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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2019-000511

THE STATE,

Respondent,

vs.

AARON McKENZIE CAPERS,

Appellant.

FINAL BRIEF OF RESPONDENT

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"The lower court abused its discretion in denying Appellant Motion for Reconsideration of sentence where the lower court abused its discretion in sentencing the Applicant to a sentence which was not consistent with the articulated intent of the judge and where record below establishes that the Appellant's aggregate sentence of eighty (80) years imposed by the sentencing judge was imposed in significant part as punishment for bad acts for which he had neither been convicted, or, pleaded to and therefore were entered in violation of the trial judge's sentencing authority and as such were based upon an error of law."

COUNTER-STATEMENT OF ISSUE ON APPEAL

Was Appellant's appellate challenge to the trial judge's decision not to reconsider the aggregate eighty-year sentence imposed properly preserved for appellate review when the arguments Appellant is now raising on appeal were neither raised to nor ruled upon by the trial judge? Furthermore, notwithstanding any issue preservation concerns, did the trial judge somehow abuse his broad discretion or otherwise err by virtue of his sentencing decisions in Appellant's case when the aggregate sentence imposed fell within the permissible statutory sentencing limits for Appellant's exceedingly-serious crimes and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations?

STATEMENT OF THE CASE

In December of 2017, Appellant Aaron McKenzie Capers, who was eighteen years old at the time, was arrested following an investigation into a home invasion, armed robbery, and sexual assault of an eighty-one-year-old woman living in Goose Creek, South Carolina. Subsequent to his arrest, the Berkeley County Grand Jury indicted Appellant for first-degree burglary, first-degree criminal sexual conduct, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and solicitation to commit a felony. On March 18, 2019, a jury trial was commenced on all the indicted charges except solicitation to commit a felony in the Berkeley County Court of General Sessions with the Honorable R. Markley Dennis, Jr., circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Appellant as indicted. Following the verdict, Judge Dennis sentenced Appellant to a fifty-year term of imprisonment for first-degree burglary, a *consecutive* thirty-year term of imprisonment for first-degree criminal sexual conduct, and concurrent terms of imprisonment of thirty years for armed robbery, thirty years for kidnapping, and five years for possession of a weapon during the commission of a violent crime. Appellant then timely filed a notice of appeal. However, a few days after that, Appellant also timely filed several post-trial motions, including one seeking reconsideration of his sentence, along with an amended notice of appeal.

Following that, this Court—at Appellant's request—held the appeal in abeyance and remanded the matter to the court of general sessions so Appellant's timely post-trial motions could be addressed. On January 6, 2020, a hearing was held on the motions in the Berkeley County Court of General Sessions with Judge Dennis again presiding. At the conclusion of the hearing, Judge Dennis took Appellant's motion seeking reconsideration of his sentence under advisement pending the provision of additional information. Subsequently, in February of 2021,

a virtual hearing was held before Judge Dennis once the additional information had been provided. Ultimately at the conclusion of that hearing, Judge Dennis denied Appellant's reconsideration motion, and that ruling was confirmed through a written order issued on February 19, 2021. Appellant then filed another amended notice of appeal on March 30, 2021, and this Court subsequently ruled Appellant's previously-initiated appeal could proceed forward.

STATEMENT OF FACTS

On the afternoon of December 21, 2017, Appellant—while home for the holidays from his freshman year of college—went to the residence of eighty-one-year-old Mitsue Listak ("Victim"), who lived near Appellant's father's house, with a distinctive Halloween mask covering his face. (R. p. 25; pp. 27-29; p. 41; p. 49; pp. 64-66; p. 89; pp. 170-171; p. 335; p. 419). Upon arriving there, Appellant lured Victim into opening the door, sprang out at her when she did, and forced his way inside her residence. (R. pp. 28-29). Appellant then directed Victim to one of her own bedrooms, made her remove her sweatshirt and expose her breasts, groped her chest, and forced her to perform oral sex on him while threatening her with a knife. (R. pp. 29-33; p. 46; p. 62; p. 82; pp. 416-417). Once he had completed those horrifying acts to his satisfaction, Appellant ejaculated in Victim's mouth, spit on her face, and robbed her of both cash and her bank card. (R. pp. 33-38; pp. 133-134; p. 419). Following that, Appellant commanded Victim to take him to the bank so he could get more of her money. (R. p. 38). In response, Victim did as ordered, went to the garage, and opened the garage door. (R. p. 38). However, when she did, she fortuitously saw a friend across the street and—seeing an opportunity to escape—quickly ran for help before Appellant could stop her, which prompted Appellant to flee himself. (R. pp. 38-39; p. 59; pp. 63-67; p. 69; p. 71; p. 74; p. 77; p. 267).

