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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212777

THE STATE, ...RESPONDENT

v.

JAMES CARRIER,...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion to quash his 2012 indictment for lewd act where the indictment contained no facial irregularities and where Appellant failed to present any evidence of actual abuse of the grand jury proceedings?

2. Whether Appellant's cruel and unusual punishment claim is preserved for appellate review where it was not raised to and ruled upon by the trial court, and to the extent it was preserved, whether the trial court did not impose cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution where: (1) GPS monitoring is not punishment, and (2) even if this Court now finds it is punishment, it is proportional to Appellant's?

3. Whether the trial court properly denied Appellant's motion for a mistrial where no evidence was introduced at trial in violation of the Rule 801(d)(1)(D) "time and place" exception to the hearsay rule?

STATEMENT OF THE CASE

On October 2, 2009, the Greenwood County grand jury indicted Appellant for lewd act. (09-GS-24-1146). (2009 Indictment). He moved for a speedy trial and on May 16, 2012, a hearing on the motion was convened at the Greenwood County Courthouse before the Honorable J. Cordell Maddox. Appellant was present and was represented by Eighth Circuit Public Defender E. Charles Grose, Jr., Esquire. The State was represented by Assistant Solicitor Elizabeth White of the Eighth Circuit Solicitor's Office. (Indictment true billed October 2, 2009 & May 16, 2012, Tr.p.1). At the conclusion of the hearing, Judge Maddox issued a written order directing that the case be set for trial to begin on the afternoon of June 18, 2012. (Order dated and filed May 16, 2001). On June 8, 2012, Appellant was again indicted, via direct indictment, by the Greenwood County grand jury for lewd act. (12-GS-24-1166). (2012 Indictment).

On June 18, 2012, the case was called for trial before the Honorable D. Garrison Hill. Appellant was present and was again represented by Mr. Grose. The State was represented by Assistant Solicitor White and Assistant Solicitor Andrew M. Hodges. After hearing arguments and taking testimony on several motions, including Appellant's written "Motion for Court to Try Defendant on the Original Indictment," the parties agreed to continue the trial until the July 16, 2012, term of court. (June 18-19, 2012, Tr.p.1; p.48, lines 7-14; p.218, line 8-p.219, line 16; Defendant's Exhibit #1).

On July 17, 2012, the trial was resumed before Judge Hill. Appellant was present and was again represented by Mr. Grose. The State was represented by Assistant Solicitor Hodges and Assistant Solicitor Matt Swilley. On July 18, 2012, at the conclusion of trial, Appellant was found guilty of lewd act. He was sentenced by Judge

Hill to fifteen (15) years' imprisonment and was placed on mandatory electronic monitoring [GPS monitoring] as required by the South Carolina Code. (July 17, 2012, Tr.p.181, line 23-p.182, line 7; Sentencing Sheet). On July 30, 2012, Appellant filed a post-trial motion for a new trial, or in the alternative, to reconsider the sentence. (Motion for New Trial dated and filed July 30, 2012).[1] On August 9, 2012, Judge Hill issued a written order denying the motion. (Order dated August 9, 2012, and filed August 14, 2012). On August 16, 2012, Appellant filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of the appeal. This Brief of Respondent (the State) follows.

[1] Although the motion was not served and filed until twelve days after imposition of the sentence, it appears it was timely because the tenth day after sentencing fell on Saturday, July 28, 2012. See Rule 29, SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence.").

STATEMENT OF FACTS

On October 2, 2009, the Greenwood County grand jury indicted Appellant for lewd act. The face of the 2009 indictment is signed by the foreman of the grand jury and includes the hand written words "True Bill." It lists "Chris Haden, Greenwood County Sheriff" as the witness before the grand jury. The body of the 2009 indictment alleges the crime was committed "on or about the 1st day of January, 2003." (2009 Indictment No. 09-GS-24-1146). On June 8, 2012, Appellant was directly indicted by the Greenwood County grand jury for lewd act. The face of the 2012 indictment is signed by the foreman of the grand jury and includes the hand written words "True Bill." It also lists "Chris Haden, Greenwood County Sheriff" as the witness before the grand jury. The body of the 2012 indictment alleges the crime was committed "between the 1st day of January, 1999, and the 31st day of December, 2003." (2012 Indictment No. 12-GS-24-1166). The 2009 indictment was nol prossed following Appellant's conviction under the 2012 indictment.

On June 18, 2012, when the case was initially called for trial, Appellant submitted a pretrial "Motion for Court to Try Defendant on the Original Indictment." (June 18-19, 2012, Tr.p.48, lines 7-14; Defendant's Exhibit #1). He claimed surprise at the expanded time frame in the 2012 indictment, alleged Brady[2] violations, and argued it would violate due process to allow the State to go forward on that new indictment. Appellant's counsel added:

> And I should probably throw in at this point that I'm suspicious that the new indictment is not valid on its face because this morning was the first I've had confirmed that Mr. Haden was not going to testify. Mr. Haden is listed as the person who testified before the grand jury during this term of court. And if he was not here – he certainly is not employed with the

[2] Brady v. Maryland, 373 U.S. 83 (1963).

