ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2011-202734

THE STATE,

Respondent,

vs.

CHARLES M. DEVEAUX,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
Bar # 100145

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

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant failed to object to the qualification of Olszewski as an expert in child abuse assessment; therefore, the issue is not preserved for appeal. However, regardless of preservation, Olszewski was properly qualified as an expert in child abuse assessment; therefore, Olszewski's testimony regarding delayed disclosure and the level of detail children provide was properly admitted. Furthermore, the majority of Appellant's arguments regarding improper vouching and bolstering are not preserved for review. Regardless, of preservation, Olszewski did not improperly vouch for Victim's credibility or bolster Victim's testimony.

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III.

Appellant's argument regarding the State's reference to section 16-3-657 of the South Carolina Code in its opening and closing arguments is not preserved for review. Regardless of preservation, the trial judge did not err in allowing the State to refer to section 16-3-657 of the South Carolina Code during its opening and closing arguments. Moreover, the trial judge did not err in charging the jury on section 16-3-657 of the South Carolina Code.

IV.

The trial judge properly denied Appellant's motion for a mistrial because no Brady violation occurred.

STATEMENT OF THE CASE

On June 17, 2009, a Richland County Grand Jury indicted Appellant for criminal sexual conduct with a minor, first degree. On October 10, 2011, Appellant proceeded to trial before the Honorable G. Thomas Cooper.

At trial, Attorneys Rhodes Bailey, Brian Shealy, and Joanna Delaney represented Appellant. Assistant Solicitors Kathryn Ashton and Nicole Simpson represented the State. On October 13, 2011, the jury found Appellant guilty as charged.

On November 7, 2011, Judge Cooper sentenced Appellant to thirty years of imprisonment. On November 8, 2011, Appellant served a Notice of Appeal. On December 5, 2012, Appellant served the Initial Brief of Appellant. This Brief follows.

ARGUMENT

I.

Appellant failed to object to the qualification of Olszewski as an expert in child abuse assessment; therefore, the issue is not preserved for appeal. However, regardless of preservation, Olszewski was properly qualified as an expert in child abuse assessment; therefore, Olszewski's testimony regarding delayed disclosure and the level of detail children provide was properly admitted. Furthermore, the majority of Appellant's arguments regarding improper vouching and bolstering are not preserved for review. Regardless, of preservation, Olszewski did not improperly vouch for Victim's credibility or bolster Victim's testimony.

In the summer of 2008, Appellant digitally penetrated his ten year old daughter ("Victim"). (R. p. 75.) Appellant contends the trial judge erred in qualifying Raymond Olszewski as an expert in forensic interviewing and child abuse assessment. However, Appellant never specifically objected to Olszewski's qualification as an expert in child abuse assessment. Moreover, even if the trial judge erred in qualifying Olszewski as an expert in forensic interviewing, Olszewski was properly qualified as an expert in child abuse assessment. Therefore, any error in qualifying Olszewski as an expert in forensic interviewing was harmless. Furthermore, the majority of Appellant's arguments regarding improper vouching and bolstering are not preserved for review. Regardless, of preservation, Olszewski did not improperly vouch for Victim's credibility or bolster Victim's testimony.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The decision to admit or exclude evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack

evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). Likewise, the decision whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent an abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

A. Qualification

i. Rule 702, SCRE

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Before a witness is qualified as an expert, the trial court must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001).

ii. Forensic Interviewing

Although qualifying Olszewski as an expert in forensic interviewing may have been error,[1] as discussed below, any error was harmless due to the fact that Olszewski was properly qualified as an expert in child abuse assessment.

iii. Child Abuse Assessment

Initially, Appellant's argument regarding the improper qualification of Olszewski as an expert in child abuse assessment is not preserved.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court 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, 725 (2000).

After the State moved to qualify Olszewski as an expert in forensic interviewing and child abuse assessment, defense counsel questioned Olszewski regarding his qualifications as a forensic interviewer and the reliability of forensic interviewing. (R. pp.

[1] See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006).

271-272.) Thereafter, defense counsel stated, "[W]e don't think this is a science that he can be an expert in, Judge." (R. p. 273.) Appellant's objection seemed to only relate to the qualification of Olszewski as an expert in forensic interviewing, not child abuse assessment. Therefore, any argument that the trial judge erred in qualifying Olszewski as an expert in child abuse assessment is not preserved.

However, regardless of preservation, Olszewski was properly qualified as an expert in child abuse assessment; therefore, Olszewski's testimony regarding delayed disclosure and the level of detail children provide was properly admitted.