In the immediate aftermath of those shocking events, law enforcement officers rapidly responded to the scene and began an investigation into the matter while Victim, who experienced a stress-induced heart attack based on what had been done to her, was rushed to the hospital. (R. pp. 39-41; p. 66; pp. 78-81; pp. 121-124; pp. 258-262; p. 416). At the outset of the ensuing investigation, the perpetrator's identity remained unknown. (R. p. 41). However, within just a few hours of the incident, Appellant used Victim's bank card to purchase gasoline, and that

transaction was recorded on the gas station's surveillance system. (R. pp. 86-88; pp. 104-106; pp. 146-147; pp. 149-150; p. 152; pp. 153-156; pp. 159-161; pp. 173-175). As a result of that, Appellant was identified and swiftly arrested, his father's home was searched, and officers found a distinctive Halloween mask matching the description of the one used by the perpetrator at that location. (R. pp. 86-90; pp. 94-95; p. 104; pp. 165-168; p. 263; pp. 335-336; pp. 483-484).

Following Appellant's arrest, DNA profiles were developed from buccal swabs collected from Victim and Appellant along with various items of evidence recovered during the investigation into the incident. (R. pp. 79-80; p. 109; pp. 137-138; p. 191; p. 203; p. 209; pp. 215-219; p. 246; pp. 264-265; p. 270). Ultimately, upon analysis, Appellant's DNA profile was determined to match profiles developed from the sperm fraction found on swabs taken from the upper and lower portions of Victim's mouth shortly after the incident and on cuttings from Victim's sweatshirt. (R. pp. 229-234; p. 248). Significantly, the probability of randomly selecting an unrelated individual with a matching profile was approximately one in 7,900,000,000,000,000,000,000,000,000. (R. p. 230; pp. 233-234).

A few months later, Jesse Gill, who was one of Appellant's cellmates at the Hill-Finklea Detention Center in Berkeley County, arranged to meet with law enforcement through his defense counsel. (R. pp. 276-278; pp. 296-297). During the meeting, Gill provided officers with information about a murder-for-hire plot Appellant was attempting to arrange, and he was able to also provide handwritten notes along with a hand-drawn map from Appellant that contained information about the plot. (R. pp. 280-284; pp. 288-292; p. 300; pp. 303-312; pp. 342-343). Horrifyingly, the map was a sketch of Victim's residence and the area surrounding it, and the notes detailed an attempt on Appellant's part to hire a "hitter" to murder Victim in exchange for a few thousand dollars. (R. pp. 297-299; pp. 313-323). Those documents also included personal

information about Victim along with other details that did not appear in the discovery materials that had been turned over to the defense. (R. p. 299; p. 317; pp. 430-432; pp. 453-454). Upon subsequent analysis, the notes and map were confirmed to contain Appellant's own handwriting, and Appellant's fingerprints were found on one of the notes along with on the map. (R. p. 365; pp. 367-369; pp. 371-374; p. 386; pp. 392-396).

Based on everything uncovered in the investigation, Appellant was indicted for numerous offenses, and he proceeded forward to trial on charges of first-degree burglary, first-degree criminal sexual conduct, armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (R. pp. 10-12; pp. 646-647; pp. 654-655; pp. 658-659; pp. 666-667; pp. 674-675). During the course of trial, evidence and testimony was presented demonstrating Appellant committed the horrifying home invasion, rape, and robbery of Victim on the date of the incident and then later attempted to have Victim murdered once he had been arrested for his crimes. (R. pp. 25-109; pp. 112-115; pp. 118-124; pp. 146-185; pp. 187-209; pp. 222-246; pp. 258-278; pp. 280-286; pp. 288-292; pp. 294-333; pp. 334-355; pp. 361-386; pp. 387-396; pp. 415-424; pp. 426-434; pp. 449-454; pp. 483-484). Upon being presented with all that evidence and testimony, the jury convicted Appellant as indicted after just over an hour of deliberations. (R. pp. 534-537).

Following the verdict, the solicitor turned to the issue of sentencing and asked the trial judge to impose a sentence that would remove Appellant from society for the protection of the public. (R. pp. 544-546). As support for that request, the solicitor indicated Victim had been greatly impacted by Appellant's actions, pointed out Appellant's dangerousness was shown by the cold and calculating nature of his crimes, and noted his dangerousness was only heightened by the fact he attempted to have Victim assassinated prior to trial. (R. pp. 545-546). Conversely,

