative to the forensic interview from nineteen days earlier.

Appellant complains the trial court erred in failing to sustain Appellant's objection under Rule 403, SCRE to a questionnaire filled out by Daughter (Supp. R. 1-2) being admitted into evidence. The questionnaire was clearly probative because it contained a report of sexual abuse and was not prejudicial because Daughter provided a more detailed account of sexual abuse only three weeks earlier during her second forensic interview. Further, the "cumulative" nature of the evidence was hardly prejudicial to Appellant and the trial court did not abuse its discretion in declining to

exclude the evidence. Therefore, the trial court did not err in allowing the questionnaire into evidence.

How the issue arose

Dr. Susan Lamb testified a nurse practitioner under Dr. Lamb's direction examined both Daughter and Sarah's daughter. Dr. Lamb explained when a person is examined for whom there are concerns of sexual assault, the first thing is to determine if there is evidence that needs to be recovered. The medical staff also gets a history from the victim "so they kind of tell you what has gone on, what has occurred, that directs where you're going to look." R. pp. 297-98 (direct quote p. 298, lines 1-3).

Dr. Lamb then discussed the questionnaire (Supp. R. pp 1-2):

> So at the age of 11, you know, she is not old enough to consent to a sexual encounter. We do perform an adolescent questionnaire kind of based on if the children look like they're kind of acting more like teenagers at that time, and it does have questions about engaging in any consensual sexual activity.

R. p. 307, line 25 – p. 308, line 5. Dr. Lamb explained the teenagers are given the form to fill out by themselves in a back room, and the answers on the form are in Daughter's handwriting. R. p. 308, lines 10-22. When the prosecution moved to admit the questionnaire into evidence, defense counsel lodged an objection: "Objection to be cumulative and under 403." R. p. 309, line 2.

Dr. Lamb published that Daughter responded negatively to the question, "Have you ever had sex because you wanted to?" However, Daughter wrote underneath in a blank space, "But [I've] been sexually abused." R. p. 309, lines 15-19; Supp, R. pp 1-2. On the second page of the exhibit, question 12 asks, "Is there anything else that you would like to discuss with the provider?" Here, Daughter wrote, "[I've] been sexually abused and had sex with my dad." Supp. R. p. 2. However, this second statement was not published to the jury during trial.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "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. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. Sweat, 362 S.C. at 127, 606 S.E.2d at 513. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting* State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct. App. 1998) (emphasis added) (*quoting* United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989)). In determining whether the danger of unfair prejudice outweighs the probative value of evidence, the court must consider the entire record, and the

determination will turn on the facts of each case. Lyles, 665 S.E.2d at 206 (*citing* State v. Gillian, 373 S.C. 601, 646 S.E.2d 872, 876 (2007)).

In the instant case, defense counsel failed to explain to the trial court how the questionnaire was prejudicial. It clearly was relevant because Daughter reported sexual abuse. One of the grounds upon which a trial judge may sustain an objection under Rule 403, SCRE is "considerations of . . . needless presentation of cumulative evidence." In the instant case, the pertinent portions of Exhibit 20 are cumulative in the sense that it is more evidence Daughter reported sexual abuse, but it was not cumulative in context because it was part of Dr. Lamb's explanation of the course of treatment for Daughter when she was under Dr. Lamb's care for treatment of possible sexual abuse.

Despite acknowledging that the objection was limited to Rule 403, SCRE and not to hearsay, Appellant nonetheless complains Daughter's answers constitute improper hearsay. This is a blatant attempt to backdoor an issue not presented to the trial court, but Appellant's hearsay arguments are not preserved for review. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999) (The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial). Daughter's report of sexual abuse falls within the parameters of Rule 801(d)(1)(D),SCRE (allowing statement of declarant where the declarant is an alleged victim of a sexual assault and the statement is limited to the time and place of the incident) – except for three words: "with my dad."

However, "with my dad" is admissible under Rule 803(4), SCRE, because the statement was made for purposes of a medical diagnosis. The form itself makes itself clear at the top: "Please answer the questions below. What you write is PRIVATE – only people who need it to do their jobs can see it. Tell the truth. Your honest answers will help the provider who is going to see you

today." State's Exhibit 20. See United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (a doctor must be able to identify physical and emotional problems that accompany child sexual abuse).