Notably, behavioral evidence regarding victims of sexual abuse has historically been introduced in criminal sexual conduct cases. See State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."); State v. Kirton, 381 S.C. 7, 17, 671 S.E.2d 107, 112 (Ct. App. 2008) (quoting testimony on the subject of delayed reporting presented during Kirton's trial on a charge of criminal sexual conduct with a minor); State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.").

Furthermore, other jurisdictions have recognized the value of such testimony.[2] See. e.g., State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) ("There are numerous cases

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[2] See also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children.) (citations omitted). Laypersons such as jurors are not likely aware of this, and, without correction of defense counsel's suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of

from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury.").

In State v. Carpenter, 556 S.E.2d 316 (N.C. Ct. App. 2001), the North Carolina Court of Appeals found no error in allowing expert testimony regarding the fact that delayed and incomplete disclosure is not unusual in cases of child abuse. In responding to the defendant's argument that the state failed to show any scientific foundation for the opinion testimony, the North Carolina Court of Appeals noted the expert "was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education, which included interviewing two thousand children in her career." Id., at 321. The court opined that her testimony "was clearly instructive and helpful to the jury in understanding the evidence since the nature of the sexual abuse of children places lay jurors at a disadvantage." Id. (internal quotations and citations omitted).

In State v. Cardany, 646 A.2d 291 (Conn. App. Ct. 1994), the Appellate Court of Connecticut held that expert testimony on delayed disclosure was admissible in the prosecution's case-in-chief, noting: "It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the

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sexual abuse renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.").

jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief."

In Kilby v. Commonwealth, 663 S.E.2d 540 (Va. Ct. App. 2008), the Virginia Court of Appeals found that the trial court did not err in allowing a witness to provide expert testimony on delayed disclosure. Id., at 546-547. She was admitted as an expert in "forensic interviewing, child sex abuse disclosure by children of sexual assault and recantation." Id., at 543. In finding the admission of her testimony proper, the Virginia Court of Appeals noted she attended numerous forensic training programs and was qualified as an expert in state court and the military courts. She was the lead forensic interviewer at the children's hospital. Id., at 547. In a footnote, the Virginia Court of Appeals noted the following:

> Specifically, she testified that she has attended training through the First Witness Program in Duluth, Minnesota, Finding Words in Windona, Minnesota, and the American Professional Society of Abused Children. She has also received "advanced training" through the National Advocacy Center in Huntsville, Alabama and has attended "many, many, many" national symposiums on forensic interviewing.

Id., at 544, n.3

In State v. Perry, 218 P.3d 95 (Or. 2009), the Oregon Supreme Court found expert testimony on the phenomenon of delayed disclosure by victims of child sexual abuse admissible. The expert testified that examiners and interviewers in her organization received extensive specialized training, and there were specialized journals and other peer reviewed literature devoted to the area of child sexual abuse. The expert also testified that the phenomenon was common and well understood, with a body of literature concerning the issue. Id. at 97.

In responding to a claim of trial court error in allowing the prosecution's expert to testify about sexual abuse of children and characteristics of perpetrators, the Louisiana Court of Appeals noted the following:

> [The expert] testified very broadly about the general characteristics of sexual abuse victims, namely how such victims delay disclosure and some of the reasons why disclosure may be delayed, such as fear or shame. As discussed, part of [the expert's] training and experience included counseling children who were victims of sexual abuse. It would not have been beyond her expertise to explain, based on her own practice and experience, the basics of delayed disclosure.

State v. Friday, 73 So.3d 913, 931-32 (La. Ct. App. 2011).

In finding an expert's testimony on delayed disclosure admissible under its supreme court's authority, the Massachusetts Court of Appeals opined: "Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition at least since Dockham,[3] informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Commonwealth v. Bougas, 795 N.E.2d 1230, 1236 (Mass. Ct. App. 2003).

The Georgia Court of Appeals found testimony about child sexual abuse syndrome, including testimony about delayed disclosure, admissible, relying on its longstanding supreme court precedent. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006) (citing Allison v. State, 535 S.E.2d 805 (Ga. 1987)).

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[3] Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989) (finding testimony about the characteristics of abused children to be admissible).

The Iowa Court of Appeals found counsel was not ineffective for failing to object to an expert's testimony on characteristics of abused children, noting in part: "We determine the opinion evidence could help the jury in understanding the evidence because it explained the delayed reporting symptom that existed in children who were sexually abused." State v. Tonn, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989).

In the case at hand, Olszewski testified that he had a bachelor's degree in psychology and a master's degree in social work. (R. p. 266.) Furthermore, Olszewski took and taught numerous courses that related to child sexual abuse. (R. p. 268.) Moreover, Olszewski's testimony regarding delayed disclosure and the level of detail given by children assisted the jury. Thus, Olszewski was properly qualified as an expert in child abuse assessment.