defense counsel asked the trial judge to be merciful and lenient towards Appellant and, in making that request, contended Appellant was an eighteen-year-old college freshman at the time of the incident, which she characterized as a "horrible mistake." (R. pp. 546-548). Defense counsel further requested an opportunity to obtain a mitigation expert to provide sentencing guidance.[1] (R. pp. 547-548). In addition to that, Appellant personally apologized on his own behalf for his actions, asked for forgiveness, claimed he had excelled academically and athletically in the past, and asserted he made "one mistake" that now had led to him being "in a courtroom with handcuffs behind [his] back." (R. p. 549). Following those remarks, the trial judge indicated he was not going to impose a life sentence upon Appellant even though one could statutorily be imposed and, instead, was going to "give [Appellant] a chance at some point in time[.]" (R. p. 553). However, the trial judge further explained Appellant's actions could not be tolerated, demonstrated significant "callousness," and continued to be "repulsive" during Appellant's period of pre-trial incarceration. (R. pp. 553-554). The trial judge then sentenced Appellant to an aggregate eighty-year term of imprisonment for his heinous crimes, and, in doing so, the trial judge expressly confirmed his decision to structure the sentence in that manner was "intentional" due to the "atrocities" committed. (R. p. 554).

[1] In arguing for such an opportunity, defense counsel suggested the South Carolina Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), was applicable not just to juvenile offenders who were under the age of eighteen but to eighteen-year-old offenders like Appellant as well. (R. pp. 547-548). However, in the Aiken decision, our Supreme Court—through a divided plurality decision—extended resentencing solely to *juvenile homicide* offenders that had previously been sentenced to life without parole prior to the issuance of the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012). Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014). And, in doing so, our Supreme Court expressly and unambiguously explained it "consider[ed] juveniles to be individuals *under eighteen*" for purposes of its decision. Id. at 537 n. 1, 765 S.E.2d at 573 n. 1 (emphasis added). Accordingly, as the trial judge correctly recognized, the Aiken decision had no relevance or applicability to Appellant's case since—notwithstanding the fact he was not a homicide offender—Appellant was simply *not* a juvenile as a matter of law at the time of his crimes. (R. p. 547).

Subsequent to that, defense counsel filed a timely post-trial motion seeking an opportunity to present additional mitigation on Appellant's behalf and arguing the sentence imposed was "excessive" in light of Appellant's "age and lack of prior record." (R. p. 680). In rebuttal, the solicitor filed a response contending Appellant's sentence was appropriate under the circumstances involved. (R. pp. 682-686).

Eventually, a hearing was held on the reconsideration motion, and, during that hearing, defense counsel noted she had provided the trial judge with over thirty letters of support from Appellant's family members and friends. (R. p. 575). Following that, both Appellant's aunt and a retired school principal who was a family friend addressed the trial judge, and, while doing so, they each read multiple letters that had been prepared by Appellant's relatives. (R. pp. 575-592). Through those letters, the trial judge was presented with information about Appellant's background and purported good characteristics, and he also heard numerous entreaties for him to consider reducing Appellant's sentence. (R. pp. 575-595). Defense counsel then spoke on Appellant's behalf, and, as part of her remarks, she asserted Appellant would be approximately eighty-eight years old when he would first be eligible for any type of release due to the nature of his convictions. (R. pp. 604-605). Critically, in response, the trial judge quickly confirmed he understood and was aware of that fact. (R. pp. 604-605). Beyond that, several other individuals spoke on Appellant's behalf while, conversely, the solicitor and others asked the trial judge not to alter Appellant's sentence due to the "extraordinary" and shocking nature of Appellant's actions, including his attempt to have Victim assassinated. (R. pp. 607-626). After being presented with all that information, the trial judge took the matter under advisement while confirming he would consider everything. (R. p. 628).

Subsequently, defense counsel arranged for Dr. Donna Maddox to perform a psychiatric evaluation of Appellant, and, after conducting one, Dr. Maddox issued a report detailing the results of that evaluation. (R. pp. 729-736). In her report, Dr. Maddox opined Appellant's aggregate sentence was "tantamount to a life sentence given the shortened life expectancy of South Carolina inmates." (R. p. 730). She further indicated the trial judge should have had a variety of information presented to him, including information about how Appellant's brain development was not complete by the age of eighteen, how he was treated as an infant for a condition that could have had adverse effects on brain development, how he reported having mild closed head injuries throughout his life, how he claimed to be a drug user, how he may have potentially been exposed to verbal and physical abuse during his childhood, how he had "features" of post-traumatic stress disorder, how he claimed to have been molested in college by a "large female," how a recent cognitive examination showed good development of the frontal lobes of his brain, how he had a disciplinary infraction for indecent exposure but was otherwise adjusting to incarceration, how he reported he had engaged in "high risk sex" in the past, how he claimed he was intoxicated at the time of the offense, and how he alleged had "no memory of raping the victim."[2] (R. pp. 730-735). Ultimately, Dr. Maddox described Appellant's "offense" as a "single aberrant act," attributed his behavior to a "multitude of factors" like trauma exposure and substance abuse, and concluded he would be a "good candidate for rehabilitation." (R. pp. 735-736).