In the instant case, this was not only a report of sexual abuse, but a report of incest. As the Supreme Court of North Carolina has stated:

> First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

State v. Aguallo, 350 S.E.2d 76, 80 (N.C. 1986) (citing United States v. Renville, 779 F.2d 430 (8th Cir. 1985); see also, State v. Geboy, 764 N.E.2d 451, 462 (Ohio App. 2001) ("The rule does not expressly limit its scope to statements regarding the declarant's physical or bodily condition. In fact, the rule has been interpreted as to include diagnosis and treatment of psychological injuries as well as physical ailments."); Valmain v. State, 5 So.3d 1079, 1084 (Miss. 2009) (finding "the identity of the child's sexual abuser was pertinent to treatment, therefore reasonably relied upon by the treating physician, although the perpetrator was not a member of the child's household" and noting that "the paramount concern in treatment of sexual abuse is to ensure that a child is not returned to the environment that fostered, allowed, or permitted the abuse").

Further, any error is merely cumulative to numerous statements by Daughter during the second forensic interview accusing Appellant of sexual assaults, including intercourse. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) (finding inadmissible hearsay merely cumulative); see also State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (noting the Constitution requires a criminal defendant to receive a fair trial, not a perfect one). The present case does not present a scenario where a witness testifies to a declarant's statement. Instead, in the present case, the out of court statement, Daughter's handwritten answer to a questionnaire, was

brought to court and viewed by the jury. Its hearsay nature and its limitations of proof are patent to the jury and therefore not prejudicial even if hearsay was presented as a ground for objection. But again, the scope of Appellant's objection was based on Rule 403, and the trial court did not abuse its discretion in finding the evidence was more probative than prejudicial.

III.

Appellant did not object to testimony describing photographs found on his phone, and when the trial court later in the trial sustained his objection to the photographs being introduced into evidence, Appellant did not move to strike prior testimony or ask for further relief, therefore Appellant received the relief requested. Any error is harmless in light of the overwhelming evidence of guilt.

Appellant complains the trial court erred in allowing testimony in contravention of Rule 403, SCRE. The problem with this argument is Appellant never made that objection. Paula Stevens from the Fort Mill Police Department used extraction software, including Cellbrite, to download the contents on Appellant's cell phone. After laying foundation for the download, the prosecution moved a flashdrive of the download into evidence. Defense counsel made the following objection: "Your Honor, yes, we would object to that. We're not sure exactly what's being moved into evidence as far as what kind of images or pictures or anything." R. p. 284, lines 1-7. Defense counsel did not explain why defense counsel did not know what was being moved into evidence. The trial court overruled defense counsel's "not sure" objection. R. p. 284, line 8. Nothing was preserved for review.

Stevens described for the jury items found on the cellbrite download: One of the items downloaded was a photograph of a man's aroused penis with a child's face visible behind the couch. Another photograph depicts an erect penis and a separate picture of a child under a similar blanket taken at the same time. There was also pornography on the phone. R. pp. 284-87. The defense did not lodge any objection to this testimony or any testimony during the remainder of Stevens' direct examination. Technical issues prevented the prosecution from publishing the photographs to the jury. R. p. 291.

After Stevens, two more witnesses testified for the State. Then prior to the State's last

witness testifying, defense counsel sought to "clarify" the "not sure" objection:

> One, I want to clarify our objection yesterday. Our objection to the phone dump as we did object to yesterday was, one, we weren't entirely sure what was going to be presented. But we do object to the pictures that she does intend to introduce under 402 as irrelevant, and 403, more prejudicial than probative in this matter. It's a picture of a penis. There's allegations that he looked at pornography, and I believe she's going to talk about a child that is in one of these pictures where he is displaying his penis. To my knowledge that child is not one of the children that is a victim of the cases we are trying so that is my objection.

R. p. 366, line 23 – p. 367, line 10.

The prosecution explained the photographs were to rebut Appellant's claim during his interview "that he would never do anything in front of any children . . . . It was found on his phone, it was still saved on his phone . . . ." R. p. 368, lines 1-9. The prosecutor, in response to defense counsel's inquiry, indicated she did not intend for the jury to view the phone dump. R. p.369, lines 4-7. The trial court took the matter under advisement and allowed the proposed pictures to be marked as Court's exhibits. R. pp. 366-367. The jury never saw those pictures because the trial court later sustained defense counsel's objection under Rule 403, SCRE. Defense counsel did not make any motions to strike any previous testimony. Tr. pp. 388-89.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). Following the "not sure" objection, Stevens' subsequent testimony was not timely objected to. State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) finding the objection untimely where counsel did not object after several pages of testimony). Further, defense counsel never objected to Steven's testimony on the basis of Rule 403, SCRE. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (to preserve for review an alleged error in admitting

evidence, the objection must sufficiently bring into focus the precise nature of the alleged error so the error may be understood by the trial judge. The party may not argue one ground at trial and another on appeal). The ground asserted on appeal must be supported by the objection raised at trial. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993).

