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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY GERRARD GRIDINE,

APPELLANT

APPELLATE CASE NO. 2021-001188

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 14, 2021, a Richland County Grand Jury indicted Terry Gridine, Appellant, for third-degree criminal sexual conduct. R. *(indictment). Appellant was tried before the Honorable Jocelyn Newman and a jury, on October 11 and October 13 – 14, 2021. Appellant was represented by Tracy Pinnock and Kathleen Warren. April Sampson and Paul Walton prosecuted the case. r. 1.

Appellant was convicted as indicted and he was sentenced to ten years of imprisonment suspended upon the service of seven years of imprisonment and five years of probation. Appellant was ordered to register as a sexual offender. Tr. 419, l. 15 – 420, l. 1; R. 394.

This appeal follows.

STATEMENT OF FACTS

Appellant was fifty-six years old and a manager at Manchester Farms at the time of his trial. R. 267, ll. 16-19. He had no history of committing sex crimes and he had no history of inappropriate behavior with women. R. 383, ll. 18-22; R. 310, l. 22 – 313, l. 14; R. 145, l. 24 – 146, l. 7. Appellant had a girlfriend, Laura, as well as several children and grandchildren. Appellant came from a large "tightknit" family, which included multiple siblings, aunts, nieces, and nephews. R. 267, l. 23 – 273, l. 10. Appellant's mother, a person who had "held the family together," died in 2016. R. 270, l. 23 – 271, l. 24.

At the time of Appellant's trial, Appellant's aunt, S.W. (Complainant) was seventy-six years old. R. 114, ll. 23-25. Until October of 2017, Appellant had a "normal nephew/auntie relationship" with Complainant. However, Complainant was known in the family as someone who liked to "stir the pot." R. 269, l. 21 – 270, l. 1. Some family members were wary of Complainant and did not trust her. R. 307, ll. 4-7.

On October 21, 2017, seven days before she accused Appellant of sexually assaulting her, Complainant was arrested for shoplifting. Complainant called Appellant from the detention center to get his help posting her bond. However, she was unable to reach Appellant. R. 165, l. 19 – 169, l. 5.

Several days later, on October 26, 2017, Appellant stopped by Complainant's house to kill some time while waiting for his girlfriend, who lived "down the road" from Complainant, to get off work. R. 272, l. 22 – 273, l. 16. Appellant had been going by Complainant's house to hang out "forever." R. 272, l. 22 – 273, l. 3. Complainant's son Junior was there for a while but he left, and Appellant stayed on visiting with Complainant. R. 76, l. 4 – 77, l. 1; R. 118, l. 120, l.3. That evening, Appellant admitted to Complainant that he had been thinking of committing

suicide; he was depressed by the approaching anniversary of his mother's death. Also that evening, Complainant confronted Appellant about his failure to answer the phone when she called him for help from the jail. According to Appellant, he later left and went to his girlfriend's house without incident. R. 275, l. 14 – 277, l. 23; R. 173, ll. 2-4; R. 166, ll. 14-20. Appellant denied sexually assaulting Complainant. R. 272, ll. 10-11.

Complainant agreed that on the night of the alleged incident Appellant admitted to her he had been contemplating suicide. R. 120, ll. 18-24. However, Complainant called police the following evening and she claimed that Appellant made crude sexual remarks to her, tore at her clothes, and penetrated her vagina with his fingers. Complainant alleged she hit Appellant with a lamp until he stopped. R. 57, l. 12 -58, l. 1; R. 123, l. 11 – 127, l. 24.

Appellant pleaded not guilty. Appellant believed his failure to help Complainant bond out of jail was the catalyst for falsely accusing him of sexual assault. R. 249, ll. 11-19. However, the jury was not permitted to hear much of the context provided above.

As to Issue 1, Appellant was prevented from cross-examining Complainant about a source of bias or motive to misrepresent: Appellant's failure to help Complainant with her recent arrest. On cross-examination, defense counsel attempted to question Complainant as follows.

Q Do you recall telling [Appellant] that you had tried to reach out to him because you needed help?

A No.

Q So you did not call him?

A No.

Q Because you had been arrested?

MS. SAMPSON: Objection, Your Honor.

A That was some weeks—

R. 156, ll. 2-10. The jury was excused and the solicitor objected to the defense's line of questioning pursuant to Rule 5, SCRCrimP. The solicitor incorrectly claimed that defense counsel was required to notify her of the defense's intention to cross-examine the complainant with this information because the State had filed a "Reciprocal Rule 5." R. 157, l. 4 – 158, l. 12. The solicitor argued that defense counsel should be limited to questioning Complainant about Appellant's refusal to help her with some unspecified matter: "They could say she called for assistance, he didn't give it, and based on that, that is motive." R. 170, ll. 1-3.