B. Vouching/Bolstering

i. Not Preserved for Appeal

In Appellant's brief, Appellant argues that a few of Olszewski's statements mirrored the improper statements in State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). (App. Br. pp. 12-13.) However, many of the statements Appellant complains about on appeal were not objected to during trial. Therefore, those issues are not preserved for appeal.

"An issue may **not** be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (emphasis added); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("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.")

First, Appellant failed to object to Olszewski's statement regarding the fact that forensic interviewers always look "at the level of detail" that the child gives, and when a child gets older, his or her ability to provide detail increases. (R. pp. 270-271.) Therefore, Appellant cannot complain about the statement on appeal. Moreover, the problem in McKerley was not that the forensic interviewer testified generally about the level of detail children can provide at different ages. McKerley, 397 S.C. at 466, 725 S.E.2d at 142. The problem in McKerley was that the forensic interviewer testified that "those statements have a level of detail that . . . they would be able to tell **[only] if something were to have happened.**'" Id. (alteration in original) (emphasis added). In contrast, Olszewski's generic statement regarding the level of detail children are able to provide at different ages did not expressly or implicitly vouch for Victim's credibility or bolster Victim's testimony.

Second, Appellant failed to object to Olszewski's statement regarding how he tries to assess the competency of the child. (R. p. 277.) Therefore, Appellant cannot complain about the statement on appeal. Moreover, contrary to Appellant's assertion, McKerley does not discuss whether or not a statement regarding assessing the competency of the child is a proper statement or not. See McKerley, 379 S.C. 461, 725 S.E.2d 139.

Third, Appellant failed to object to Olszewski's statement regarding how he tries "to discover whether or not something has happened to the child." (R. p. 280.) Therefore, Appellant cannot complain about the statement on appeal.

Fourth, Appellant failed to preserve his improper vouching argument regarding Olszewski's delayed disclosure testimony. (R. p. 286.) At trial, defense counsel objected to the delayed disclosure testimony; however, his objection was that Olszewski was "not a child psychologist." (R. p. 286.) Defense counsel did not object on the ground of improper vouching. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A] party may not argue one ground at trial and an alternate ground on appeal."). Therefore, Appellant cannot argue on appeal that the statement was improper vouching or improper bolstering. Moreover, contrary to Appellant's assertion, McKerley does not discuss whether or not delayed disclosure testimony improperly bolsters a victim's testimony. See McKerley, 379 S.C. 461, 725 S.E.2d 139. Furthermore, as discussed above in subsection A, an expert in child abuse assessment may testify regarding delayed disclosure because the testimony assists the jury and is not within the jury's common knowledge. Thus, the delayed disclosure testimony did not expressly or implicitly vouch for Victim's credibility or bolster Victim's testimony.

Finally, Olszewski did not vouch for Victim's credibility or bolster Victim's testimony when he made the statement on page 288 of the record, lines 1-2, concerning the level of detail Victim provided in this case. As an initial matter, Appellant's vouching argument is not preserved. When Olszewski first testified regarding the level of a detail, Appellant did not object. (See R. pp. 270-271.) Moreover, when Olszewski testified how children at different ages provided different levels of details, Appellant never objected. (See R. p. 287). Thus, Appellant's failure to object at the first opportunity made the issue unpreserved. See State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review.").

Regardless of preservation, Olszewski's statement regarding the level of detail Victim provided did not improperly vouch for Victim's credibility or bolster Victim's testimony. In South Carolina, an expert's comment on the veracity of a child's accusations of sexual abuse is improper. See State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In State v. Douglas, our Supreme Court held that the forensic interviewer never addressed the veracity of the victim. State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009). In Douglas, the forensic interviewer testified regarding how she conducted her interviews and made a deal with the victim that they were going to tell each other the truth. Id. In its reasoning, the Supreme Court found that the forensic interviewer never stated she believed the victim, and the victim never agreed to tell the truth to the forensic interviewer. Id. at 504, 671 S.E.2d at 609. Thus, there was no evidence that the forensic interviewer believed the victim was telling the truth. Id.

In State v. Hill, this Court held that the forensic interviewer's testimony concerning coaching and the level of detail the victim provided in the case was not improper bolstering. State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 377 (Ct. App. 2011). In Hill, Olszewski, the same expert in the case at hand, testified regarding the level of detail the victim provided. Id. at 293, 715 S.E.2d at 375-376. In its reasoning, this Court stated the following:

> In the case at hand, as in Douglas, the forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony.

