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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
J. Derham Cole, Jr., Circuit Court Judge

Appellate Case No. 2025-001938

The State, ...Respondent,

v.

Joel Antonio Duran, ...Appellant.

INITIAL BRIEF OF APPELLANT

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During cross-examination, the Solicitor accused Joel Duran of making up an "excuse," and the trial court sustained Mr. Duran's objection, struck the question from the record, and instructed the Solicitor not to do it again. Despite the trial court sustaining this objection, the Solicitor called attention to this exchange during the State's closing argument. This Court should order a new trial.

Question IV

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Question V

This Court should order a new trial based on the cumulative error doctrine because the three separate trial errors combined to exacerbate the prejudice to Joel Duran.

STATEMENT OF CASE

The State charged Joel Duran with two counts of first-degree criminal sexual conduct with a minor during the period of January 1, 2021 to November 30, 2021. One indictment alleged "penile penetration of the anus" of the child.[1] R. *. The second indictment alleged "vaginal intercourse" with the child. R. *.

[1] "The child" refers to the minor alleged to be the victim of the two counts of first-degree criminal sexual conduct with a minor.

From July 14-18, 2025, the State tried Mr. Duran for two counts of first-degree criminal sexual conduct with a minor before the Honorable J. Derham Cole, Jr. and a jury. Wendy D. Hallford represented the State, and undersigned counsel represented Mr. Duran. The jurors convicted Mr. Duran as charged, and Judge Cole sentenced him to concurrent terms of life imprisonment without the possibility of parole. Tr. 330-41, R. *.

Pursuant to Rule 29(a), SCRCrimP, Mr. Duran moved the trial court for an order granting him a new trial on July 24, 2026. R. *. The State responded on August 15, 2025. Judge Cole denied the motion on September 12, 2026. R. *. This appeal follows.

STATEMENT OF FACTS

Joel Duran grew up in Florida. He has seven children. He has a ninth-grade education. His trade is home repair and maintenance, including roofing, painting, and electrical work. Tr. 219-21. He also worked at a chicken farm and as a landscaper. Tr. 223.

Joel and Jenny Hernandez[2] grew up together in Florida and have known each other for over 23 years. Growing up, their relationship was not romantic, and they do not have children together. Jenny moved to Upstate South Carolina and "disappeared" for a while. Jenny reconnected with Joel through Facebook. Jenny invited Joel to South Carolina, and their relationship changed from friendship to romantic. After he moved to South Carolina, Joel learned that Jenny was "in a bad situation." Despite having "two jobs," Jenny was "behind [on the] rent." Jenny was not "paying a lot of attention" to her six children, and the children "were complaining their mama is never at home." Joel worked, but she scaled back so she could spend more time with her children. Jenny's children were sleeping on

[2] Jenny Hernandez did not testify.

the floor, and Joel bought beds. Jenny did not know how to cook, so Joel did the cooking. Joel also cleaned the house. Tr. 221-25.

Joel, Jenny, Jenny's six children, and Tiffany Woody eventually moved into a three-bedroom, two-bathroom house. Tr. 224-25; State's Ex. 1.

Tiffany Woody[3] and Jenny Hernedez were friends, having met when they worked at the same place. Because Joel and Jenny "worked a lot" Tiffany watched the children. Joel was not faithful to Jenny and had a sexual relationship with Tiffany. Tiffany wanted to "move forward," "get more serious," "put Jenny aside," and move with her to Columbia, South Carolina. Joel decided to stop the relationship with Tiffany. Tiffany "got upset," started acting different," and made allegations against Joel and Jenny. Tr. 225-27.

Eventually, an issue developed between Joel and the child's sister regarding discipline. The sister took her "electronic devices," including phone, tablet, and laptop, into the bathroom "a lot." She would stay in the bathroom for "45 minutes to an hour, and the other kids wanted to use the restroom." Joel and the sister argued. "It ended up pretty bad," and Joel told Jenny he "did not want to live in South Carolina anymore" and planned to move back to Florida. Joel and Jenny talked, and Jenny promised to fix the situation. Tr. 227-29.

After the incident with the child's sister, Joel noticed the sister and Tiffany Woody interacted differently. Previously, neither the child nor her sister "did not like Tiffany" because she was another authority figure in the house. After Joel and the sister argued, the sister and Tiffany became close. Tr. 229-30.

