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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
William P. Keesley, Trial Judge

JUSTIN RYAN CONE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2022-1498

BRIEF OF RESPONDENT
(*White v. State* Review)

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PETITIONER'S STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner, Justin Ryan Cone, for first-degree criminal sexual conduct with a minor in May 2012, and amended the indictment in August of 2014. Steve Wayne Sumner, Esquire, represented Petitioner on the charge.

A jury trial was held November 17, 2014, through November 19, 2014. The Honorable William P. Keesley presided. At the conclusion of trial, the jury found Petitioner guilty as indicted. (App. 382-83).[1] Judge Keesley sentenced Petitioner to 30 years imprisonment. (App. 388). Judge Keesley advised Petitioner on the record at the time of sentencing that he had a "very narrow time frame in which" to appeal and cautioned that he should quickly direct counsel to file a notice "if you have any desire whatsoever to appeal." (App. 388). Ultimately, while the process was started, the appeal was not perfected.

Petitioner then filed an application for post-conviction relief on August 1, 2017, and raised various claims of ineffective assistance of trial/appeal counsel and alleged misconduct by the prosecution and a juror. (App. 393). In his attachment to the application, Petitioner alleged that his direct appeal, though filed, had not been correctly perfected. (App. 398-400). Respondent made its return on January 16, 2018, initially requesting that an evidentiary hearing be held on the allegations, but Respondent subsequently filed an amended return and moved to dismiss claims as untimely apart from the claimed denial of the right to direct appeal, and requested that the evidentiary hearing would be restricted to the claim that Petitioner did not knowingly and voluntarily waive his right to direct appellate review. (App. p. 418-21 and 423-24).

An evidentiary hearing was held on February 21, 2019, before the Honorable Alex Kinlaw, Jr. (PCR court) at the Greenville County Courthouse. Applicant was present and was

[1] References to "App." indicate the original appendix filed in this PCR appeal. Later references to "Cert. App." indicates the smaller appendix filed with the petition to this Court.

represented by R. Mills Ariail, Jr., Esquire. At the outset of the hearing, PCR counsel informed the PCR judge that Petitioner wished to "go forward with trying to get a belated appeal" and was "wiling to withdraw his remaining claims" in the application. (App. 429-30). Mr. Sumner was thereafter called as a witness and testified that while Petitioner had indicated he wished to file, and Mr. Sumner did begin the process, Mr. Sumner was thereafter instructed by Petitioner's mother not to work on the case. (App. 433-36). Mr. Sumner testified that he even provided names of other attorneys and asserted that he "wrongly made a presumption that she had hired one of the other attorneys." (App. 435). After the PCR judge found that trial counsel failed to perfect the appeal, Petitioner withdrew the remaining claims on the record. (App. 441-44). By written order issued on March 6, 2019, filed March 12, 2019, the PCR judge memorialized his ruling finding Petitioner was entitled to belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). (App. 453-55).

Petitioner filed a petition for a writ of certiorari arguing the PCR judge properly found that he did not knowingly and voluntarily waive his right to direct appellate review of his conviction, and filed with the petition a *White v. State* brief pursuant to Rule 243(i)(1), SCRAP. In the *White v. State* brief, filed September 20, 2019, Petitioner raised the following issues:

1.

> Did the trial judge err in allowing the solicitor to argue that the complaint's testimony need not be corroborated pursuant to S.C. Code Ann § 16-3-657 where the judge found that instructing the jury on that statute was improper?

2.

> Did the trial judge err in barring defense counsel from cross-examining the minor about specific punishments she received for lying, ruling the matter not relevant and, if relevant, barred under Rule 403, SCRE and in failing to perform the requisite Rule 403 analysis on the record?

(*White v. State* brief, p. 1).

The State did not contest the finding supporting of a *White v. State* review but did file a Brief of Respondent in opposition to the direct appeal questions raised.