Id. at 295, 715 S.E.2d at 376-377.

In the case at hand, as in Douglas and Hill, Olszewski never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. In other words, Olszewski's testimony did not eliminate the possibility that Victim was coached. Accordingly, the trial judge properly overruled Appellant's objection.

In summary, the majority of the arguments Appellant makes on appeal are not preserved. Regardless of preservation, Olszewski did not vouch for Victim's credibility or bolster Victim's testimony.

II.

With respect to the improper testimony from the investigator, Appellant's mistrial argument is not preserved for review because Appellant neither contemporaneously objected to the sufficiency of the curative instruction nor contemporaneously moved for a mistrial. Moreover, Appellant never objected on improper vouching grounds to the investigator's testimony. Regardless, of preservation, the trial court did not abuse its broad discretion when it refused to grant Appellant's mistrial motion.

Appellant contends the trial court erred in not declaring a mistrial after the Olszewski and the investigating officer "improperly vouched for [Victim's] credibility and testified about the details of the alleged incident." (App. Br. p. 19.) However, Appellant failed to preserve his mistrial motion with respect to the investigator's testimony because Appellant neither contemporaneously objected to the sufficiency of the curative charge nor moved for a mistrial. Regardless, of preservation the trial court did not err in denying Appellant's mistrial motion with respect to Olszewski and the investigator's testimony.

Standard of Review

"The decision to . . . deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999).

"A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). Moreover, "[t]he granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its

prejudicial effect can be removed in no other way." Dempsey, 340 S.C. at 570, 532 S.E.2d at 309 (Ct. App. 2000).

In determining whether to grant a mistrial, the trial judge should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). The burden is on the moving party to establish both error **and** prejudice. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). Appellate courts favor the exercise of the wide discretion of the trial judge in evaluating a mistrial request. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

A. Investigator Martin's Testimony

Appellant contends the trial judge erred in denying his motion for a mistrial after Investigator Martin "improperly vouched for [Victim's] credibility and testified about the details of the alleged incident."

i. Issue Preservation

However, as an initial matter, Appellant's mistrial motion regarding the investigator exceeding the time and place exception to the hearsay rule is not preserved for review because Appellant neither contemporaneously objected to the sufficiency of the curative instruction nor contemporaneously moved for a mistrial.

When the investigator started testifying regarding the details of the sexual assault, Appellant objected on the ground that the testimony exceeded the time and place exception to the hearsay rule. (R. p. 166.) The trial judge sustained Appellant's objection, struck the testimony, and issued the following curative instruction: "All right.

Ladies and gentlemen, strike that from the record. This witness doesn't – doesn't have personal knowledge of anything like that. So I'm going to ask you to disregard that in your consideration of this case, and I'm going to ask that it be stricken from the record." (R. p. 167.)

Thereafter, without any on-the-record objection or motion for a mistrial from Appellant, the investigator continued testifying. After Appellant cross-examined the investigator and made unrelated arguments, Appellant moved for a mistrial based on the fact that the investigator's testimony exceeded the time and place exception to the hearsay requirement. (R. p. 182.) Thereafter, the following colloquy occurred:

> THE COURT: I struck that from the record.
>
> MR. BAILEY: Yes, sir. We would just like to preserve that, and we moved for a mistrial at that time.
>
> THE COURT: Anything further?
>
> MR. BAILEY: No, sir.
>
> COURT: You prepared to go forward with this officer?
>
> MR. BAILEY: Yes, Judge.

(R. p. 182.)

When the trial judge issued the curative instruction, Appellant did not make a contemporaneous objection to the sufficiency of the curative instruction or move for a mistrial. (R. p. 167); see State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 615 (Ct. App. 2012) (noting that the law assumes a curative instruction will remedy an error; therefore, failure to object to the sufficiency of that charge renders the issue waived and unpreserved for appellate review); State v. Heller, 399 S.C 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) ("Although Heller subsequently moved for a mistrial, he initially

accepted the trial court's ruling wherein the trial court sustained his objection and granted his requested relief of striking the offending testimony. Because he accepted the ruling and did not contemporaneously move for a mistrial or object to the sufficiency of the court's curative instruction, this issue is not preserved for our review. Further, though Heller did move for a mistrial and argue the curative instruction was insufficient immediately following conclusion of the State's direct examination of Kevin, this is insufficient to qualify for a contemporaneous objection."); State v. Ferguson, 376 S.C. 615,620-621, 658 S.E.2d 101, 104 (Ct. App. 2008) (holding that an issue is not preserved if the objecting party does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial); State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996).