[3] Tiffany Woody did not testify.

One day, law enforcement and the Department of Social Services ("DSS") came to the house. DSS wanted to talk to both children because "somebody made a report that" Joel had been "touching these girls." The DSS investigator told Joel the girls "denied the allegations." Tiffany took the girls into one of the bedrooms and "locked the door." However, law enforcement and DSS told Joel he needed to remove himself from the house, and he did. Tr. 230-32. \

Law enforcement ultimately arrested Joel Duran for the charges that are the subject matter of this appeal. Joel Duran testified at his jury trial and denied the ever sexually abused the child or her sister. Tr. 219, 229, 232. Regina Kauffman, the mother of two of Joel's children, testified. Regina observed Joel around his children and Jenny' children and believed Joel had wonderful relationships with children. After and aggressive cross-examination by the Solicitor, Regina testified the Joel always maintained his innocence and she had no reasons to believe Joel ever sexually assaulted a child. Tr. 214-19

At trial the State relied on the testimony of the child (Tr. 62-115), her adoptive mother (Tr. 116-23), a sexual assault examination nurse (Tr. 124-33), and medical doctor (Tr. 133-46), so-called blind expert (Tr. 148-79), and the Children's Advocacy Center interviewer (Tr. 183-91).[4]

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017) (internal citations and quotations omitted).

[4] The State also called one of the Solicitor's Office investigators who took the photograph that was admitted into evidence as State's Ex. 1. Tr. 61-62.

"An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id*.

Before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotations omitted) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). This Court does "not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (citing *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012). In cases like this one, when "credibility" is the "most critical determination" for jurors to make in the case, the error is not harmless. *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011).

ARGUMENTS

Question I

This Court should order a new trial because Rebecca Hamrick, qualified as an expert in child sexual abuse dynamics, impermissibly bolstered and vouched for the credibility of the child, and the trial court's curative instruction did not cure the prejudice.

The State called Rebecca Hamrick,[5] and the trial court qualified her as a so-called blind expert "in the field of child sexual abuse dynamics." Tr. 148-53. During her direct testimony, the following exchange occurred:

> Q. What are some – are there any standard emotional behavioral characteristics of a child who has been sexually abused?
>
> A. There are not – there are not the single most – the single most consistent factor of the single most – the strongest correlation is if the child tells about the abuse. That's our – our number one recollect is that if something happened that they are telling about it, that they're going through –

Tr. 162-63; *see also* Post Trial Motions, Ex. A,[6] R. *.

Mr. Duran moved for a mistrial based on the improper bolstering and vouching, citing *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015), *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000). Tr. 163-67. The trial court considered *Dempsey*, *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017), *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019). The trial court agreed with Mr. Duran that this testimony was

[5] The State's witness list identified this witness as Rebecca Grounsell, but her last name was Hamrick at the time of the trial. Tr. 147-48.

[6] Ex. A is the transcript of the testimony produced by the court reporter during trial and provided to the trial judge and counsel.

improper; however, the trial court denied the mistrial motion and gave a curative instruction:

> Ladies and gentlemen of the jury, before we – before we took a break the last question put to our witness, Ms. Hamrick, elicited a response regarding disclosure of abuse, which was not responsive to the question posed and which the law considers bolstering or vouching for the credibility of a witness.
>
> Assessment, as I mentioned in the preliminary instructions to you, assessment of the credibility of a witness is your responsibility as jurors, and witnesses may not give testimony as to the believability or credibility of other witnesses.
>
> The last – the last response to the question from Ms. [Hamrick] before we – before we broke will be stricken from the record and the jury will disregard it and the state will proceed with its questioning.

Tr. 167-8. Mr. Duran objected to the curative instruction both before and after it was given to the jurors by the trial judge. Tr. 168-69, 172, 174.