The Court of Appeals agreed that "there is sufficient evidence to support the PCR judge's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal" then considered the issues raised in the *White v. State* brief, but denied relief. Of relevance here, the Court of Appeals found the first issue, *i.e.,* on issue on the State's argument, was not properly preserved for review and had also been waived. (Cert. App. 1-2). Petitioner filed a petition for rehearing, and, regarding the first issue, requested rehearing on both the failure to properly preserve and the waiver of the issue. (Cert. App. 5-8). The State made a return, which it amended on September 20, 2022. (Cert. App. 14-23). The Court of Appeals denied the petition on September 22, 2022. (Cert. App. 24).

Petitioner then sought review by this Court on both the issues raised in the Court of Appeals. By order dated May 24, 2023, this Court granted review of the first issue, and denied review of the second issue presented. Petitioner filed his Brief of Petitioner on June 23, 2023. This Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner became friends with the Casey and Doug Millers, the mother and father of the victim, through a mutual appreciation for automobile racing. (App. 176-79, 220-222, 283). The victim's father and mother eventually developed a sexual relationship with Petitioner that included sex acts known as threesomes and oral sex in a position known as the "sixty-nine." (App. 179-80). The acts occurred over a period of years in the bedroom of the victim's parents or the living room of their home. (App. 180, 201-02). The bedrooms in the Millers' home did not have doors, but the doorways of the children's rooms had sheets hung across the frames. (App. 180-83).

The victim's mother discovered the victim's younger sister inappropriately rubbing a doll and discovered that the victim and the younger sister had been engaging in sex acts. (App. 183). When questioned about the matter by her mother, the victim disclosed that she had been sexually abused. (App. 184-85). After the incident was reported to police, a medical exam was conducted on the victim, which did not reveal the presence of any sexually transmitted diseases or changes to the victim's genitalia. (App. 209-11, 226). The victim was forensically interviewed at the Julie Valentine Center, and a video recording of the interview was admitted into evidence and played for the jury at Petitioner's trial. (App. 98-104). The victim testified at trial that Petitioner made her perform oral sex on him and that she disclosed the abuse to her mother. (App. 84-85).

Petitioner also testified at trial. He admitted his sexual interactions with both the victim's parents, (App. 286, 293), but denied the sexual abuse of the minor, (App. 283, 291). He testified that he and victim's father, would watch sexually explicit movies, and the children would attempt to interrupt. According to Petitioner, the victim's father "would tell them to close your eyes and hold your ears." (App. 287, 298). Petitioner testified that the victim's father

approached him at some later point and asked what he had done with the victim. Petitioner denied any abuse. (App. 288-90). On cross-examination, Petitioner admitted the child victim would say she was his girlfriend but denied that he would indicate that she was. (App. 295).

In reply, the State presented Teresa Miller, whose son was friends with Petitioner. Ms. Miller testified Petitioner would "tease" the victim "about her being his girlfriend and he would kind of put his arm around her and say this is my girlfriend. And said I'm going to marry you some day, huh? And she would say yeah. And he'd say I'll wait on you." (App. 301-302).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "The trial court has broad discretion when dealing with the propriety of the solicitor's argument . . . ." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (citing *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)). An appellate court will not overturn the trial court's decision "absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." *Copeland*, at 324, 468 S.E.2d at 624 (citations omitted). "[T]he appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." *Id.* "[T]he appellant has the burden of proving" that he "did not receive a fair trial because of the alleged improper argument." *Id.*

ARGUMENT

I. The Court of Appeals properly found the issue of whether the trial court erred in allowing the State to argue that the victim's testimony need not be corroborated was procedurally unavailable for a merits review given the absence of a contemporaneous objection and a waiver of the issue.

Relevant Facts:

While the parties and trial court were discussing potential jury instructions, the State requested that the court charge the provisions of S.C. Code Ann. § 16-3-675 that the victim's testimony did not have to be corroborated. The State noted that it anticipated mentioning that in closing. (App. 309). Petitioner objected to the charge on the ground that it would constitute an improper comment on the facts from the bench. (App. 310). The trial court took the matter under advisement but stated that it would not prevent the State from arguing the statute to the jury in even if the court ultimately declined to charge the statute. (App. 310).