Even if Appellant did move for a mistrial during the off-the-record bench conference, the trial judge did not acknowledge that Appellant moved for a mistrial during the bench conference. (R. p. 182.); see York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review."). Moreover, the trial judge did not make an on-the-record ruling on Appellant's mistrial motion; therefore, the issue is not preserved for review. (R. p. 182); see Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and **ruled upon** in the trial court will not be considered on appeal.") (emphasis added).

Additionally, Appellant's argument that the investigator's testimony improperly vouched for Victim's credibility is not preserved because Appellant never objected to the testimony on vouching grounds. See Prioleau, 345 S.C. at 411, 548 S.E.2d at 216 ("[A]

party may not argue one ground at trial and an alternate ground on appeal."). Thus, Appellant cannot argue on appeal that the testimony was improper vouching.

ii. Sufficiency of the Curative Instruction

Regardless of preservation, the trial judge properly exercised his broad discretion in deciding to give a curative instruction instead of granting a mistrial. The trial court cured any potential prejudice to Appellant with its instruction to disregard the investigator's response to the solicitor's question. See State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (noting a curative instruction is usually deemed to cure an alleged error); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given).

Here, as in Ferguson, 376 S.C. at 621, 658 S.E.2d at 104, and State v. Edwards, 373 S.C. 230, 237, 644 S.E.2d 66, 69 (Ct. App. 2007), the curative instruction was simple, and the court refrained from reiterating or emphasizing the investigator's answer. Accordingly, the curative instruction cured any potential prejudice that the investigator's statement could have caused.

B. Olszewski's Testimony

On appeal, Appellant argues that the trial court should have granted a mistrial because Olszewski improperly vouched for Victim's credibility and testified beyond the scope of the time and place exception to the hearsay rule.

As discussed in Issue I of this brief, many of Appellant's vouching arguments are not preserved for review, and the arguments that are preserved have no merit.

As for Appellant's argument that Olszewski's testimony exceeded the time and scope exception to the hearsay rule, his argument is not preserved for review. Appellant points to page 287 and 288 of the record to support his argument. However, the only time Appellant objected was on page 288 of the record, and his objection was based on improper vouching. (R. p. 288.) Appellant never argued that the testimony exceeded the scope of the time and place exception to the hearsay rule. (R. p. 288.) After Olszewski finished testifying, Appellant moved for a mistrial and tried to bootstrap an additional objection to his original vouching objection in his motion for a mistrial. See State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (a party may not use a mistrial motion to bootstrap objections to testimony that the party never made). Accordingly, Appellant's time and place argument in support of his mistrial motion is not preserved for review.

III.

Appellant's argument regarding the State's reference to section 16-3-657 of the South Carolina Code in its opening and closing arguments is not preserved for review. Regardless of preservation, the trial judge did not err in allowing the State to refer to section 16-3-657 of the South Carolina Code during its opening and closing arguments. Moreover, the trial judge did not err in charging the jury on section 16-3-657 of the South Carolina Code.

A. Appellant failed to preserve the issue regarding the State's reference to section 16-3-657 of the South Carolina Code during the State's opening argument.

Although Appellant made a pretrial motion to prevent the State from referencing section 16-3-657 of the South Carolina Code during the State's opening argument, Appellant failed to obtain a ruling on the issue before the State presented its opening argument. Moreover, Appellant failed to contemporaneously object to the State's reference to the statute during its opening argument. Accordingly, Appellant's argument is not preserved for review.

"Generally, an issue must be both raised to and **ruled upon** by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (emphasis added). If an error 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).

Furthermore, "[i]n order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. 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." See State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003) (citations omitted).

Before the trial began, defense counsel made a motion to prevent the State from referencing section 16-3-657 of the South Carolina Code in its opening argument. (R. p. 20.) Furthermore, defense counsel objected to the trial judge charging the jury on section 16-3-657 of the South Carolina Code. Notably, the trial judge **did not rule** on the issue at that time. (R. p. 22.)

After the defense counsel made the motion but **before the trial judge ruled on the motion**, the State made a reference to section 16-3-657 of the South Carolina Code during its opening argument. (R. p. 67.) Appellant did not make a contemporaneous objection at the time the State made the reference to the statute during its opening argument. After Appellant made his opening argument, Appellant reminded the trial judge of his pretrial motions. At that time, the trial judge denied Appellant's motion to preclude the State from referencing the statute. (R. pp. 68-69.)