Under the facts of this case, the trial court's instruction did not cure the prejudice. The State called Sexual Assault Examination Nurse Jennifer Combs and Dr. Amanda Small, who testified that both of the child's medical exams were normal, meaning there is no physical evidence to cooperate her allegations. Tr. 124-46. Mr. Druan testified and denied the allocations. Tr. 219, 229, 232. As a result, credibility was the central issue for the jurors to determine. *Compare State v. Kromah*, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with State v. Anderson,* 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied

any improper conduct. There was no physical evidence of sexual abuse."); *see also Johnson*, 376 S.C. at 11, 654 S.E.2d at 836 ("Because the case against Johnson essentially consisted of witness testimony, the credibility of each witness was crucial to the verdict."). That the jurors initially announced a hung jury, deliberated for over nine hours over two days, and asked the Court to replay testimony demonstrates that the State's evidence was not overwhelming and the jurors struggled to reach a verdict. Tr. 315-31.

This Court should order a new trial because the curative instruction did not cure the prejudice. "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (internal quotations omitted). Given that credibility was the main issue for the jurors to consider, this Court cannot say the error was harmless beyond a reasonable doubt. *State v. Tapp*, 398 S.C. 376, 389-90, 728 S.E.2d 468, 475 (2012) ("our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict"); *Mizzell*, 349 S.C. at 334, 563 S.E.2d at 319 ("'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.").

Question II

During cross-examination, the Solicitor accused Joel Duran of making up an "excuse," and the trial court sustained Mr. Duran's objection, struck the question from the record, and instructed the Solicitor not to do it again. Despite the trial court sustaining this objection, the Solicitor called attention to this exchange during the State's closing argument. This Court should order a new trial.

Prior to trial, the State moved to exclude Mr. Duran's statement to law enforcement, arguing, "[T]he State will not offer any statement or pretrial statement by [Mr. Duran] into

evidence during the State's case-in-chief." R. *. Prior to trial, Mr. Duran responded to this motion in writing:

> Law enforcement interviewed Mr. Duran by telephone, and he denied these allocations. Law enforcement audio-recorded the interview. The State represents it "will not offer any statement of partial statement by [Mr. Duran] into evidence at trial during the State's case-in-chief." Mr. Duran acknowledges the general rule that the statement is not admissible; however, this Court must guard against the State gaining an unfair advantage by excluding this statement. *See, e.g., State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 298 (Ct. App. 2000) (During closing arguments, "[t]he prosecutor accused Blurton of a recent fabrication, an accusation which could not have been seriously made if the trial court had properly admitted the taped telephone conversations between Blurton and" and another individual.") *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

R. *

Mr. Duran testified at trial and denied the allegations. Tr. 219, 229, 232. On cross-examination, the Solicitor asked Mr. Duran about not including a portion of his testimony in his statement to law enforcement prior to his arrest and his trial testimony. Mr. Duran explained he was on trial now and wanted the jurors to know everything. The Solicitor accused Mr. Duran of "making up an excuse." Counsel for Mr. Duran objected to the Solicitor's comment as argumentative. The trial court sustained the objection, and Mr. Duran moved to strike and requested the trial court instruct the prosecutor "not to do that again." The trial court struck the comment and noted that the Solicitor is "aware" not to do it. Tr. 236-39.

During closing arguments, the Solicitor reminded the jurors about this exchange and implied that Mr. Duran had three years to make up a lie:

> So when I asked him, well, sir, you didn't tell Amanda Wilson, Investigator Wilson, that [the child] also went into that room and you didn't tell Amanda Wilson that Tiffany was too strict and you didn't tell the story about being

a scorned lover, he said something like, yeah, because now I'm on trial. Well, he had some time to think about it and he thought, um, my –

Tr. 263. Mr. Duran objected Counsel objected to the Solicitor calling Mr. Duran a liar, citing *Blurton*, and the trial court sustained the objection. Tr. 263. During deliberations, the jurors requested to rehear the testimony of the child and Mr. Duran. Tr. 328-29. In doing so, the jurors once again heard the Solicitor's improper cross-examination for Mr. Duran.

The Solicitor emphasizing the stricken testimony during closing argument disregarded the trial court's earlier warning. Mr. Duran moved the trial court to order a new trial. R. *. That the jurors initially announced a hung jury, deliberated for over nine hours over two days, and asked the Court to replay testimony demonstrates that the State's evidence was not overwhelming and the jurors struggled to reach a verdict. Tr. 315-31. This Court, accordingly, cannot say beyond a reasonable doubt that the error did not contribute to the verdict. *See, e.g., Tapp* and *Mizzel, supra*.