The following day, before argument began, the trial court denied the State's request to charge, explaining that it believed it improper to single out a single witness's credibility in jury charges and would instead charge the jury that "[it] may believe one witness against many or many against one. Which is the same thing. It's just a lot shorter and it's not specifically tailored to one particular witness." (App. 326-27). The State asked for permission to reference the statute and use its language in the opening on the law, and the trial court gave its explicit permission for the State do so, over Petitioner's objection to the State's opening on that particular point of law. (App. 328-29). Petitioner argued that the State in opening on the law should be confined to the charge. (App. 328). Seeking clarification, the prosecutor advised he would "say something along the lines of, and if this is an incorrect or misstatement of the law, His Honor will correct it with his jury charge," which the trial judge found appropriate. Petitioner's counsel followed with "I'm not going to object to it." (App. 329). Petitioner's counsel continued: "I don't want to

waive this just purely for appellate purposes. I do object to him referencing that in his opening on the law for the reasons I've stated. And as long as you say the records are protected, I'm not going to object during the actual opening statement." (App. 330). The trial judge granted "continuing objection," cautioning, "[i]f the Supreme Court says that's okay. I don't take it upon myself to try to do anybody else's job." (App. 330). After a short break, the State announced that it would not open on the law. (App. 331).

Thereafter, in presenting the first closing argument, Petitioner argued that there was "not one piece, not one shred of independent corroboration [of the allegations against him] of any type," though "there are lots of different types out there that could be" presented. (App. 340). Petitioner continued in the argument to concede that "[t]he law doesn't require it. But I would be a huge concern for me with the stakes as high as they are." (App. 340).

In its closing presented after the defense closing, the State briefly mentioned the statute:

> Now, there's another section in our law, Section 16-3-657, criminal sexual conduct, testimony of a victim need not be corroborated. The testimony of the victim need not be corroborated in prosecutions under Section 16-3-652 to 658, which are the sections governing criminal sexual conduct. And I've said this before and I'll say it again, if anything I've misstated, His Honor will correct me. If I've said something wrong about the law, His Honor will correct me. But if I'm not mistaken, he will make plain to you that you can believe one person over many. You can put whatever weight on any piece of testimony you want to put. That's your prerogative. That's what you're permitted to do as jurors. And that's what we expect you to do.

(App. 351). The State continued to underscore that it bears the burden of proof, beyond a reasonable doubt. (App. 351-53). The State then turned to credibility, positing that "[t]he question seems to be is the victim telling the truth?" (App. 353). He suggested, "What did her emotions say? When she talks to her mom she's crying, she's trembling, she's communicating things physical that people don't communicate with words," and continued to describe the victim's demeanor from initial disclosures through testimony. (App. 353-54, 358), He also

described behavior problems that only improved after disclosure. (App. 354-55). He noted consistency in the disclosure. (App. 355-56). In comparison, the State posited that if the joking about the child being a "girlfriend" was innocent, why then lie about having said it all, unless there was an element of guilt attached. (App. 357). The State further noted disclosure is not always immediate, (App. 361-62), and underscored the "[c]ontextual details" that undercut a suggestion of just seeing sexual acts and attempting to describe that in a child-like way compared to revealing the details the child knew – knowledge of the details of Petitioner's anatomy, and testimony that supported actually engaging in sexual acts rather than mere description, (App. 362-67).

The trial judge then instructed the jury that the jury would "alone judge the credibility of the witnesses." (App. 370). He explained the jury could believe all or part of any testimony, or "one witness against many or many against one," and consider possible bias, demeanor, or "lack of evidence presented by the State." He cautioned that the jury was "not to exercise these considerations arbitrarily," but "use [their] sense of logic and reason" and "common sense," and "good judgment." (App. 370). The judge instructed:

> … under your oath you must accept and apply the law as I give it to you. That means you have to accept and apply the law as I give it to you. That means you have to abandon any conflicting ideas you may have about what the law is or what it should be. I give you the law, you apply it to the facts as you determine them to be and in that way you reach your verdict.