> Greenwood Sheriff's Office now. If – if he was not here and he didn't testify in front of the grand jury, then that indictment becomes irregular. And so that's an additional problem that, you know, we may need to – to take into account.

(June 18-19, 2012, Tr.p.53, line 24-p.54, line 12). After offering testimony and arguments, the parties announced they had reached an agreement to continue the trial until the July 16, 2012, term of court. (June 18-19, 2012, Tr.p.218, line 8-p.219, line 16).

On July 17, 2012, when the trial resumed, Appellant advised the court that although the continuance resolved most of his concerns about the indictment, he was still moving to be tried solely on the 2009 indictment. He argued the 2012 indictment was defective because the witness listed was not in the state of South Carolina when the grand jury met. Appellant repeatedly alleged Sheriff's Investigator Haden was not present and therefore could not have been a witness when the case was presented to the grand jury, but offered no evidence in support of his allegation. Based on this unsubstantiated claim Appellant argued the indictment was not valid and should be quashed. The solicitor responded that since the indictment had been "true billed" by the grand jury, it was not deficient. (July 17, 2012, Tr.p.11, lines 1-5). The trial court ruled as follows:

> Mr. Grose, I share with you your concerns about the current status of the Grand Jury practice in our State. However, I don't know any authority that would require me to quash the indictment based on the identity of the witness. The indictment itself sets forth the allegations for listing of a witness on the form, on the back of the indictment. If that is inaccurate, without any further showing would not be sufficient to render the indictment defective. Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe, does that and I know the Federal Courts do it. And there have been many assaults on the Grand Jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

(July 17, 2012, Tr.p.11, line 22-p.12, line 13). Appellant later renewed his motion to quash and the trial court again denied the motion. (July 17, 2012, Tr.p.95, lines 5-21). Ultimately, the jury was sworn and the trial proceeded on the 2012 indictment. (July 17, 2012, Tr.p.95, lines 21-22).

The State called the victim to the stand. She testified she grew up with her mother and brother in Greenwood County and lived next door to a neighbor with three boys. The victim and her brother went to their neighbor's house nearly every day from the time she was five years old until she was fifteen or sixteen, and she remembered Appellant also often coming to the neighbor's house from the time she was six or seven years old until she was eleven. The victim testified Appellant: "would make me touch him and he would touch me on my breast and vagina and make me kiss him and make me rub his penis." She said Appellant did this "pretty much every time he was there." The victim testified the abuse took place in various locations throughout the house and that Appellant told her it was okay because he loved her. She said Appellant once gave her a note saying that when she turned sixteen he would come get her because she would be old enough so that nobody could do anything about it. The victim didn't immediately report the incidents and first told somebody about the abuse two weeks before her sixteenth birthday when she started having scary dreams about Appellant coming back. (July 17, 2012, Tr.p.113, line 12-p.118, line 10). The victim described one particular incident that happened in her neighbor's bedroom while she and the three boys were playing video games. She said Appellant came into the room, sat next to her, reached under her clothes, and touched her vagina and her breast. (July 17, 2012, Tr.p.118, line 19-p.119, line 23).

Next the State called Carolyn Travis. Ms. Travis was the youth and children's director at the victim's church and supervised the victim's youth group from the time the victim was eight or nine years old through the date of the trial. While Ms. Travis was on the stand the following exchange took place:

> Q: Now, Ms. Travis, did [the victim], in 2009 did [the victim] approach you pertaining to the abuse she suffered?
>
> A: Yes.
>
> MR. GROSE: Your Honor, I object to the Solicitor characterizing as abuse that was suffered. That is an issue in dispute, Your Honor.
>
> THE COURT: Just rephrase your question, Mr. Swilley.
>
> Q: Did [the victim] approach you pertaining to the incidents with Mr. Carrier?
>
> MR. GROSE: Your Honor, that is improper, asking about identity. The limitation is on time and place and I move for a mistrial, that is improper.
>
> THE COURT: Overruled, go ahead.

(July 17, 2012, Tr.p.131, line15-p.132, line 2). Ms. Travis then testified the victim told her, in 2009, that the incident happened at the neighbor's house when the victim was five or six years old. Ms. Travis offered no testimony about the victim's statement beyond her report of the time and place of the incident. (July 17, 2012, Tr.p.132, line 3-p.133, line 19). Finally, the State called forensic interviewer Jessica Bell and counselor Susan Bentley in regard to the victim's statements as to the time and place of the lewd act. They each testified the victim said the incident happened around 2000 or 2001 at the neighbor's house. (July 17, 2012, Tr.p.134, line 18-p.140, line 12). Appellant was found guilty of lewd act.