Question III

This Court should order a new trial because the trial court erred as a matter of law by allowing the jurors access to a laptop computer to replay the Children's Advocacy Center videotapes, thereby giving undue prominence to this evidence.

Over objection, the trial court allowed the jurors to have a laptop computer during deliberations to replay the Children's Advocacy Center videotaped interviews of the child.[7] Mr. Duran objected, compared these interviews to testimony, and requested the court require the jurors return to the courtroom to review the videotaped interviews, so the trial

[7] Initially, the Solicitor's Office was going to provide the laptop computer with the password being "S0licitor." Tr. 312-13. After Mr. Duran objected, the Clerk of Court provided the computer. Because no other audio, video, or digital evidence was admitted during the trial, the only purpose of the laptop computer was to view the Children's Advocacy Center interviews.

court could supervise the review of the videotapes to ensure the interviews were not overemphasized. Tr. 309-10, 312-13.

State v. Plyler summarized the rule in South Carolina for replaying testimony of a witness during juror deliberations:

> The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request. The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue *so as not to give undue prominence to the evidence requested.*

275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980) (emphasis added). The same rule in *Plyler* applies to audio and videotape. *State v. Winkler*, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010) ("The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.").

"The rereading of a witness' testimony is disfavored when it unduly emphasizes that testimony." *United States v. Binder*, 769 F.2d 595, 600-01 (9th Cir. 1985) (citing *United States v. Nolan,* 700 F.2d 479, 486 (9th Cir.)). "The determination to allow a rereading or rehearing of testimony must be based on particular facts and circumstances of the case. Undue emphasis of particular testimony should not be permitted." *Id*. *Binder* explained:

> Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness. Since there was no physical evidence, the only evidence of acts of molestation was presented through the children's videotaped testimony. The defendant denied any criminal conduct, asserting that the children were displeased with him and their charges against him

> were vindictive. Credibility became a crucial issue. Under these circumstances the videotaped testimony may have taken on great significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony.

Id.

Here, allowing the jurors to replay the videotaped interviews are even more prejudicial because the interviews were conducted outside the presence of Mr. Duran and he did not have an opportunity to cross-examine. Although this question appears to be a matter of first impression in South Carolina, the Supreme Court of Florida explained:

> [A]llowing a jury to have access to videotaped witness statements during deliberations has much the same prejudicial effect as submitting depositions to the jury during deliberations. By permitting the jurors to see the interview once again in the jury room, there is a real danger that the child's statements will be unfairly given more emphasis than other testimony. Furthermore, unlike testimony in open court or even deposition testimony, the interviews are conducted on an ex parte basis without the right of cross-examination. Thus, we hold that videotaped out-of-court interviews with child victims introduced into evidence under section 90.803(23) shall not be allowed into the jury room during deliberations.

Young v. State, 645 So. 2d 965, 967 (Fla. 1994). The Supreme Court of Florida notes its "ruling would not prevent the trial judge from allowing the jury to view the videotape a second time *in open court upon request*," *id*., at 968 (emphasis added), which is the procedure Mr. Duran requested the Court follow. Other states have similar rules. *See, e.g., People v. Jefferson*, 393 P.3d 493, 503 (CO. 2017) (the trial court abused its discretion in granting the jury unfettered access to the DVD of J.B.'s out-of-court statement"); *State v. A.R.*, 213 N.J. 542, 560–61, 65 A.3d 818, 829 (2013) ("under no circumstances shall the jury have unfettered access to audio- or video-recorded statements in the jury room during deliberations. Replay in open court permits the required record of the replay to be made");

Summage v. State, 248 Ga. App. 559, 561, 546 S.E.2d 910, 913 (2001) (error in allowing child victim's 45-minute videotaped statement to go to jury room, over objection of defense counsel was harmful because "[t]he trial court did not caution the jurors not to place undue emphasis on the videotape or place any limits on the number of times or manner in which they should view it"); *Chambers v. State*, 726 P.2d 1269, 1276 (Wyo. 1986) ("a testimonial videotape may never go to the jury for unsupervised viewing during deliberations").