Defense counsel argued that she had not violated Rule 5 since this was "impeachment evidence." R. 158, ll. 20-24. "[Appellant] has been charged with CSC third against [Complainant]. The arrest or the bond sheet indicates that [Complainant] was arrested for shoplifting in Forest Acres, posted bond for that charge on October 21st. Six days later she was accusing [Appellant] of a sexual assault after, it is our understanding, from reaching out to him for help with posting her bond, which he did not do." R. 165, l. 19 – 166, l. 2. "Your Honor, it goes directly to our theory of defense, It shows that [Complainant] has a motive to make these allegations up, that she is biased against [Appellant]." R. 166, ll. 3-6. "[I]t is impeachment evidence. We have a right to present [Appellant's] defense. It is integral to our defense, the issue of motive and bias." R. 171, ll. 6-9. "So that was our intention with using it. We would not be going into any details, asking anything outside of, You were arrested, you contacted him about bond, he did not post it, you had to find somebody else. And that is it." R. 166, ll. 11-13.

Defense counsel further explained, You heard in opening statements also, [Appellant] is going to be testifying in his own defense, Your Honor. And part of his testimony . . . is that he

had the conversation with [Complainant], she told him she reached out to him, he was not there to assist her in getting out of jail." R. 166, ll. 14-20.

Complainant's testimony on the matter was proffered. Complainant agreed that she was arrested, she tried to get in touch with Appellant, could not reach Appellant, and had to call her sister. R. 168, l. 7 – 169, l. 5. *In camera*, Complainant was defensive and tried to minimize her attempt to reach Appellant.

> BY MS. PINNOCK:
>
> Q Ms. [Complainant], you were arrested—you called [Appellant] for help with posting your bond because you had been arrested, is that right?
>
> A No.
>
> Q You were not arrested?
>
> A Yes.
>
> Q Okay. And that was October 21st of 2017?
>
> A I didn't—
>
> . . .
>
> A I didn't call him. I was trying to get in touch with him to get in touch with my daughter.
>
> Q Okay. But you never talked to [Appellant] on the phone, did you?
>
> A No.
>
> Q Okay. And you had to find somebody else to come assist you?
>
> A I couldn't get him, so I called my sister.
>
> Q Okay.
>
> A It had nothing to do with him.

R. 168, l. 5 – 169, l. 5.

The court ruled the testimony was inadmissible but told the defense it could question Complainant generally that she had asked Appellant for help.

> [T]he mention of an arrest, considering what the testimony is, is of course inflammatory, it is bad character evidence, it is – it has little probative value. And to the extent that it does have probative value, that value is outweighed by the potential of substantial unfair prejudice to the victim.
>
> And so pursuant to rules 403, 404, and some extent 608, I'm going to sustain the objection. And I won't tell you what questions to ask, but I don't disagree with what [the solicitor] said in substance if this is about asking for help or financial help, or something like that. I'm not going to tell you whether you should ask that or not, of course, but there shall be no mention of the victim, the alleged victim's arrest.

R. 171, l. 14 – 172, l. 8.

Defense counsel asked, "Is Your Honor's ruling limiting what [Appellant] can testify about?" R. 172, ll. 18-19. The court replied, "We're not going to talk about the fact that she was arrested." R. 172, ll. 20-21. Defense counsel objected to the limitation of her cross-examination of Complainant and to the potential restriction of Appellant's testimony.

> But the issue is, Your Honor, he was part of the conversation. And the actions from [Complainant] followed this conversation. If he can't explain to the jury why she had the motive and bias against him to a degree that would explain why she would be accusing him of a sexual assault and not just saying that he stole something from her house, needing to borrow ten dollars is not the same as not coming to get your family member out of jail.

R. 173, ll. 2-10.

The court withheld ruling on whether it would similarly restrict Appellant's testimony. The court issued a curative instruction ordering the jury to disregard the last question and answer it had heard. R. 174, ll. 2-16. Defense counsel then asked Complainant, generically, whether

Appellant had been unresponsive when Complainant "reached out to [Appellant] for help." R. 174, l. 21 – 205, l. 17.

As to Issue 2, after the court advised Appellant of his rights to testify in his own defense or to remain silent, the solicitor immediately asked whether Appellant intended to testify that Complainant tried to contact him from the jail, and argued that Appellant should be foreclosed from doing so. R. 247, l. 16 – 249, l. 6. The court asked defense counsel how Appellant knew about Complainant's arrest and defense counsel again stated that Appellant was told so by the Complainant herself, the night of the alleged sexual assault. The solicitor then argued the testimony was inadmissible hearsay. R. 248, l. 10 – 249, l. 6.

Defense counsel observed that, "we would not have this issue if we had been allowed to cross-examine [Complainant] on that issue." R. 249, ll. 8-10. "[W]e have been hamstringed at this point . . ." Tr. 280, ll. 1-2. Defense counsel argued that Appellant's rights to due process and to present a defense by exploring bias and motive should override a hearsay objection on these facts. R. 250, ll. 4-16.

The court sustained the objection.

> Okay. You were not barred yesterday from asking her whether she later told him that she called him or something that would give some nexus to what you are trying to do today . . . I'm not going to allow the hearsay testimony about something that he heard later that she might have done from the jail, and whatever. So that objection is sustained.