Thus, Appellant failed to preserve the issue for review. See Hill, 394 S.C. at 299-300, 715 S.E.2d at, 379 ("Further, we find no merit to Hill's assertion on appeal that the trial judge erred in allowing the prosecution to unduly emphasize this law in its opening and closing. First, it is questionable whether this argument is properly preserved for review inasmuch as, although defense counsel made a pretrial objection to the State being allowed to address it in its opening and closing, counsel failed to make any contemporaneous objection to the State's references to the 'no corroboration' law in its opening and closing arguments, and failed to argue to the to the trial judge that the State's references during opening and closing 'unduly emphasized' the statement of law.").

B. Appellant failed to preserve the issue regarding the State's reference to section 16-3-657 of the South Carolina Code during the State's closing argument.

As mentioned above, a party must make a contemporaneous objection in order to preserve an issue. See Johnson, 363 S.C. at 58, 609 S.E.2d at 523 (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court).

In the case at hand, Appellant did not object to the State's reference to the statute during its closing argument until after the State concluded the argument. (See R. p. 441; R. pp. 450-451.) Because Appellant failed to contemporaneously object to the State's reference to the statute, the issue is not preserved for review.

C. Regardless, neither the State nor the trial judge unduly emphasized section 16-3-657 of the South Carolina Code.

In any event, the trial judge did not err when he allowed the State to refer to the no corroboration statute, and the trial judge did not err in charging the statute because the charge was not unduly emphasized.

Generally, a trial court is required to charge only the current and correct law of South Carolina. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006).

Section 16-3-657 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." These referenced statutes prohibit various forms of criminal sexual conduct, including criminal sexual conduct with a minor for which Appellant was charged.[4]

"A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." Rayfield, 369 S.C. at 117-18, 631 S.E.2d at 250. Further, the Court explained the need for the statute:

> Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. **The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases 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.**

Id. at 117, 631 S.E.2d at 250 (emphasis added). Accordingly, the trial court charged the jury with the correct and applicable law. See also Schumpert, 312 S.C. at 509, 435 S.E.2d at 863 (holding no reversible error to charge instruct the on the "no corroboration" statute).

[4] See S.C. Code Ann. § 16-3-655 (Supp. 2007).

In the case at hand, the trial judge charged the jury that only the jury can make findings of fact. (R. p. 452.) Additionally, the trial judge instructed the jury to disregard anything that the trial judge said or did that indicated to the jury that he had an opinion on the facts of the case. (R. p. 452.) Furthermore, the trial judge instructed the jury multiple times that the State has the burden of proving guilt beyond a reasonable doubt. (R. pp. 453-454; R. p. 459.) Moreover, the trial judge charged the jury the following:

> Now, necessarily, in any case, you must determine the credibility of the witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and evaluate the evidence and determine which evidence convinces you of its truth.
>
> In determining the believability of . . . witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one. You may believe a part of the testimony of a witness and reject the remaining part of the same witness. You may believe the testimony of a witness in its entirety or reject the witnesses testimony in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of the witness while on the witness stand.
>
> These considerations you do not exercise arbitrarily. Your objective, ladies and gentlemen, is to seek the truth regardless of its source. In exercising your mental processes and determining what you determine to be true, the law simply requires that you exercise your good judgment, your common sense, your sense of logic and reason, and your experiences in life. You then apply these attributes to the evidence and determine what you, the jury, consider to be truthful evidence. You will then take and apply the law as it is now stated to you and thus arrive at a true verdict in this case.

(R. pp. 456-457.)

Notably, the trial judge only mentioned the no corroboration statute one time. (R. pp. 459-460.) Moreover, not only did the trial judge take precautions to ensure the jury

was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of the witnesses, the State also informed the jury of these matters in its opening and closing arguments. (See R. p. 67; R. pp. 410-415; R. pp. 417-418); see also Hill, 394 S.C. at 299-300, 715 S.E.2d at 379 (Ct. App. 2011) (finding no merit in defendant's argument that the trial judge erred in allowing the State to unduly emphasize the no corroboration law in its opening and closing because the trial judge took "precautions to ensure the jury was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, [and] the State also informed the jury of these matters in its opening and closing arguments.").

Accordingly, the trial judge did not err in allowing the State to refer to the no corroboration statute, and the trial judge did not err in charging the statute to the jury.

IV.

The trial judge properly denied Appellant's motion for a mistrial because no <u>Brady</u> violation occurred.

Appellant contends that the trial judge erred in not declaring a mistrial after the State failed to produce the entire file from the Assessment and Resource Center ("ARC"), including a report from a psychiatrist who examined Victim. However, the trial judge properly denied Appellant's motion for a mistrial because Appellant **<u>failed</u>** to prove the following: 1) that the evidence was favorable to Appellant; 2) was in the possession of or known by the prosecution; 3) was suppressed by the State; and 4) was material to Appellant's guilt or innocence or was impeaching.