Once that report had been prepared and provided to the trial judge, the trial judge conducted another hearing on the reconsideration motion virtually. (R. p. 632). During the

[2] In discussing Appellant's claim of being intoxicated at the time of the "offense," Dr. Maddox noted Appellant reported he was using drugs "on the *night* of the offense." (R. p. 735) (emphasis added). Importantly though, the incident—which involved *many* offenses—occurred during the middle of the afternoon. (R. pp. 26-27; pp. 64-65; p. 69; pp. 78-79).

hearing, defense counsel—relying on Dr. Maddox's report—asserted Appellant was not a danger to the community, alleged Appellant suffered from post-traumatic stress disorder, characterized the incident as an "isolated" event, and noted Dr. Maddox had stated Appellant's sentence "amount[ed] to" a life sentence. (R. pp. 632-634). In response, the solicitor reiterated Appellant's actions had been "chilling" and included an attempt to have Victim assassinated while incarcerated. (R. pp. 635-636). Following that, Appellant spoke on his own behalf, pointed to his participation in some programs for self-improvement while incarcerated, and requested leniency from the trial judge. (R. pp. 636-637). Ultimately, after listening to and receiving that additional information, the trial judge declined to reconsider Appellant's sentence while indicating he believed the sentence imposed—which he noted was less than the maximum allowable—was warranted by the circumstances. (R. p. 639; p. 727). As support for that decision, the trial judge noted there were many factors relevant to sentencing, and he further pointed out Appellant committed crimes against Victim, followed that by using the bank card he stole from her, and then—according to evidence the trial judge considered to be "overwhelming"—attempted to arrange for Victim to be killed. (R. pp. 638-639).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a trial judge's sentencing decisions in rare and unusual circumstances in light of the broad discretion afforded to trial judges on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."); State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."). Furthermore, appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948); cf. State v. Davis, 88 S.C. 229, __, 70 S.E. 811, 814 (1911) ("It is excepted that imprisonment for five years in this case is excessive. We have repeatedly held that we have no jurisdiction to correct a sentence on this ground, provided it is within the limits prescribed by law for the discretion of the trial court, and is not the result of partiality, prejudice, oppression, or corrupt motive.").

ARGUMENT

Appellant's appellate challenge to the trial judge's decision not to reconsider the aggregate eighty-year sentence imposed was not properly preserved for appellate review because the arguments Appellant is now raising on appeal were neither raised to nor ruled upon by the trial judge. Furthermore, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion or otherwise err by virtue of his sentencing decisions in Appellant's case because the aggregate sentence imposed fell within the permissible statutory sentencing limits for Appellant's exceedingly-serious crimes and nothing appearing in the record established it was imposed as the result of any partiality, prejudice, corrupt motive, or improper considerations.

Appellant contends reversal is warranted in his case because the trial judge supposedly abused his discretion by refusing to reconsider the aggregate eighty-year sentence imposed. As support for that contention, Appellant, who repeatedly and inaccurately states on appeal he was just sixteen years old at the time of his offenses, maintains the reconsideration motion should have been granted because: (1) the trial judge indicated he was not going to impose a life sentence but ended up imposing a term-of-years sentence that was the functional equivalent of one; and (2) the trial judge allegedly "exceeded his sentencing authority" when deciding upon Appellant's sentence by considering the fact Appellant attempted to hire someone to murder his elderly victim after he was arrested. Initially, to the extent Appellant maintains on appeal the trial judge purportedly erred by imposing—and then declining to reconsider—a sentence either inconsistent with his stated intent or based on inappropriate sentencing considerations, neither of those arguments was properly preserved for appellate review because they were not raised to or ruled upon by the trial judge. As a result, Appellant's current appellate arguments cannot properly be considered or addressed for the first time on appeal. However, even if our state's issue preservation requirements could somehow be ignored in Appellant's case, the trial judge did not abuse his broad sentencing discretion by imposing an aggregate eighty-year sentence for Appellant's appalling crimes because that sentence fell well within the permissible sentencing

limits for Appellant's offenses. Beyond that, nothing was presented during the circuit court proceedings suggesting the aggregate sentence imposed resulted from any partiality, prejudice, oppression, corrupt motive, or any other improper sentencing considerations. Under such circumstances, the trial judge did not abuse his broad discretion by sentencing Appellant to a statutorily-authorized eighty-year term of imprisonment for Appellant's many highly-serious and disturbing crimes, and there is no proper basis upon which Appellant's aggregate sentence could be disturbed on appeal. Appellant's convictions and aggregate sentence should be affirmed.