(App. 371).

The judge further explained that the burden of proof remained with the State, and expressly instructed: "A defendant is not required to prove his innocence. He is not required to prove anything. The burden is on the State to prove the guilt of the Defendant beyond a reasonable doubt…." (App. 373).

Following the jury charge, this exchange took place on the record:

> THE COURT: Please state for the record exceptions, additions or objections to the charge; from the State?
>
> [Asst. Solicitor] TOOKER: Nothing from the State, sir.
>
> THE COURT: Do you want to preserve the objection about not charging the corroboration?
>
> [Asst. Solicitor] TOOKER: Yes. I'd like to preserve that objection.
>
> THE COURT: From the Defense?
>
> [Defense counsel] Sumner: No objection.
>
> THE COURT: Do you want to preserve any objections you raised yesterday in the conference?
>
> [Defense counsel] Sumner: I do. I just object to my colleague referencing that statute, corroboration statute in his closing, but I'm just reiterating that.

(App. 378-79).

Treatment in the Court of Appeals:

As relevant to his appeal, the Court of Appeals held:

> 1. As to whether the trial court erred in allowing the solicitor to reference section 16-3-657, we hold Petitioner's argument is not preserved for review because he did not contemporaneously object at trial. *See Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (finding CSX's failure to contemporaneously object to closing argument precluded it from raising issue on appeal). Further, Petitioner conceded this issue at trial when he admitted the solicitor could argue the statute during his closing. *See State v. Bryant*, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (stating that because appellant conceded the court's ruling was not prejudicial, he could not assert on appeal that the court's ruling denied him a fair trial).

(Cert. App. 2).

Discussion:

The record shows that, in closing argument, defense counsel was the first to acknowledge before the jury that the law does not require corroboration. (App. 340). The record similarly

shows that the objection prior to argument was to the State mentioning the statute in its opening on the law, which did not happen. There was no objection to the brief reference to the statute in closing. The Court of Appeals was correct to find that the issue was not properly preserved for review on the merits.

"To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson,* 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing S*tate v. Johnson,* 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Johnson*, 363 S.C.at 58-59, 609 S.E.2d at 523. Moreover, the ground must be specific: "A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021). "An issue that was not preserved for review should not be addressed by the Court of Appeals, and" in fact, if an unpreserved issue is considered, "the court's opinion should be vacated to the extent it addressed an issue that was not preserved." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694.

The Court of Appeals found the issue not preserved for a ruling on the merits "because he did not contemporaneously object at trial." (Cert. App. 2). The record fully supports the Court of Appeals. The objection that Petitioner initially made was to when the solicitor's argument could be made, essentially that the State should not "open on the law" with a point of law that would not charged. (App. 328, Petitioner's counsel stating "… I would object to him opening on that point of the law. I do respect the Court's ruling that either of us can argue it, and he can argue that. But I don't think that opening on the law is proper for anything other than the

charge against Mr. Cone."). That differs from Petitioner's current argument that it was improper for the State to refer to the statute in his closing argument at all, and far different from a suggestion that the reference was to an "improper legal consideration[]." (*See* BOP 12).

Further, the contemporaneous objection rule is particularly relevant here because not only did Petitioner's counsel fail to object to the State's mention of the statute in closing argument, but Petitioner's counsel also mentioned the law first. Had counsel objected there would have been discussion as to whether counsel had opened the door to the brief comment.[2] Thus, contrary to Petitioner's assertion there was not a "change" in the "posture of the objection," therefore the first objection preserved the issue, (*see* BOP 12), the defense acknowledging the law prior to the State's argument is a significant change. At any rate, the first objection, as noted above, simply was not so broad as to say argument was inappropriate at any time.[3] This leads to the alternative basis for finding the issue procedurally unavailable – the fact that Petitioner waived the issue.

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[2] At the very least, it would become relevant as to any request for relief in considering whether a purportedly improper argument by the State thereafter had "an effect on the trial as a whole." *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("the idea of an invited response is used not to excuse improper comments, but to determine their effect on the trial as a whole"); *see also Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it is does not unfairly prejudice the defendant.").