R. 250, l. 17 – 251, l. 15. The prosecutor continued to argue, claiming Complainant's arrest was inadmissible on the grounds that the charge had been expunged, and cited § 17-22-150 and *State v. Joseph*, 328 S.C. 352 (Ct. App. 1997). R. 252, l. 6 – 254, l. 12. The court stated that it found those sources provided further support for the court's ruling. R. 254, ll. 17-21.

Appellant went on to testify in his defense, but on this matter he only testified in general terms that the evening Complainant accused him of sexual assault, they had a discussion about the fact that Complainant had previously called him for assistance because she "needed help with something" but Appellant did not receive the call. R. 275, ll. 9-24.

As to the Issue 3, when testifying to the details of the alleged incident on direct examination, Complainant claimed that: 1) she was sitting in her recliner when Appellant came up behind her and gave her a hug and said he loved her before he went back outside, then Appellant came back inside and got on his hands and knees in front of her and made crude sexual comments; 2) Complainant pushed Appellant away and got up from her recliner, whereupon Appellant grabbed her and put his finger in her vagina; and 3) Complainant's son was home when Appellant arrived but he left before the alleged assault. R. 123, l. 11 – 127, l. 5; R. 119, ll. 17-23.

However, Complainant had detailed the allegations a bit differently to Officer Christian, the responding officer who came to take the initial report. Officer Christian was the first witness to testify, he had already testified by the time Complainant took the stand. R. 2; R. 57, l. 12 – 58, l. 9. Officer Christian's body-warn camera[1] captured Complainant's claims that: 1) she was sitting in her recliner when Appellant came up behind her and put her in a choke hold so she pushed him away; 2) Complainant got up from the recliner and moved to the couch, then moved back to the recliner before Appellant sexually assaulted her; and 3) Appellant repeatedly asked Complainant if her son was home.

On cross-examination, defense counsel questioned Complainant about these details. At that time, Complainant claimed 1) she did not push Appellant's arms off her when he came up

[1] Officer Christian's body-warn camera footage was offered for identification as Defendant's Exhibit #1 and is on file with this Court.

behind her recliner; 2) she did not move from her recliner to her couch, and did not get up from her recliner until Appellant initiated the sexual assault; and 3) that she had not told Officer Christian that Appellant kept asking if her son was home. Defense counsel reminded Complainant that Officer Christian's body-camera had captured her statements and Complainant listed to the audio through headphones. After listening to the audio, Complainant still claimed she had not said those things to Officer Christian. R. 183, l. 4 – 188, l. 4; R. 193, l. 12 – 194, l. 22.

After the State rested, the defense recalled Officer Christian in its case-in-chief. Officer Christian confirmed that Defense Exhibit #1 was the recording from his body-camera (the footage had not previously been introduced), and the defense attempted to play the relevant portions of the footage to impeach Complainant's testimony. The solicitor objected to hearsay and argued Appellant could not use the footage for impeachment because Officer Christian "can't impeach her statement." Defense counsel argued she had complied with Rule 613(b), SCRE. The court sustained the objection. R. 256, l. 6 – 265, l. 7. The jury did not hear the impeachment evidence.

As to Issue 4, defense counsel sought to offer evidence that Complainant had a reputation for untruthfulness via the testimony of Tomeka Scott. Appellant was Scott's uncle. Complainant was Scott's great-aunt. R. 314, l. 1-8. The solicitor asked for a proffer of Scott's testimony. R. 303, ll. 11-21. Scott testified in camera that she did not confide in Complainant because, "you hear from different family members, you know, that they would say, Well, you can't trust her, or, Don't get in mix with her too much, you know, just stuff like that. But I just keep my distance away from drama, period, so." R. 307, ll. 2-9. Scott was wary of Complainant. R. 307, ll. 2-9.

Scott testified that although the close, extended family used to get together a lot, it lately had held family gatherings only "every now and then." R. 305, ll. 9-20.

The solicitor argued that since Scott avoided Complainant, she did not know Complainant well enough to testify about her and that her testimony was hearsay. Defense counsel argued, "That's what reputation is, Your Honor, things that you hear from people. And there is a specific hearsay exception for this very thing, for reputation and character. R. 308, l. 12 – 309, l. 4. Defense counsel argued that the testimony was admissible pursuant to Rules 803(21), 404(a)(2), and 405, SCRE. R. 295, l. 22 – 297, l. 18.

The court ruled, "Based on the testimony that I just heard, that does not qualify for any exception, So the State's objection is sustained." R. 319, ll. 5-7.

After successfully preventing Appellant from presenting evidence of the complainant's bias and motive to misrepresent as well as her reputation for untruthfulness, the solicitor unfairly argued in closing that Complainant was credible because, "Why does she need to come and make up a lie?" R. 330, ll. 10-11. "[W]hat bias does she have, what motivation would she have? And what is it? Other than it happened." R. 331, ll. 3-5.