As for the pictures themselves, the trial court sustained defense counsel's subsequent objection and defense counsel asked for no further relief. Although the photographs are inexplicably designated for the record on appeal by opposing counsel, the jury never saw the photographs. State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct. App. 2000) (where an appellant objects and the objection is sustained but he fails to move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal) *rev'd in part on other grounds*, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding where one party obtains from the trial court the only relief sought, this Court has no issue to review on appeal).

Since the jury never saw the content of the download, defense counsel's objections to the photographs were sustained, defense counsel never interposed an objection to Stevens' description of the photographs, and defense counsel never sought to strike the testimony, the trial court did not err and the issue is not preserved for review. The purported error is harmless beyond a reasonable doubt. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (Error is harmless when it could not reasonably have affected the result of the trial).

IV.

The record fails to support Appellant's claim that Appellant was seated where the victims were completely unable to see him, and nonetheless Appellant's counsel acquiesced in Appellant's final seating arrangement.

Appellant complains his rights under the Confrontation Clause were violated because he was moved to where the victims were unable to see him. The record does not support his claim, instead Daughter's testimony shows the opposite. Further, the record is insufficient for review and the issue is not preserved for review. In the end, defense counsel never raised a Confrontation Clause argument, but instead acquiesced in the final seating arrangements.

How the issue arose.

Prior to the first witness being called, the trial court noted he previously indicated to the parties:

> [C]ertainly as a right of confrontation and I'm not going to disturb that right, but I am going to modify it just a bit. Instead of [Appellant] sitting where he's sitting now I'm going to ask that he have a seat where Investigator Reynolds is seated tomorrow when the children testify. I think that would be, you know, in the best interest of the children. **That way he is able to see** and able to confront, in air quotes, as far as I'm concerned and I think that's reasonable. Any objection to that?

R. p. 75, lines 2-12 (emphasis added).

Defense counsel responded:

> Your Honor, I would just say, the way the table is twisted I can barely see the witness box from here. I don't think he can be seen. In normal circumstances it's hard to see the witness box. But we will keep him at the end of the table, which is practically in the grand jury box.

R. p. 75, lines 13-18.

In response, the trial court asked the lawyers to "look at it and we'll make a determination."

R. p. 75, lines 19-20. The trial court asked Investigator Reynolds if he could see and a speaker, presumably the investigator, responded, "There's a glare, I can't see, Your Honor." R. p. 75, line 24. The speaker moved and responded to the trial court's subsequent inquiry, "I can see." R. p. 75, line 25 – p. 76, line 1. The trial court indicated that he may have the defendant seated "to the right of Mr. Nielson" or "where Kenny is standing right now, . . . " R. p. 76, lines 2-8. The trial court explained, "That way the children **don't have to** make eye contact." R. p. 76, lines 8-9. The prosecutor responded that she felt the arrangement did not violate the Confrontation Clause and the defendant did not "have to be glaring into the eyes of the children." R. p. 76, lines 10-14. None of the participants indicated the children would be wholly unable to see Appellant when they testified.

The trial court advised:

> Okay. We'll make that determination contemporaneously but that's where I'm leaning toward, **if there's any other argument about that we can deal with that at the time.** I think right now I'm going to have him seated two seats down from where Mr. Nielson is seated right there right in front of – right behind where Kenny is standing right now, ...

R. p. 76, lines 15-21 (emphasis added). Defense counsel advised he would have further argument. R. p. 76, line 22 – p. 77, line 1. Note in the first seat, there was a glare, not an obstruction. In the second seat the investigator tested, he could see – there is no indication a witness that could be seen from that vantage point would be unable to see the observer. Also note while defense counsel indicated he would present an argument, he never made the argument even when the opportunity presented itself.

The issue of Appellant's seating was revisited shortly before Daughter testified. Before bringing the jury back in, the trial court asked the attorneys if there was anything else and defense counsel replied, "Yes, the seating of my client." R. p. 172, lines 19-22. The following colloquy

ensued:

> Defense counsel: Judge, I can tell you, if you're in that grand jury box it's elevated and you're going to be able to see eye level. I'm telling you right now, if you sit in that chair where he is as low as possible, or if you want him to move a little bit further, we put Kenny in the box and all I can see was the top of his head.
>
> Court: From where he was sitting. I don't care if he sees, I don't want her to see.
>
> Prosecutor: Your Honor, why don't we have him sit in [the] orange taped seat in the grand jury box, that way he's not only blocked by, you know, just distance but also by your bench.
>
> Court: That's what I was thinking about.
>
> Prosecutor: Yes, sir, and I think that will take care of it.
>
> (Break in the proceedings.)
>
> Court: All right. So when the children testify I'm going to have the defendant sit over there where the orange tape is. Okay?
>
> Defense counsel: **Can we just go ahead and do that?**
>
> Court: Yeah, exactly. So Mr. Corlew, I need you – you can take whatever you're looking at and go sit over there. Kenny, point to where the orange tape is. Right there. Thank you, sir.