A. Appellant's Current Appellate Arguments Were Not Properly Preserved for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and *arguments*." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added); cf. Unemployment Compensation Comm'n of Alaska v. Aragan, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial judge; (2) raised

by the appellant; (3) raised in a timely manner; and (4) raised to the trial judge with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). If an issue—including a constitutional one—is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal."). Critically, on appeal, an appellant is limited solely to the grounds raised at trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Moreover, in the context of sentencing issues, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998); see State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). Importantly, an appellant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to

him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

In the case sub judice, Appellant has raised several arguments on appeal as to why the trial judge supposedly abused his discretion by refusing to reconsider the aggregate eighty-year sentence imposed. More specifically, Appellant alleges the trial judge reversibly erred in connection to the sentence imposed because he purportedly: (1) imposed a sentence inconsistent with his expressed sentencing intent and, thus, somehow imposed a sentence that was based upon a "factual conclusion" unsupported by the evidence; and (2) "exceeded his sentencing authority" by giving consideration to Appellant's shocking actions after his arrest when deciding upon the appropriate sentence and, therefore, somehow "effectively" sentenced him for a crime for which he had not yet been convicted. Importantly though, defense counsel did *not* raise either of those arguments to the trial judge at any point in time, including before or after the sentence was imposed during the trial proceedings, through the post-trial motion seeking reconsideration of the sentence, or during either of the *two* hearings held on that post-trial motion. Instead, defense counsel merely raised a vague claim Appellant's sentence was "excessive" due to his age and lack of a prior record through the post-trial motion before urging the trial judge during the ensuing hearings on that motion to reconsider the sentence imposed for several reasons, including reasons related to Appellant's *post-arrest and post-conviction* actions that purportedly reflected favorably on his rehabilitative potential. Meanwhile, defense counsel—despite noting to the trial judge Appellant's aggregate sentence would ultimately amount to a life sentence when making her request for leniency—never suggested to the trial judge he actually abused his discretion or factually erred due to the aggregate sentence's potential to keep Appellant imprisoned for the remainder of his life, and defense counsel likewise—despite herself

referencing Appellant's involvement in the murder-for-hire plot during sentencing discussions—never suggested to the trial judge he should not or could not properly consider the fact Appellant attempted to arrange for Victim's murder while incarcerated as part of his sentencing considerations.

Because defense counsel did not raise any of the arguments Appellant is now attempting to raise on appeal and, instead, directly sought for the trial judge to give sentencing consideration to Appellant's actions subsequent to the incident date, the trial judge was wholly denied an opportunity to consider, address, or rule upon those arguments—including the current one suggesting it was improper for the trial judge to consider Appellant's post-arrest attempt to have his victim killed before she could testify about what he did to her—both at the time he imposed Appellant's aggregate eighty-year sentence and when he was entertaining Appellant's post-trial motion seeking reconsideration of it. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); cf. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (explaining a party generally cannot properly take a position at one stage of the proceedings and then take a contrary position at a later stage of the same proceedings). Critically, without first giving the trial judge an opportunity to address the various now-asserted claims of error regarding the sentence imposed, Appellant is legally precluded from raising those claims for the first time on appeal. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); cf. State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's

appellate contention the sentence imposed was "cruel and excessive" was unavailable to him on appeal because that particular contention was not raised to the circuit court judge).

As a result, Appellant's appellate arguments challenging the trial judge's sentencing decisions were not properly preserved for appellate review and cannot appropriately be considered or addressed now on appeal. See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."); State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"); cf. State v. Gulledge, 321 S.C. 399, 404-405, 468 S.E.2d 665, 669 (Ct. App. 1996) ("Gulledge . . . argues the State did not prove she had the resources to pay $210,000.00 in restitution and the trial court failed to state its findings and the underlying facts and circumstances of them. Because this argument was neither raised to nor addressed by the trial court, we need not deal with it." (citation omitted)). Appellant's convictions and aggregate sentence should be affirmed.

B. The Trial Judge Did Not in Any Way Abuse His Broad Discretion or Otherwise Err by Sentencing Appellant to an Aggregate Eighty-Year Sentence for His Heinous Crimes

In South Carolina, trial judges are vested with broad discretion to impose a sentence falling within the statutory limits upon an offender convicted of a crime. Sidell, 262 S.C. at 398, 205 S.E.2d at 3. In exercising that broad sentencing authority, the trial judge must be accorded "very wide" discretion to determine the appropriate sentence and can properly consider "*any and all information* that reasonably might bear upon the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (emphasis added). Furthermore, the trial judge is fully permitted to consider one or more of a variety of legitimate penological justifications—including retribution, incapacitation,

deterrence, and rehabilitation—in deciding what sentence is appropriate under the circumstances. See Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (instructing "[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation[,]" and explaining there is no constitutional mandate requiring adoption of any one penological theory); Jones v. United States, 463 U.S. 354, 368-369 (1983) ("A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation."). So long as the sentence imposed falls within the permissible sentencing limits for an offender's crime, the trial judge's decision regarding the appropriate sentence will not be found to be improper *unless* it violated the constitutional prohibition against cruel and unusual punishment or resulted from partiality, prejudice, oppression, or corrupt motive.[3] See Wood v. State, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971) ("It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction . . . against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.").