The case was, as defense counsel noted, a "he said/she said" credibility battle. R. 50, ll. 20-23. In addition to Complainant's testimony, the State produced text messages between Complainant and Appellant after the alleged offense in which Appellant apologized for an unknown matter. Complainant then texted Appellant an accusation of sexual assault, and Appellant replied, "I don't understand." *See* State's Exhibits #10 – 16.[2] The solicitor argued that Appellant was apologizing for the sexual assault. R. 332, ll. 8-11. Appellant testified he

[2] State's Exhibits #9 – 15 are photographs of text messages between Appellant and Complainant and are on file with this Court.

apologized for sharing with Complainant the heavy news that he had been contemplating suicide. R. 280, l. 17 – 281, l. 23.

The solicitor also presented testimony from a physician's assistant at a pain management clinic that Complainant had been a patient at the clinic for fifteen years and had chronic low back pain. The physician's assistant said that Complainant was seen at the clinic on November 1, 2017, for a regular follow-up appointment and Complainant claimed her left side was sore from being assaulted and thrown to the ground. R. 97, l. 19 – 103, l. 15.

Although the jury deliberated for three hours and asked to be recharged on the law, Appellant was ultimately convicted as indicted. R. 367, l. 22 – 373, l. 13.

As to Issue 5, defense counsel moved for a new trial based on cumulative error. As seen, this was a "he said/she said" case. R. 50, ll. 20-23. Counsel cited to the jury's lengthy deliberations[3] and argued, "And that was without some of the evidence that we had planned and hoped of presenting for his defense . . . we were not allowed to go into Ms. [Complainant's] arrest as being part of her motive and bias against [Appellant]." R. 379, l.23 – 380, l. 7. "We were not allowed to go into some of the reputation evidence that we were planning on presenting . . . And we believe that evidence could have made a difference if [Appellant] had been able to go into it. Your Honor, I would respectfully request a new trial." R. 380, ll. 10-22.

The court denied the motion. R. 380, ll. 23-24. Appellant was sentenced to an active prison term of seven years, and he was ordered to register as a sexual offender. R. 389, l. 15 – 390, l. 1.

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[3] Counsel argued that the jury deliberated for two and a half hours but it appears from the transcript that the jury deliberated for three hours. R. 367, ll. 22-23; R. 372, ll. 14-21; R. 379, ll. 24-25.

ARGUMENT

1.

The court erred where it prohibited Appellant from cross-examining Complainant on whether she was arrested and unsuccessfully attempted to reach Appellant to help her obtain bail a week before she alleged that Appellant sexually assaulted her, since Appellant was entitled to considerable latitude in cross-examining his accuser on her bias or motive to misrepresent.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

The trial court erred by improperly restricting Appellant's right to cross-examine his accuser. Appellant was constitutionally entitled to considerable latitude in cross-examining Complainant, his accuser, on her bias and motives. Complainant said Appellant sexually assaulted her and Appellant said he did not. Appellant was not permitted to cross-examine Complainant on her potential bias or motive for falsely accusing him of a crime: that she called him to help bail her out of jail a week before and he did not answer. Complainant admitted these facts during her proffer. There were no eyewitnesses to the alleged offense. There was no forensic evidence. There was no confession. On the facts of this case, the error was not harmless.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the

witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). The right of confrontation includes the right to cross-examine witnesses. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). Accord *State v. Smith*, 315 S.C. 547, 551, 446 S.E.2d 411, 413 (1994) ("the right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser.")

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). A witness's credibility may be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316.

"Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594 (citing *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983); *State v. Collins*, 235 S.C. 65, 110 S.E.2d 270 (1959)). *See also* Rule 611(b), SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."); *State v. Grace*, 350 S.C. 19, 33, 564 S.E.2d 331, 338 (Ct. App. 2002) (where there was no physical evidence to support the victim's claims of sexual abuse and the State relied primarily on the credibility of the witnesses, "Appellant's right to present a defense mandates that he be permitted to freely cross examine the witnesses about the credibility issues relevant to his defense.")

"A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.'" *State v. Blackwell*, 420 S.C. 127, 150, 801 S.E.2d 713, 725 (2017) (quoting *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

"As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a 'meaningful' cross-examination." *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. *See State v. Graham*, 314 S.C. 383, 385-86, 444 S.E.2d 525, 527 (1994); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

"[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S.

284, 295 (1973) (internal quotations and citations removed) (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Berger v. California*, 393 U.S. 314, 315 (1969)).

The evidence at issue here was admissible pursuant to Appellant's constitutional rights to confrontation and meaningful cross-examination. The trial court ruled the proposed cross-examination was inadmissible under Rules 403, 404, and 608, SCRE, finding the evidence was bad character evidence as to Complainant, it had little probative value, and that value was "outweighed by the potential of substantial unfair prejudice to the victim." R. 171, l. 14 – 172, l. 8. This ruling was not supported by the evidence. In this case, those rules provided a basis for admitting the evidence, not for excluding it. On October 27, 2017, after a lifetime of having a good relationship with her nephew, Complainant accused Appellant, who was in his fifties and had no history of inappropriate behavior with women, of sexually assaulting her. R. 310, l. 22 – 313, l. 14; R. 145, l. 24 – 146, l. 7; R. 392 During the proffer, Complainant admitted that she had been arrested on October 21, 2017, she had tried to contact Appellant but was unable to do so, and she wound up having to get her sister to assist her in bonding out of jail. R. 168, l. 5 – 169, l. 5.