[3] Moreover, Petitioner's initial objection at trial to the solicitor's arguing the statute while opening on the law was rendered moot when the solicitor ultimately waived his opening on the law. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) (finding the litigation was moot when, among other things, Friends of Hunley, Inc. provided all documents requested by Sloan in accordance with the Freedom of Information Act and holding that "[a] justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract."); *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (finding the Department's appeal from the trial court's order directing the Department to revoke its suspension of Mathis's driver's license was moot when Mathis became entitled to the return of his driver's license before the Supreme Court issued its opinion and holding that "[a] case becomes moot when judgment, if rendered, will have no

The Court of Appeals was also correct to find waiver because "Petitioner conceded this issue at trial when he admitted the solicitor could argue the statute during his closing." (Cert. App. 2). Plainly, the statute does provide that the testimony of the victim "need not be corroborated…." S.C. Code § 16-3-657. (*See* App. 310, Petitioner's counsel argued to the trial judge, "I just want to stay that I understand that the State is requesting that charge, I can't really, I guess, argue against the statute," though he asked for the court not to charge the statute to avoid an improper comment on the facts). Consequently, Petitioner's counsel conceded (and correctly so) that argument would be proper. (App. 328, Petitioner's counsel admitted to the trial judge, "… I would object to him opening on that point of the law. I do respect the Court's ruling that either of us can argue it, and he can argue that. But I don't think that opening on the law is proper for anything other than the charge against Mr. Cone."). When a party concedes an issue below, it may not raise the issue on appeal. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998); *State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000). Again, the record fully and fairly supports the Court of Appeals opinion that the issue was not procedurally available for review on the merits.

Respondent relies upon the procedural arguments and urges this Court to similarly find the issue unavailable for review on the merits. However, Respondent argues in the alternative that the record also conclusively demonstrates that the State's argument was not improper, and certainly did not show a denial of due process such as would support relief.

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practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief."). This, too, was a significant change.

II. Alternatively, should this Court disagree with the Court of Appeals as to preservation and waiver, the record shows that there was no error in allowing the argument because the argument reflected a correct statement of law, and, when fairly reviewed in context, could not cause a due process violation

It was not improper for the State to argue the victim's testimony did not need to be corroborated, either at the time of trial or at present. Indeed, defense counsel introduced that same concept prior to the State mentioning it all. (App. 340), It simply cannot be said that the State arguing the same (and correctly based on the statute) so infected the trial that fairness was at issue. Petitioner's reliance on later precedent from this Court regarding jury charges based on the statutory provision is misplaced. (*See* BOP 14-17).

Subsequent to the trial, this Court held that the statute, S.C. Code § 16-3-657 should not be used as *a jury charge*. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016). The Court overruled, among other cases, *State v. Rayfield,* 369 S.C. 106, 631 S.E.2d 244 (2006), "to the extent it condones the use of section 16–3–657 as a jury charge." *Stukes*, 416 S.C. at 500, 787 S.E.2d at 483 and n. 5. The precedent is firmly based upon the court's instruction and does not consider arguments at all. *Id.* Without question, the trial judge did not charge Section 16-3-657 and the logic of *Stukes, i.e.,* "this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case," is not applicable. *Id.*, at 499, 787 S.E.2d at 483.

Not only was it proper for the solicitor to argue that the victim's testimony did not need to be corroborated, but it would also have been proper for the trial court to charge the jury on that statement of law as well in light of the controlling opinion in effect at that time. This Court held in *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), *overruled by Stukes*, *supra.,* that the

trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting the statute. *Id.* at 115-16, 631 S.E.2d at 249. The statute provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . . ," which includes the offense for which Petitioner was tried and convicted. S.C. Code Ann. § 16-3-675. The Court in *Rayfield* held that a trial court was not required to charge the statute to the jury, and that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. *Id.* at 117-18, 631 S.E.2d at 250. Notably, the trial court in *Rayfield* instructed the jury, as the trial judge in Petitioner's case did, that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness . . . ." *Id.* at 116-17, 631 S.E.2d at 249-50. This Court found the trial court had not erred in charging the jury on the statute because the trial court thoroughly and fully instructed the jury on the State's burden of proof, the jury's obligation to be the fact-finder and judge the credibility of the witnesses at trial. *Id.* at 118, 631 S.E.2d at 250. This is particularly relevant consideration of a *White v. State* review of this appellate issue because counsel was acting under the precedent that did not support an objection to the charge, though ultimately, the trial court did not give the requested charge.