In the case sub judice, Appellant was convicted of *five* separate and distinct criminal offenses—including first-degree burglary, first-degree criminal sexual conduct, kidnapping, and armed robbery—stemming from the appalling incident. Notwithstanding the inherently grave nature of those offenses, four of Appellant's five heinous crimes have been statutorily classified by our legislature as "violent" and "most serious" in South Carolina. See S.C. Code Ann. § 16-1-60 (identifying first-degree burglary, first-degree criminal sexual conduct, armed robbery, and

[3] On appeal, Appellant has *not* attempted to raise a contention his aggregate sentence constituted cruel and unusual punishment. (App. Br. pp. 1-10).

kidnapping as "violent" crimes); S.C. Code Ann. § 17-25-45(C)(1) (classifying first-degree burglary, first-degree criminal sexual conduct, armed robbery, and kidnapping as "most serious" offenses); see also State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that *first-degree burglary*, *armed robbery*, and *kidnapping* are anything other than grave offenses of the 'most serious' nature." (emphasis added)). Meanwhile, as a result of Appellant's conviction for first-degree burglary, the trial judge—based on the applicable sentencing limits—was required to sentence Appellant to a term of imprisonment of no less than fifteen years up to *life without parole* for that offense *alone*. See S.C. Code Ann. § 16-11-311(B) (stating first-degree burglary is "punishable by life imprisonment," explaining life imprisonment means "until death," and further indicating a sentencing judge may discretionarily impose a sentence of not less than fifteen years). Beyond that, the trial judge was statutorily required to sentence Appellant to at least ten years of imprisonment for his remaining offenses and was permitted to sentence him to up to ninety-five years of imprisonment for those crimes in addition to the sentence imposed for first-degree burglary. See S.C. Code Ann. § 16-3-652(2) (mandating a person convicting of first-degree criminal sexual conduct must be imprisoned for "not more than thirty years"); S.C. Code Ann. § 16-3-910 (mandating a person convicting of kidnapping "must be imprisoned for a period not to exceed thirty years"); S.C. Code Ann. § 16-11-330(A) (mandating a person convicted of armed robbery "must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted"); S.C. Code Ann. § 16-23-490(A) (mandating a person convicted of possession of a weapon during the commission of a violent crime "must be imprisoned five years" unless death or life without parole was imposed for the violent crime). Thus, based on his commission of a shocking home invasion that culminated in the robbery and

rape of an eighty-one-year-old woman, Appellant was facing a sentence of no less than a non-suspendible fifteen-year term of imprisonment up to a sentence of life without parole *plus* an additional ninety years of imprisonment for his convictions. See State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997) ("[W]hether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge."); see also State v. Jacobs, 393 S.C. 584, 589, 713 S.E.2d 621, 624 (2011) (holding a sentence for first-degree burglary cannot be suspended).

Despite having the discretionary authority to sentence Appellant to life without parole *plus* a consecutive term of imprisonment of just short of a century, the trial judge—mercifully for Appellant—elected not to impose such a sentence. Instead, the trial judge imposed an aggregate term-of-years sentence that: (1) did not unyielding require Appellant to be incarcerated until his death as would have been true if he was sentenced to an actual life without parole sentence; and (2) fell well within the permissible sentencing limits for Appellant's numerous grave crimes. See S.C. Code Ann. § 16-11-311(B) ("For purposes of [the first-degree burglary statute], 'life' means until death."). And, in doing so, the trial judge did not say or do anything suggesting that aggregate sentence was imposed as the result of any improper partiality, prejudice, or oppressive or corrupt motive on his part, including by giving consideration to the information establishing Appellant continued his criminal behavior even after he was arrested by trying to have his elderly victim snuffed out. See State v. Fleming, 228 S.C. 129, 133-134, 89 S.E.2d 104, 106 (1955) ("In this question, appellants complain of the sentence in that their accomplice received a sentence of 18 months while they received a sentence of 10 years. This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial Judge and is not the result of partiality, prejudice, oppressive or