During closing arguments, the Solicitor urged the jurors to view the Children's Advocacy Center videotapes during deliberations. Tr. 259. Although initially announcing a hung jury, the jurors deliberated for over nine hours, over two days, which was more than enough time to review the videotape repeatedly. Tr. 315-31.

That the jurors initially announced a hung jury, deliberated for over nine hours over two days, and asked the Court to replay testimony demonstrates that the State's evidence was not overwhelming and the jurors struggled to reach a verdict. This Court, accordingly, cannot say beyond a reasonable doubt that the error did not contribute to the verdict. *See, e.g., Tapp* and *Mizzel, supra*. This Court should order a new trial.

Question IV

This Court should order a new trial because, when the jurors announced a "hung jury," the trial court erred as a matter of law by giving an *Allen* charge that implied the jurors are required to reach a verdict in order to avoid the State and Spartanburg County the expense of a retrial.

The trial court submitted the case to the jurors at 12:56 p.m., on Thursday, July 15, 2025. At approximately 3:20 p.m. on July 15th, the jurors announced, "We have a hung jury." Tr. 315-16; Court's Ex. 6, R. *. The trial court gave an *Allen*[8] charge:

Good afternoon, ladies and gentlemen.

[8] *Allen v. United States*, 164 U.S. 492 (1896).

By way of the foreman you have – which we have the note which we have marked as Court's Exhibit 6. You have stated that you have been unable to agree on a verdict in this case.

As I instructed you earlier, the verdict of the jury must be unanimous. When a matter is in dispute, it isn't always easy for even two people to agree. So when 12 people must agree, it becomes even more difficult. In most cases absolute certainty cannot be reached or expected.

However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this you should consult with one another, express your own views and listen to the opinions of your fellow jurors.

Tell each other how you feel and why you feel that way. Discuss your differences with open minds. Although the verdict of the jury must be unanimous, every one of you has the right to your own opinion.

The verdict you agree to must be your own verdict, the result of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with your fellow jurors. The majority should consider the minority's position and the minority should consider the majority's position.

You should carefully consider and respect the opinions of each other and reevaluate your position for reasonable correctness and impartiality.

You must lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case.

If you do not agree on a verdict in this case I must declare a mistrial. In that case it does not mean that anybody wins. It just means that at some future time we will try this case with some other jury sitting where you now sit.

The same participants will come and the same lawyers will ask basically the same questions and get basically the same answers, and we will go through this process again.

You were selected in the same manner and from the same source as any future jury will be, and there is no reason for me to suppose that the case will ever be submitted to 12 more intelligent, impartial, conscientious and competent jurors than you or that more or clearer evidence will be produced on one side or the other. So therefore at this time I'm going to ask that you return to your deliberations and see -- and see that – if you can attempt to reach a verdict. So at this time I'm going to ask you to return to your deliberations. Thank you very much.

Tr. 316-18.

Mr. Duran objected:

> I would just object on the grounds that I think the language that when you talk about future jurors' lives, there would be a cost to the county or the state, that overall it's urging them that they have to return a verdict when, in actuality, they don't. So I just object on those grounds.

Tr. 318.

The trial judge overruled the objection. Tr. 318. The jurors deliberated until almost 5:33 p.m. on July 15th. Tr. 320. The jurors deliberated from 9:30 a.m. to 2:07 p.m. on July 16th before reaching a verdict. Tr. 321, 331. Mr. Duran moved for a new trial based on this *Allen* charge. R. *.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial by impartial jurors. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *E.g. Klopfer v. North Carolina*, 386 U.S. 213 (1967), *Pointer v. Texas*, 380 U.S. 400 (1965), *Gideon v. Wainwright*, 372 U.S. 335 (1963). "The verdict of the jury should represent the opinion of each individual juror." *Allen*, 164 U.S. at 501. A trial court may properly instruct jurors to consider "opinions of each other" and "decide the case if they could conscientiously do so." *Id*. "[J]urors may not be coerced into surrendering views conscientiously held." *Jenkins v. United States*, 380 U.S. 445, 446 (1965). Determining whether "the jury was improperly coerced requires that [an appellate court] consider the supplemental charge given by the trial court in its context and under all the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (citing *Jenkins,* 380 U.S. at 446). "South Carolina approves the use of a modified *Allen* charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority." *State v. Taylor*, 427 S.C. 208, 214,

829 S.E.2d 723, 727 (Ct. App. 2019) (citing *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) and *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)).