<u>Standard of Review</u>

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion. <u>State v. Crim</u>, 327 S.C. 254, 489 S.E.2d 478 (1997). "The power of the court to declare a mistrial ought to be used with the greatest caution and for plain and obvious causes stated into the record by the trial judge. The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." <u>State v. Kelsey</u>, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998) (internal citations omitted). "The trial court should first exhaust other methods to cure possible prejudice before declaring a mistrial. The defendant must show error and resulting prejudice to receive a mistrial." <u>State v. Garris</u>, 394 S.C. 336, 345 714 S.E.2d 888, 893 (Ct. App. 2011).

<u>Brady v. Maryland</u>

In <u>Brady v. Maryland</u>, 373 U.S. 83 (1963), the Supreme Court held the following: "[T]he suppression by the prosecution of evidence favorable to an accused

upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Furthermore, "an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." State v. Moses, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010).

1. The evidence withheld was not favorable to Appellant.

First, the evidence withheld in this case was not favorable to Appellant. Appellant has not articulated why Dr. Watson's evaluation is favorable to him. Instead, Appellant simply speculates that the evaluation **might** be favorable to him if he could hire an expert witness to review the evaluation. However, the mere possibility the evaluation might have been potentially favorable does not entitle Appellant to the extreme measure of the dismissal of his case.

2. The evidence withheld was not in the possession of the State or known by the State.

Second, the evidence here was not in the possession of the State or known by the State. The Brady doctrine "extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998).

However, unlike the police department, ARC does not work on behalf of the prosecution. See generally, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)) ("Nonetheless, knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis.") (internal quotation marks and citation omitted); see also United States v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999).

In order to obtain ARC's records, the State had to subpoena the records. (R. p. 244; R. p. 246.) The State could not just march to ARC's office and rummage through ARC's confidential medical records. The State gave Appellant all of the records that ARC gave the State. (R. p. 244.) When the problem was discovered at trial, ARC told the State that they did not give the State the evaluation by Dr. Watson because Dr. Watson was an independent contractor and there were HIPAA concerns. (R. pp. 244-245.) Moreover, the trial judge had to order the full ARC file in order to obtain the evaluation, which shows the State's lack of authority to view ARC's files. (R. p. 249.) Furthermore, a few days before the trial began, defense counsel saw Dr. Watson's name on some of the ARC records and inquired about Dr. Watson's role in the case; however, the State did not know that Dr. Watson had any involvement in the case. Defense counsel could have requested a court order for any of ARC's files in which Dr. Watson was involved. The State is not required to undertake a fishing expedition on behalf of the defendant.

3. The evidence was not suppressed by the State.

Third, the evidence was not suppressed by the State. As discussed above, the State did not know of the evaluation and it was not in the State's possession. Thus, ARC was the one that suppressed the evaluation, not the State.

4. The evidence was not material.

Fourth, the evidence was not material to Appellant's guilt or innocence. Even if the evaluation by Dr. Watson included a modicum of exculpatory evidence, the evidence is clearly not material so as to be a violation of Appellant's due process rights under Brady.

"In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988) (citing State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987)). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 683 (1985).

Appellant has failed to articulate how the evaluation that was not disclosed until trial was material. Instead, Appellant's argument regarding materiality is based on pure speculation. Contrary to Appellant's assertion that it "appeared from Dr. Watson's testimony that her conclusions contradicted those of Phipps[,]" Dr. Watson's testimony

was consistent with Phipps' testimony. In fact, Dr. Watson approved of Phipps' treatment plan of Victim. (R. p. 223.)

At trial, Phipps testified that she first met with Victim in January of 2009. (R. p. 217.) During Victim's initial assessment, Victim informed Phipps that she was experiencing nightmares, was afraid of the dark, and had a loss of appetite. (R. p. 221). However, towards the end of Victim's treatment, Victim did not have any symptoms. (R. p. 221.)

During the in camera examination, Dr. Watson testified that she met with Victim on May 8, 2009. (R. pp. 319-320.) Dr. Watson testified that on May 8, 2009, towards the end of Victim's treatment, Victim denied having any **current** symptoms indicative of depression, mania, or anxiety. (R. p. 316.) Furthermore, on May 8, 2008, Victim denied having any fear of seeing Appellant and was not concerned that Appellant could hurt her at that time. (R. p. 316.) Thus, Dr. Watson's testimony was consistent with Phipps' testimony.