corrupt motive."); People v. Gramo, 623 N.E.2d 926, 935 (Ill. App. Ct. 1993) (instructing harsh sentencing ought to be imposed upon a defendant who preys upon an elderly victim); cf. Franklin, 267 S.C. at 246, 226 S.E.2d at 898 (rejecting a contention the sentencing judge erred by "considering charges against [Franklin] which had not been disposed" when imposing the sentence while emphasizing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come"). Under such circumstances, the trial judge did not abuse his broad discretion or otherwise err in connection to Appellant's sentence, and there is simply no proper basis upon which the trial judge's discretionary sentencing decisions in Appellant's case could be disturbed on appeal. See State v. Bass, 242 S.C. 193, 197, 130 S.E.2d 481, 483-484 (1963) ("This Court has no jurisdiction to correct a sentence alleged to be excessive when it is within the limits prescribed by law.").

In arguing to the contrary, Appellant first maintains the aggregate term-of-years sentence imposed was inconsistent with the trial judge's expressed sentencing intent because the trial judge indicated he was not going to impose a life sentence but nevertheless effectively did so "as a practical manner" based on the length of the term-of-years sentence imposed coupled with Appellant's purported remaining life expectancy as reflected in a particular study.[4] Importantly

[4] On appeal, Appellant's arguments concerning his alleged remaining life expectancy are premised on the contents of a report that he states was presented to the South Carolina Supreme Court in an *unrelated* original jurisdiction case as opposed to the trial judge in his case. (App. Br. pp. 8-9). Significantly, since the report Appellant now seeks to rely upon was not presented to—and, thus, obviously not considered by—the trial judge when addressing Appellant's sentence, it cannot appropriately be considered as a basis for reversing the trial judge's sentencing decisions on appeal. See Rule 210, SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); see also S.C. State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); Mullis v. Celanese

though, the trial judge expressly explained his decision to impose an aggregate eighty-year term of imprisonment upon Appellant was "intentional" due to the heinous nature of Appellant's many crimes and then later confirmed he understood Appellant would be elderly before he would have any possibility of obtaining release, which were statements that could leave no legitimate doubt as to whether he actually intended to impose the sentence he imposed. Meanwhile, although Appellant contends his term-of-year sentence may wind up having the same practical effect as a life without parole sentence, the trial judge did *not* sentence Appellant to a true life without parole sentence that would bar him from any opportunity for obtaining release prior to his death and, instead, imposed a lengthy term of years that ensured Appellant would not be released back into society for many decades but could theoretically obtain release if he reached a sufficiently advanced age.[5] Therefore, when viewed in the proper context and in light of the trial judge's own express statements confirming the *intentional* nature of the manner in which he structured Appellant's sentence, the trial judge's decision to impose—and then decline to reconsider—the aggregate eighty-year sentence was *not* inconsistent with his decision not to impose a life sentence upon Appellant since the sentence imposed was not an actual life without parole sentence and, thus, does not preclude Appellant from being released before his death if he

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Corp. of Am., 234 S.C. 380, 393, 108 S.E.2d 547, 553 (1959) (explaining matter not before the trial judge is "not entitled to consideration on appeal").

[5] Due to the nature of Appellant's crimes, Appellant will necessarily be required to serve at least eighty-five percent—or sixty-eight years—of his aggregate eighty-year sentence before he will be eligible for any form of release. See S.C. Code Ann. § 24-13-150 (stating offenders convicted of "no parole" offenses must serve at least eighty-five percent of their sentences before being eligible for release). Therefore, based on his age and remaining sentence, Appellant will be approximately eighty-six years old before he will have any chance at release from custody. Id. Meanwhile, according to data compiled by the Social Security Administration, a male citizen born on Appellant's birthdate would be expected to live until reaching an age of between eighty-one years old and nearly eighty-eight years old. S.S.A. Life Expectancy Calculator, https://www.ssa.gov/planners/lifeexpectancy.htm.

ultimately survives to an age similar to that of his own victim's at the time of the disturbing crimes. See State v. Saxon, 261 S.C. 523, 530, 201 S.E.2d 114, 118 (1973) ("The statement made by the trial judge must be considered in context.").