Brewster v. Hetzel, 913 F.3d 1042 (11th Cir. 2019) reviewed the history of trial courts coercing jurors to reach a verdict. "From the fourteenth through the eighteenth centuries, one method of accelerating unanimity was to prohibit jurors from eating or drinking until they all agreed on a verdict." 913 F.3d at 1046 (citing 3 William Blackstone, Commentaries 375). Judges could "carry" jurors around "the circuit from town to town in a cart. . . . until a judgment bounced out." *Id*. (internal quotations and citations omitted) (citing Blackstone at 376 and *Renico v. Lett*, 559 U.S. 766, 780 (Stevens, J., dissenting)). *Brewster* acknowledged our judicial system has "come a long way and now accept[s] that some jury deliberations will end in deadlock." 913 F.3d at 1047. In *Brewster*, the trial judge gave a "lengthy charge emphasiz[ing] that the jurors had taken an oath to follow the law, which meant they must deliberate more [and] his instructions with the challenge that he had taken his oath seriously and hoped they would do the same." 913 F.3d at 1047. "[W]hen told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials taken out of the jury room." *Id*. Eighteen minutes later, the jurors returned a guilty verdict. *Id*. *Brewster* observed, "Though the judge addressed his admonitions to the entire jury, the lone holdout must have felt as though they were aimed at her." 913 F.3d at 1055. After all, "the holdout juror was using [crosswords puzzles] to keep holding out" and resist the pressure of the majority jurors. *Id*. 913 F.3d at 1054. *Brewster* held, "the coercive circumstances that led to the verdict undermined the fundamental fairness of the trial and the reliability of the verdict." 913 F.3d at 1056.

Brewster thus recognized the Sixth Amendment allows a juror to cease deliberating to protect a consciously held view from the pressure of the majority jurors.

As this Court held in *Taylor*:

> The charge here also overemphasized the cost and expense of a retrial. While it is not error to tell the jury that a retrial will be costly, *see State v. Singleton*, 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995), the Fourth Circuit has warned such statements are disfavored and should not be overbearing. *United States v. Hylton*, 349 F.3d 781, 788 (4th Cir. 2003); *see also McElhiney*, 275 F.3d at 945 (holding comments on cost of retrial can be coercive if overstressed). Also, telling the jury the case will "have" to be retried is misleading. A hung jury often acts as an alarm bell to all but the unthinking, awakening one side (sometimes both) to weaknesses in their case, which can lead to a plea deal rather than a retrial.

427 S.C. at 219, 829 S.E.2d at 729.

Because the trial court required the jurors to reach a verdict, misled the jurors about the necessity of a retrial, and emphasized the cost of a retrial, the *Allen* charge was improper, and this Court should order a new trial.

Question V

This Court should order a new trial based on the cumulative error doctrine because the three separate trial errors combined to exacerbate the prejudice to Joel Duran.

The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted); *Blurton*, 342 S.C. at 512-13, 537 S.E.2d at 297-98 (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

Here, this Court should apply the cumulative error doctrine because three trial errors combined to exacerbate the prejudice to Mr. Duran. First, the Solicitor calling Mr. Duran a liar during closing arguments exacerbated the prejudice of the State's improper cross-examination of Mr. Duran. Second, the improper cross-examination and closing argument further exacerbated the prejudice of resulting from Hamrick testifying:

> [T]he single most consistent factor of the single most – the strongest correlation is if the child tells about the abuse. That's our – our number one recollect is that if something happened that they are telling about it.

Third, the Court allowing the jurors unfettered access to the Children's Advocacy Center interviews during deliberations exacerbated the prejudice resulting from Ms. Hamrick's improper bolstering and vouching for the child's statements. For this combination of errors, the jurors must have believed that the child was telling the truth about the allegations merely because she made the allegations, and Mr. Duran's testimony was not to be believed in the face of a child talking about allegations of sexual abuse. This Court should order a new trial.

CONCLUSION

For the foregoing reasons, this Court should order a new trial.

Respectfully Submitted,

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