R. p. 172, line 24 – p. 173, line 22 (emphasis added).

The trial court seemed to be arranging seating where the victims did not have to look at Appellant, but record fails to conclusively indicate the victims would be unable to look at Appellant or that Appellant did not see the victims when testifying. Therefore, the record does not support that Appellant was placed "in a position in which the witnesses could not see him at all," as claimed by Appellant in his brief. Br. of App. p. 33. Appellant also misstates the record, the trial court said the basis for moving the defendant was, "That way the children don't **have** to make eye contact." This is different from the trial court completely foreclosing the victims' ability to make eye contact, as

Appellant alleges in his brief. See Br. of App. p. 34.

Indeed, the record reflects that the victims were able to see Appellant. During Daughter's testimony, when the topic turned to the beginning of Appellant's sexual abuse, the following testimony was produced:

> Q: All right. Tell the jury kind of the first thing that happened in Chester between your dad and Sarah that was kind of weird.
>
> A: **Do I have to look at him or wait?**
>
> Q: I'm sorry?
>
> A: Okay.
>
> Q: Did you understand my question? Do you want me to repeat it?
>
> A: Oh, no, I understand.

R. p. 183, lines 17-25 (emphasis added). Presumably Appellant is the "him" Daughter references in her question to the prosecutor. So it appears Daughter could have looked at Appellant if she wanted.

Coy and Craig

Appellant relies principally on Coy v. Iowa, 487 U.S. 1012 (1988). Justice Scalia described the use of a screen in the courtroom as follows:

> The trial court approved the use of a large screen to be placed between appellant and the witness stand during the girls' testimony. After certain lighting adjustments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all.
>
> [Coy] objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. . . .

Coy at 1015. The majority found the procedure, made without any determination of need, violated the Confrontation Clause. Justice Scalia wrote: "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.

He can now understand what sort of human being that man is.'" Id. at 1019. The opinion, couched in terms of men confronting men from Roman times forward, explained:

> The face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id. at 1020. Nonetheless, even Justice Scalia noted, "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant, he may studiously look elsewhere, but the trier of fact will draw its own conclusions." Id. Five justices joined Justice Scalia's opinion, but Justice O'Connor also filed a concurring opinion, joined by Justice White, explaining:

> I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.
>
> Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that child abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim. . . . Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop.

Id. at 1022-23 (J. O'Connor concurring).

Justice O'Connor's concurrence foreshadowed the Supreme Court's subsequent holding in Maryland v. Craig, 497 U.S. 836 (1990), which found statutes allowing child victims to testify via closed circuit television when the state court makes the appropriate findings. Due to the lack of objection, Craig's holding is not implicated in the present case, but Justice O'Connor's observations are helpful:

> [T]he right guaranteed by the Confrontation Clause includes not only

> a personal examination . . . but also (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; and (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing credibility.

Craig, 497 U.S. at 845-46 (cleaned up, with citations and internal quotation marks omitted).

Therefore, the Craig court explained:

> The combined effect of these elements of confrontation – physical presence, oath, cross-examination, and observation of demeanor by the trier of fact – serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

Craig, 497 U.S. at 846.

Unlike Coy, defense counsel in the present case never argued Appellant's rights under the Confrontation Clause were violated. In the end, little, if nothing is known about the final seating arrangements except that defense counsel seemed contented with the final seating. Daughter's offhand remark shows that at a minimum, she could look at Appellant if she wanted to or was directed to do so. For these reasons, this Court should not review this issue.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). An objection should be sufficiently specific to bring the exact error to the trial court's attention. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997).

In the instant case, defense counsel suggested he would later present an argument concerning

seating arrangements, but never did present this argument. The issue is not preserved and the record is inadequate for review. Notably, counsel acquiesced in the final arrangements. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (stating a defendant cannot acquiesce in an issue at trial and then complain about it on appeal). The trial court suggested seating the defendant "where the orange tape is." Defense counsel agreed, replying, "Can we just go ahead and do that?" Tr. p. 161. It therefore appears from the record that defense counsel was satisfied or at peace with the final arrangements. The issue is not preserved.

Further, the record does not support the concept that the victims could not see Appellant at all – indeed Daughter's unsolicited question suggests they could see Appellant if they chose to. Therefore, the record discloses that Craig's list of the elements of confrontation are satisfied. Craig, supra. Accordingly, the convictions and sentences should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: _____
David Spencer

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

ATTORNEYS FOR RESPONDENT

April 7, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Brian M. Gibbons, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent,

vs.

BRADLEY MARK CORLEW, Appellant.

Appellate Case No. 2021-000989

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: _____
David Spencer

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

ATTORNEYS FOR RESPONDENT

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