Rule 403, SCRE permits the exclusion of relevant evidence if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). Here, the evidence was relevant since it went to Complainant's credibility. The evidence had a high probative value since it provided an explanation for Complainant's bias against Appellant and provided a motive for falsely accusing Appellant of this crime. This

evidence went to Complainant's motive for testifying; it did not suggest a decision on an improper basis. Complainant was not the person on trial. The other exceptions provided in the rule—misleading the jury, confusing the issues, and wasting time or presenting cumulative evidence—are plainly inapplicable. In addition to Appellant's rights to confrontation and cross-examination, Rule 403, SCRE provided an alternate basis for admitting the evidence.

Rule 404(b), SCRE provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923) (as to whether evidence of other crimes falls within recognized exceptions, the acid test is its logical relevancy to the particular excepted purpose for which it is sought to be introduced). The evidence was not offered to show bad character, and it met one of the exceptions listed in 404(b) and *Lyle* because it went to the complainant's motive to fabricate the alleged assault. Rule 404(b) supported the admission of this evidence, as evidence of motive.

Rule 608(c), SCRE provides that, "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." As the South Carolina Supreme Court explained in *Smalls v. State*, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018),

> Evidence of a witness's bias can be compelling impeachment evidence, and for that reason "considerable latitude is allowed" to defense counsel in criminal cases "in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). **Our courts have followed the "general rule" that "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,'" so that "'on cross-examination, any fact may be elicited which tends to**

> **show interest, bias, or partiality' of the witness."** *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses §§ 460, 560a). **"Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'"** *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (quoting *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) and citing *Brewington*, 267 S.C. at 101, 226 S.E.2d at 250).

(emphasis added).

Here, it was not in dispute that Complainant was arrested a week before she accused Appellant of sexually assaulting her nor was it disputed that she had to reach out to family members to assist her in bonding out of jail. Appellant did not help her during this trying and embarrassing time. (It would have been particularly so for an elderly woman who had never before been arrested). The evidence had a legitimate tendency to throw light on Complainant's bias and motive to misrepresent. Rule 608(c), SCRE provides another basis for permitting cross-examination on this matter.

Finally, the solicitor's argument that pursuant to Rule 5, SCRCrimP, Appellant was required to give the prosecution notice that it intended to impeach Complainant with her arrest, was unsupported by law. Rule 5(b)(1)(A), SCRCrimP provides that certain defendants "on request of the prosecution, shall permit the prosecution to inspect and copy books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial." Here, the defense did not seek to enter any documents relating to Complainant's arrest as evidence. Instead, the defense merely sought to cross-examine Complainant about the arrest. Rule 5 does not support the prosecution's position.

The court ruled, in part, that as to Issue 2—Appellant's own testimony—Appellant could not testify about Complainant's arrest pursuant to the pretrial intervention (PTI) statute and *State*

v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), because Complainant had completed PTI. Although the trial court did not cite these sources as support for its ruling on this issue, Issue 1, assuming *arguendo* that this ruling is relevant to Issue 1, Appellant will address it here. S.C. Code Ann. § 17-22-150(a) provides that successful PTI completion is intended to restore the offender to the status he occupied before arrest, and so he may not be convicted of perjury if he fails to acknowledge the arrest. *Joseph* held that because successful completion of the PTI program results in a noncriminal disposition of the charges, participation in the PTI program cannot be considered a conviction for purposes of impeaching a witness with a conviction of a crime of moral turpitude. *Id.*, 328 S.C. at 358, 491 S.E.2d at 278. None of this governed Appellant's rights to cross-examine Complainant. Appellant did not seek to impeach Complainant with a conviction for a crime of moral turpitude, but instead sought to explore her potential motives and bias through cross-examination about her arrest. *Joseph* should be distinguished from this case on its facts, and given the constitutional magnitude of this matter. Likewise, the PTI statute is is not controlling since the Complainant was not being charged with perjury.

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728 (quoting *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012)). *Accord State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594. "Whether such an error is harmless in a particular case depends upon a host of factors." *Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728. (quoting *Delaware v. Van Arsdall*, 475 U.S. at 684. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross

examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

Here, the witness's testimony was important—the witness was Appellant's accuser in "he said/she said" sexual assault case. Her testimony was not cumulative to other evidence. As will be discussed in Issue 3, *infra*, Appellant's cross-examination of Complainant was also stymied by the court's ruling that Appellant could not be impeached with her prior inconsistent statements. The corroborating evidence in the case was minimal—it consisted only of text messages that were subject to multiple interpretations, including an innocent explanation provided by Appellant, and the fact that Complainant, who had a years-long history of back pain, continued to have back pain after the alleged assault.