Even so, Petitioner goes much further with his interpretation of *Stukes* than this Court's opinion bears out. Essentially, Petitioner contends that the argument injected an "improper legal consideration" based upon the statute, when "the statute was enacted for judicial guidance." (BOP 12). For this, Petitioner relies upon the dissent in *Rayfield* and assumes that this Court when finding the statute should not be charge, also rejected that the statute was to make

"abundantly clear – not only to the judge but also to the jury – that a defendant may be convicted solely on the basis of a victim's testimony." *See Rayfield*, 369 S.C. at 117, 631 S.E.2d at 250. Nothing in *Stukes* indicates the Court has rejected that portion of *Rayfield.* Again, this Court in *Stukes* focused on the trial court's instructions to the jury. But critically here, there was no assertion that statute was not applicable to the contrary, the trial court and even defense counsel agreed that the legal principal could be argued – he stated the legal principle in argument. (*See* App. 310, 329, and 340). On this record, there was no indication the law was "misstate[d] or misinterpret[ed]" as Petitioner now wishes to assert.[4] (BOP 14). It then follows that Petitioner's suggestion that this Court "adopt the rule that while no party is banned from arguing the general law applicable to a case, a party cannot misstate or misinterpret the law and is confined to arguing the principles that will be later charged to the jury." (BOP 14). The Supreme Court has already set in place a mechanism for reviewing a prosecutor's argument, the test in *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974), whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." This Court applies that test in ordinary review of issues alleging the State's closing argument was improper. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (citing *Donnelly v. DeChristoforo*); *State v. Huggins,* 325 S.C. 103, 481 S.E.2d 114 (1997) (same). No additional guidance is needed. Further, the record simply does not show that the State's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

First, as shown above, reference to the statute was neither incorrect nor improper. Second, the State noted that the instruction on the law would come from the judge and deferred

[4] In fact, defense counsel argued in seeking to prevent giving the charge, not that the principle was wrong, but that such a charge would be "an improper comment on the facts from the bench." (App. 310). The trial court recognized: "It's the law and its proper to argue anything that's in the law." (App. 310).

to the judge's instructions. Third, the State echoed the concept already introduced by the defense on this point of law. Fourth, the State did not rely on any presumption of credibility but argued, in detail, the reasons that the victim should be found credible. The assistant solicitor's closing was a comprehensive argument on credibility based on the facts adduced at trial. Fifth, and as a final point, the trial judge thoroughly charged the jury on how to make credibility findings and instructed that was their determination alone. There is no cause to find the State's very brief, and correct, reference to a statute – after the defense had candidly acknowledged the law reflected therein – may show a denial of due process. No relief is due. However, the Court of Appeals properly and appropriately found the issue raised was not sufficiently preserved and had been waived. Again, no relief is due.

CONCLUSION

For all the foregoing reasons, this Court, like the Court of Appeals, should affirm the conviction and sentence.

Respectfully submitted,

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s/Melody J. Brown

BY:_____
ATTORNEYS FOR RESPONDENT[5]

August 14, 2023

[5] The State's position in the Court of Appeals and the return to petition for writ of certiorari in this Court was presented by former Assistant Attorney General Taylor Zane Smith, S.C. Bar No. 103282. Mr. Smith has since left the office. Therefore, the above signed is completing the briefing in this matter on behalf of the State but expressly acknowledges Mr. Smith's work which constitutes a substantial portion of the arguments presented in this brief.