Next, as support for his appellate challenge to his sentence, Appellant maintains the trial judge improperly exceeded his sentencing authority by considering the evidence of the attempt to have Victim murdered before trial. Importantly though, Appellant's attempt to have his victim assassinated before she could testify at trial constituted powerful evidence of his guilt for the charged crimes while at the same time constituting compelling evidence reflecting negatively on his character and prospects for rehabilitation. See State v. Edwards, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009) ("[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt. Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility); State v. Tucker, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996) ("The defendant's future danger to society is a legitimate interest at sentencing. Another legitimate interest is the defendant's prospect for rehabilitation and restoration to a useful place in society." (citations omitted)). Because that evidence was *exceedingly* relevant to Appellant's degree of culpability and overall character, it was in no way improper for the trial judge, who was vested with broad discretion to consider any and all information that could reasonably bear on the appropriate sentence, to consider the fact Appellant engaged in pre-trial efforts to disrupt his prosecution by having his victim murdered when deciding what sentence to impose upon Appellant for his convictions. See Wasman v. United States, 468 U.S. 559, 563 (1984) ("It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court . . . must be permitted to consider *any and all* information that reasonably might bear on the proper

sentence for the particular defendant, given the crime committed." (emphasis added)); Franklin, 267 S.C. at 245, 226 S.E.2d at 897 ("If justice is to be done, a sentencing judge should know all the material facts."); cf. People v. Allen, 376 N.E.2d 1042, 1047 (Ill. App. Ct. 1978) (concluding the trial judge did not err in considering Allen's conduct in intimidating a witness when the evidence presented during trial fairly suggested Allen had engaged in an act of witness intimidation prior to his trial); Martin v. State, 96 A.3d 765, 792 (Md. Ct. Spec. App. 2014) (explaining a sentencing judge possesses very broad latitude as to what information can be considered when determining the appropriate sentence for a particular offender and holding the sentencing judge properly considered evidence of Martin's attempt while in custody to solicit an unknown person to convince an individual named Burks to falsely implicate someone other than Martin in the charged crime and then kill Burks after he had done so "even if it constituted evidence of an uncharged offense"). And, critically, that remained true regardless of whether Appellant had been convicted of solicitation to commit a felony or any other criminal offense specifically for his involvement in the murder-for-hire plot. See United States v. Legins, 34 F.4th 304, 326 (4th Cir. 2022) (explaining a sentencing judge has broad discretion to impose a sentence fully reflecting a defendant's background, character, and conduct and, therefore, can properly consider the defendant's pertinent good conduct along with the defendant's pertinent bad conduct, which "of course" would include any related criminal activity); United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985) (instructing a sentencing judge can properly consider information about crimes for which the defendant has been charged but not tried when imposing sentence); Flinn v. State, 563 N.E.2d 536, 544 (Ind. 1990) ("A sentencing court . . . is not limited to considering only convictions in assessing a defendant's criminal history; pending charges and uncharged crimes may be considered."); State v. Manning, 164 So. 3d 346, 358 n. 6

(La. Ct. App. 2015) ("[A]ll convictions and prior criminal activity (including arrests and pending charges) are proper sentencing consideration."); State v. Reed, 839 N.W.2d 877, 880-881 (Wis. Ct. App. 2013) ("In Wisconsin, sentencing courts are obliged to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence. Thus, at sentencing, the State is allowed to bring forth, and the circuit court may consider, pending charges." (citations and internal quotations omitted)).

For all those reasons, the trial judge did not abuse his broad sentencing discretion or otherwise err by imposing—and then declining to reconsider—a sentence that fell squarely within the permissible sentencing limits for Appellant's reprehensible crimes. See Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant."); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion."). In fact, by sentencing Appellant to a term-of-years sentence—albeit a lengthy one—instead of life without parole as was statutorily authorized for just *one* of Appellant's egregious crimes, the trial judge—who was the one solely tasked with determining the appropriate sentence under the circumstances involved—extended more leniency to Appellant than Appellant was necessarily entitled to under the law. Cf. United States v. Fowler, 948 F.3d 663, 670 (4th Cir. 2020) (rejecting Fowler's challenge to the forty-year sentence he received after he pled guilty to charges related to his sexual abuse of two minor victims and noting "the judge cut Fowler a significant break" by sentencing him to a term of imprisonment substantially lower than the 140-year sentence that could have permissibly been imposed for Fowler's crimes). Under such circumstances, there are no proper grounds upon which to disturb

Appellant's aggregate sentence on appeal, and Appellant's current arguments to the contrary—in addition to not being properly preserved for appellate review—are manifestly without merit. See State v. Sanders, 251 S.C. 431, 444, 163 S.E.2d 220, 228 (1968) (instructing the "established rule" in South Carolina is an appellate court will not reverse a sentence for being "excessive" if it falls within the statutory sentencing limits and was not imposed as the result of partiality, prejudice, oppression, or corrupt motive); cf. Sidell, 262 S.C. at 398, 205 S.E.2d at 3 ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits. The sentence of thirty (30) years, although the maximum, was within the limits permitted by law, and no abuse of discretion is shown. After a full examination of the record, we are convinced that the appeal is manifestly without merit and wholly frivolous."). Appellant's convictions and aggregate sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2019-000511

THE STATE,

Respondent,

vs.

AARON McKENZIE CAPERS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies 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."

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