The court's erroneous ruling limited the defense to a milquetoast exchange on whether Appellant had been unresponsive when Complainant generically "reached out to [Appellant] for help." R. 174, l. 21 – 175, l. 17. In addition to limiting the defense to cross-examining Complainant generically about Appellant's failure to "help" Complainant, the trial court issued a curative instruction to the jury regarding defense counsel's question of whether Complainant had been arrested. This instruction struck Complainant's initial, deceptive response that her arrest was "some weeks" prior to her accusing Appellant of sexual assault. *See Davis*, 415 U.S. at 318 ("On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness").

The State did not have a strong case. It rested on the word of Complainant. The solicitor argued several times in closing that Complainant had no motive to falsely accuse Appellant. R. 330, l. 10 – 331, l. 5. The solicitor's unfair reliance on Appellant's inability to cross-examine

Complainant on her motives further supports a finding the error was not harmless. *See Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) ("State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.") Even absent the denied cross-examination, the jury still deliberated for three hours. Appellant has established error and prejudice. U.S. Const. amend. VI; U.S. Const. amend. XIV; *Davis v. Alaska*, 415 U.S. at 316-17; *Van Arsdall*, 475 U.S. at 684.

2.

The court erred where it prohibited Appellant from testifying that Complainant was arrested and unsuccessfully attempted to reach Appellant to help her obtain bail a week before she alleged Appellant sexually assaulted her, since the testimony was admissible, and since the ruling improperly restricted Appellant's right to testify in his defense.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

Appellant had the fundamental right to be heard in his defense. The trial court's limitation of his testimony about Complainant's bias and potential motive to misrepresent improperly infringed on this weighty interest.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975)). The Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law includes "a right to be heard and to offer testimony." *Id.* (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States

by the Fourteenth Amendment." *Id.*, 483 U.S. at 52 (citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

"Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense,' . . . is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself." *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (internal citation omitted). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.*, 483 U.S. at 52 (citing *Harris v. New York*, 401 U.S. 222, 225 (1971)).

"[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). A State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock*, 483 U.S. at 55. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.*, 483 U.S. at 55-56.

Although Appellant was permitted to testify, he was not permitted to testify about Complainant's potential motive for falsely accusing him of sexual assault. It was not disputed that Complainant was arrested and unsuccessfully tried to contact Appellant in connection with her arrest. R. 168, l. 5 – 169, l. 5. Hearsay rules were insufficient to override Appellant's right to testify in his defense on this critical matter of motive. *See Rock*, 483 U.S. at 55-56. Moreover, as

defense counsel correctly argued, the hearsay problem only existed because the solicitor objected and the court improperly foreclosed Appellant from cross-examining Complainant about the arrest in the first place. The State should not be able to improperly create a hearsay problem and then benefit by using hearsay as a stumbling block to Appellant's right to testify about the critical matter of Complainant's bias and motive to misrepresent.

Nor does the alleged expungement of Complainant's arrest prevent Appellant from testifying about the matter. S.C. Code Ann. § 17-22-150(a) merely provides in relevant part, that a person who successfully completes pre-trial intervention may not be found guilty of perjury if he later fails to acknowledge the arrest. Complainant had not been charged with perjury and the statute was inapplicable. Similarly, *State v. Joseph*, 328 S.C. 352, 378, 491 S.E.2d 275, 278 (Ct. App. 1997), does not support the trial court's ruling on this issue since that case dealt with the impeachment of a witness with the witness's own expunged conviction, not with a defendant's testimony about another's arrest. *Joseph* therefore does not control this issue.

The court abused its discretion when it restricted Appellant from testifying about Complainant's arrest on the grounds that it was hearsay. The purpose of hearsay rules is to guarantee the reliability of evidence and to preserve the right of confrontation for the defendant in a criminal case. U.S. Const. am. VI; *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Appellant was the defendant in this case; he was the party with the right to confrontation. There was no reliability problem with this evidence: it was undisputed that Complainant had been arrested shortly before she accused Appellant of sexually assaulting her. As seen, a State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony," *Rock*, 483 U.S. at 55, but that is what happened here. Under these circumstances, the trial court's ruling here impermissibly restricted Appellant's right to

testify on his own behalf. *Rock*, 483 U.S. at 62; U.S. Const. amend. V; U.S. Const. am. VI; U.S. Const. am. XIV.

"An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *State v. Lee-Grigg*, 374 S.C. 388, 414, 649 S.E.2d 41, 55 (Ct. App. 2007), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010). "No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.*, 374 S.C. at 414, 649 S.E.2d at 55. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

The error was not harmless in this "he said/she said" criminal sexual conduct trial, since the error prohibited Appellant from explaining Complainant's potential motive for falsely accusing him of the offense. The corroborative evidence was scant and subject to interpretation. There was nothing that conclusively established Appellant's guilt, such as DNA or a confession. The solicitor's unfair reliance in closing on Appellant's inability to explain Complainant's potential motive to fabricate the allegations further supports a finding the error was not harmless. *See Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) ("State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.") Even absent the denied cross-examination, the jury still deliberated for three hours. The error was material and prejudicial in relation to the entire case. *Lee-Grigg*, 374 S.C. at 414, 649 S.E.2d at 55.

3.