Furthermore, the evaluation suppressed by ARC was not material because the evaluation was given to the defense in time for the defense to adequately use the evaluation at trial. Appellant had the opportunity to use the evaluation and fully develop the information at trial. Dr. Watson came to court, and Appellant had the opportunity to question her about her evaluation of Victim. Thereafter, Appellant chose not to call Dr. Watson as a witness at trial and did not ask for a continuance in order to obtain an expert. See Kennerly, 331 S.C. at 453, 503 S.E.2d 220 ("In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial."); State v. Lunsford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no error in refusing to declare a mistrial when "[d]efense counsel had access to the questioned

material before he resumed his cross-examination of Higgins and he elected to proceed with Higgins's cross-examination without taking advantage of the trial judge's offer to provide him with 'as much time as' he thought he needed to review the previously undisclosed evidence and to prepare for cross-examination of the witness in light of this new evidence"); Gathers, 295 S.C. at 481-482, 369 S.E.2d at 143 (finding no prejudice when the defense counsel was able to effectively cross-examine an expert witness about a statement made by the witness that allegedly was not disclosed in violation of Brady). In those cases, as in the case at hand, the defendant had the information prior to the close of trial and was able to use and develop the evidence to the extent desired.

Moreover, Appellant's argument regarding his inability to obtain an expert is also without merit. After Phipps testified and the parties realized that Dr. Watson met with Victim, Appellant moved for a mistrial. (R. p. 236.) Defense counsel argued that there were medical terms in Dr. Watson's evaluation that he thought could be "potentially" exculpatory, but he did not have the vocabulary to be able to articulate what those medical terms meant. (R. p. 242.) In addition, defense counsel argued that he could not ask Dr. Watson what those words meant because she was not under subpoena and could not be at the courthouse. (R. p. 242.) Furthermore, defense counsel argued that the defense was prejudiced by ARC's failure to give the defense the evaluation because the defense could not cross-examine Dr. Watson. (R. p. 249.)

In response to Appellant's motion for a mistrial, the trial judge strongly suggested that the State find Dr. Watson or else he was going to consider granting defense counsel's motion. (R. pp. 248-249.) This allowed the defense to review Dr. Watson's evaluation overnight. The State found Dr. Watson and ordered her to court. (R. p. 311.) Appellant had the opportunity to question Dr. Watson under oath and ask her what the medical

terms in her evaluation meant. (R. pp. 315-317.) Ultimately, Appellant chose not to call Dr. Watson as a witness.

After Appellant was able to question Dr. Watson regarding her evaluation of Victim and question Dr. Watson about the medical terms she used in her evaluation, Appellant changed the tune of his argument for a mistrial. (R. pp. 320-321.) Appellant then argued that he was prejudiced because he could not hire his own expert in order for the expert to render an opinion about "whether or not things in [Dr. Watson's evaluation] . . . could be consistent with or could not be consistent with an allegation of child sexual abuse." (R. p. 322.) However, expert testimony that a victim's behavior is consistent or inconsistent with child sexual abuse is improper vouching. See generally Kromah, 401 S.C. 340, 737 S.E.2d 490. In fact, when the State asked Phipps if Victim's symptoms were consistent with sexual abuse, Appellant objected and the trial judge sustained the objection. (R. p. 221.)

In summary, the evaluation was not favorable to Appellant, was not in the possession of or known by the prosecution, was not suppressed by the prosecution, and was not material to Appellant's guilt or innocence or impeaching. Therefore, the trial judge properly denied Appellant's motion for a mistrial.

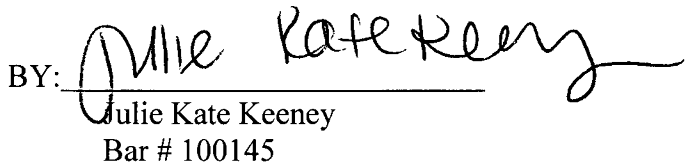
CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General



BY:__________________________
Julie Kate Keeney
Bar # 100145

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

ATTORNEYS FOR RESPONDENT

June 7, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2011-202734

THE STATE,

Respondent,

vs.

CHARLES M. DEVEAUX,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JULIE KATE KEENEY
Assistant Attorney General
SC Bar # 100145

BY

Julie Kate Keeney
Bar # 100145

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ATTORNEYS FOR RESPONDENT

June 7, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2011-202734

THE STATE,

Respondent,

vs.

CHARLES M. DEVEAUX,

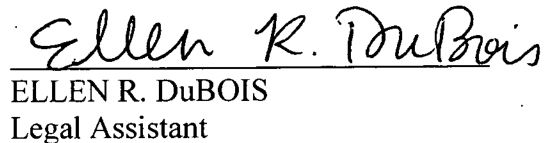
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 7th day of June, 2013.



ELLEN R. DuBOIS
Legal Assistant

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