The court erred where it prohibited Appellant from impeaching Complainant with her prior inconsistent statements about the alleged sexual assault, where Complainant continued to deny making the statements even after being presented with the statements, since Appellant was entitled to confront his accuser, and since extrinsic evidence of such statements is admissible for impeachment under Rule 613(b), SCRE.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

The details surrounding the sexual assault that Complainant alleged at trial were different from the details she alleged to Officer Christian when she reported the incident. When defense counsel cross-examined Complainant about these differences, Complainant denied making the prior inconsistent statements. After listening to her own recorded statements via headphones, Complainant still denied making them. R. 183, l. 4 – 188, l. 4; R. 193, l. 12 – 194, l. 22; Defense Exhibit #1. Defense counsel was therefore entitled to impeach Complainant with the inconsistent statements and the court's exclusion of this evidence was error.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const.

amend. VI). The right of confrontation includes the right to cross-examine witnesses. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis v. Alaska*, supra, 415 U.S. 308, 318 (1974) (internal quotations and alterations omitted).

Impeachment is an important part of confrontation. Rule 613(b), SCRE provides that,

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. **If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.** However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

(emphasis added). Under Rule 613(b), SCRE, "a proper foundation must be laid before admitting a prior inconsistent statement. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004).

Where a witness denies making a prior inconsistent statement, extrinsic evidence of the statements is admissible under Rule 613(b), SCRE. *State v. Fossick*, 333 S.C. 66, 69–70, 508 S.E.2d 32, 33 (1998). "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." *State v. Blalock*, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003).

Although the solicitor claimed that Officer Christian was not the proper witness to admit the impeachment evidence, this argument is unsupported by law. In *Blalock*, 357 S.C. at 82, 591 S.E.2d at 637, this Court found the trial court acted within its discretion in admitting extrinsic evidence of a witness's prior inconsistent statement through the testimony of the police officer who had taken the witness's statement. *See also Rutland v. State*, 415 S.C. 570, 578, 785 S.E.2d 350, 354 (2016) (had witness denied making the statements, counsel "could have introduced as evidence the police report or the newspaper article, which we find also would have damaged [the witness's] credibility as to her version of events leading up to the shooting" pursuant to Rule 613(b)); *State v. Stokes*, 381 S.C. 390, 403, 673 S.E.2d 434, 440 (2009) (affirming trial court's admission of witness's prior inconsistent statement, where the written statement was admitted through detective).

Here, the relevant foundation was laid for the statements' admission under Rule 613(b) and the complainant denied making the statements. By impeaching a witness with her prior inconsistent statements, the witness's testimony is discredited, and her credibility suffers. *See Rutland*, 415 S.C. at 577–78, 785 S.E.2d at 353. The admission of extrinsic evidence to prove Complainant made the inconsistent statements here was relevant to the jury's consideration of Complainant's veracity and the weight her testimony should be afforded. Rule 613(b), SCRE; *Blalock*, 357 S.C. at 81, 591 S.E.2d at 636.

"In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall

strength of the State's case." *Fossick*, 333 S.C. at 70, 508 S.E.2d at 34 (citing *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

Here, Complainant's testimony was of utmost importance to the prosecution's case and it was not cumulative to any other witness. The corroborating evidence was minimal and subject to interpretation. Appellant's cross-examination of Complainant was curtailed in another important way, as argued above in Issue 1. Finally, the State did not have a strong case, since the case was ultimately a credibility battle. Therefore, the error was not harmless. A reasonable jury might have received a significantly different impression of Complainant's credibility had Appellant been permitted to admit her prior inconsistent statements for impeachment. The court's decision to exclude the evidence was a manifest abuse of discretion that prejudiced Appellant. *Stokes*, 381 S.C. at 398, 673 S.E.2d at 438; *Van Arsdall*, 475 U.S. at 684.

4.

The court erred where it prohibited Appellant from offering testimony from Tomeka Scott, Complainant's relative, that Complainant had a reputation and character for untruthfulness, since the evidence was admissible as a hearsay exception and as a pertinent character trait of an alleged victim.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

Discussion

The court erred by improperly restricting Appellant's ability to present, in his defense, evidence that Complainant had a character and reputation for untruthfulness. The court's ruling that Scott's testimony was inadmissible under the evidence rules was an error of law. As seen, Scott's proffered testimony was that Complainant was considered so untrustworthy among the family that Scott did not confide in Complainant and kept her distance from Complainant. R. 305, l. 6 – 307, l. 9. This testimony was admissible on several grounds.

The Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law includes "a right to be heard and to offer testimony." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States

by the Fourteenth Amendment." *Id.*, 483 U.S. at 52 (citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). A State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock*, 483 U.S. at 55.

The credibility of Complainant was the ultimate issue in the case. Scott's testimony went directly to Complainant's character and reputation for untruthfulness—Scott said Complainant was reputed to be so untrustworthy she chose to generally avoid Complainant, and that family members warned her not to trust Complainant. The testimony was admissible as a hearsay exception. Rule 803(21), SCRE provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness: "Reputation of a person's character among associates or in the community." The comments to subsection twenty-one provide, "This section is included in the rules to ensure that reputation evidence is not excluded on the basis of hearsay." The evidence was therefore admissible under a hearsay exception.

The evidence was also admissible to attack the complainant's credibility in this "he said/she said" criminal sexual conduct case as a pertinent character trait. Rule 404(a)(3), SCRE provides that evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (3) "Evidence of the character of a witness, as provided in Rules 607, 608, and 609."

Rule 608(a), SCRE provides that, "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . ." *See State v. Grace*, 350 S.C. 19, 26, 564 S.E.2d 331, 334 (Ct. App. 2002) (pursuant to Rule 608(a), defense witness was permitted to testify that prosecution witness did not have a reputation as being a truthful and honest person). Finally, Rule 405(a), SCRE provides that, "In all cases in which

evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."

Here, Scott was prepared to testify to Complainant's character for untruthfulness in the form of her reputation within the extended family as untrustworthy. This evidence was admissible as a hearsay exception and was admissible given the nature of the case—a credibility battle. Because this case came down to credibility, the proffered evidence was highly probative. Appellant had a constitutional right to present the testimony of witnesses in his defense. It was error to arbitrarily apply Rules 803(21), 404(a)(3), 405(a), and 608(a), SCRE so as to exclude Scott's testimony here. *Rock*, 483 U.S. at 55.

"Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Appellant was prevented from properly attacking the truthfulness of the complainant in this "he said/she said" criminal sexual conduct case. Appellant was prejudiced due to the nature of the case and the import of the excluded testimony.

5.

The court erred where it denied Appellant's motion for a new trial based on cumulative error, since the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial.[4]

Standard of review

The appellate courts of South Carolina review questions of law *de novo*. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018). *See also State v. Ross*, 445 P.3d 726, 734 (Kan. 2019) (when analyzing claim of cumulative error, we use a *de novo* standard of review to determine whether totality of circumstances substantially prejudiced defendant and denied defendant a fair trial based on cumulative error).

Discussion

Each of the foregoing arguments independently entitles Appellant to relief: Appellant's rights to confrontation and to present a defense were improperly limited as to the critical matters of Complainant's bias, motive to misrepresent, prior inconsistent statements, and character and reputation for untruthfulness. However, the arguments should also be considered together since the cumulative effect of the erroneous rulings denied Appellant a fair trial.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). In *State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995), this Court found the "combined effect of the numerous unsolicited comments and the

[4] Appellant hereby incorporates the discussion sections from Issues 1 – 4, above.

limitation of cross-examination unduly prejudiced [the appellant]. Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief." "[T]he aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." *Id. See also State v. Durant*, 430 S.C. 98, 111, 844 S.E.2d 49, 55 n. 6 (2020) ("As to the cumulative error doctrine, because the trial court did not commit any reversible errors, we reject Durant's contention that a new trial is warranted.")

"An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Beekman*. 405 S.C. at 237, 746 S.E.2d at 490. *See also State v. Peterson*, 287 S.C. 244, 245, 335 S.E.2d 800, 801 (1985)[5] (reversal due to collective impact of numerous errors committed by the trial court); *State v. Daise*, 421 S.C. 442, 467, 807 S.E.2d 710, 722 (Ct. App. 2017) (errors insufficient to invoke cumulative error doctrine where any errors by circuit court were not prejudicial and did not combine to affect Daise's right to a fair trial); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one").

The following rights are among the minimum essentials of a fair trial: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented

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[5] overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled on other grounds by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

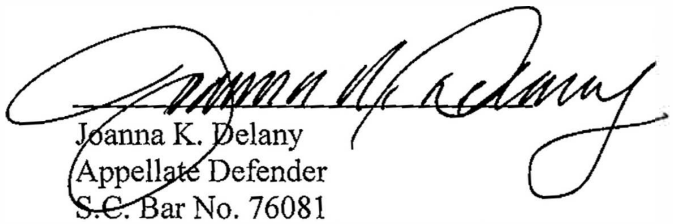
by counsel." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

As argued in the issues above, the trial court erred when it denied Appellant the ability to testify in his own defense about Complainant's bias and potential motive for falsely accusing Appellant of this crime, when it denied Appellant the ability to cross-examine Complainant about the same matter, when it denied Appellant the ability to impeach Complainant with her prior inconsistent statements to Officer Christian, and when it denied Appellant the opportunity to present evidence of Complainant's reputation and character for untruthfulness. The solicitor unfairly relied on the erroneous rulings in closing argument. R. 331, ll. 3-5.

Assuming *arguendo* that this Court finds the errors discussed in the issues above were individually harmless, the cumulative effect of the errors prevented Appellant from receiving a fair trial. *In re Oliver*, 333 U.S. at 273. Appellant was denied a fair trial because he was erroneously prohibited from meaningfully challenging the State's case on multiple fronts. Given the constitutional gravity of the errors here, this Court should apply the cumulative error doctrine. *Freeman*, 319 S.C. at 123–24, 459 S.E.2d at 875; *Johnson*, 334 S.C. at 93, 512 S.E.2d at 803; U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend. XIV.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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ATTORNEY FOR APPELLANT

This 19th day of December, 2022.