After the verdict, the trial judge asked to hear the State's position on sentencing. The solicitor noted Appellant was currently on the sex offender registry due to a prior conviction in Kentucky for first-degree sexual abuse, and asked the court to impose the maximum sentence. The solicitor then stated: "based on the law in this State that Mr. Carrier would be required to have lifetime GPS monitoring as part of his sex offender registry." (July 17, 2012, Tr.p.175, lines 2-16). Appellant responded: "On a legal matter, and I will probably - will address this also in the posttrial motion. In the legal matter the State has already brought up a lifetime electronic monitoring. Our Supreme Court has recently cut back on that." (Tr.p.178, lines 9-13). Appellant referenced a case "out of Greenville" where "the Court was required after finding a violation of probation, to order life with GPS monitoring."[3] He claimed this Court did not address a number of issues that were raised in that appeal, one of which was "sort of <u>a due process issue</u>" about "whether GPS is imposed without some kind of specific determination." Appellant asked the trial court to find that a "<u>hearing</u>" or some other due process "<u>mechanism</u>" is required before the electronic monitoring could be extended beyond the length of the actual sentence imposed. He did not mention the Eighth Amendment and never argued imposition of lifetime electronic monitoring would somehow constitute cruel and unusual punishment. (July 17, 2012, Tr.p.178, line 12-p.179, line 17) (emphasis added). Appellant was subsequently sentenced by Judge Hill to fifteen (15) years' imprisonment and was placed on mandatory electronic GPS monitoring as prescribed by statute. (July 17, 2012, Tr.p.181, line 23-p.182, line 7; Sentencing Sheet).

In his written motion Appellant first argued he was entitled to a new trial based on: (1) his pretrial objection to the 2012 indictment; (2) repeated violations of the time

[3] Appellant appeared to be referring to <u>State v. Dykes</u>, 403 S.C. 499, 744 S.E.2d 505 (2013).

and place exception to hearsay evidence; (3) admission of improper testimony about identity; (4) court's failure to declare a hung jury; and (5) insufficiency of the evidence. He next asked the trial court to reconsider his sentence on grounds that: (1) he was prejudiced by South Carolina's lack of sentencing procedures and the trial court declining his request for a pre-sentencing report; (2) he was entitled to a reduction in sentence based on character references from friends and family; and (3) he might not be awarded credit for time served where it was not expressly ordered by the trial judge. Finally, Appellant asked the trial court to declare lifetime GPS monitoring unconstitutional arguing: (1) it is punitive; (2) that mandatory placement without judicial review related to an assessment of an individual's risk of reoffending violates due process; and (3) that it constitutes cruel and unusual punishment because it is disproportionate to the severity of his crime and because of the significant charges he would incur for use of the GPS monitor. (Motion for New Trial dated and filed July 30, 2012). On August 9, 2012, Judge Hill issued a written order denying the motion. (Order dated August 9, 2012, and filed August 14, 2012). On August 16, 2012, Appellant filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of the appeal. This Brief of Respondent (the State) follows.

ARGUMENT

I.

The trial court properly denied Appellant's motion to quash his 2012 indictment for lewd act where the indictment contained no facial irregularities and where Appellant failed to present any evidence of actual abuse of the grand jury proceedings.

Appellant argues the trial judge erred in refusing to quash his 2012 indictment for lewd act upon a child because the State failed to establish the identity of the witness testifying before the grand jury. He contends the name listed as the testifying witness is not correct, which renders the indictment "irregular on its face" and reveals "actual abuse" of the grand jury process. (Brief of Appellant p.14-p.15). The State disagrees and submits Appellant's argument is without evidentiary support and is contrary to the well-established law of South Carolina.

Standard of Review

The regularity of grand jury proceedings is presumed absent clear evidence to the contrary. State v. Batchelor, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008); Evans v. State, 363 S.C. 495, 514, 611 S.E.2d 510, 520 (2005); Weathers v. State, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995); State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996). The burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated. Batchelor, 377 S.C. at 344, 661 S.E.2d at 59. Thus, the defendant must present competent evidence to support grounds asserted as the basis for a motion to quash an indictment. State v. Brownfield, 60 S.C. 509, 39 S.E. 2, 4 (1901). Facts merely alleged by a defendant may not be used as evidence to establish those facts, except with the consent of the State. Id. Speculation about 'potential abuse' of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for

quashing an otherwise lawful indictment. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996); State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991). The circuit court's denial of a motion to quash an indictment will be reversed only for an abuse of discretion. Evans, 363 S.C. at 514, 611 S.E.2d at 520.

Discussion/Analysis

During the July 17, 2012, pre-trial motions hearing, Appellant argued the 2012 indictment was defective because the named witness was not in South Carolina when the grand jury met. Appellant repeatedly alleged Sheriff's Investigator Haden was not physically in the state and therefore could not have been a witness when the case was presented to the grand jury; however, Appellant offered no evidence in support of his allegation. Assistant Solicitor Hodges neither admitted nor denied Appellant's claim. Instead, he explained he was not in the grand jury proceeding when the 2012 indictment was presented, but noted probable cause must have been presented to the grand jury because it issued an indictment. Appellant continued to argue the allegedly misidentified witness rendered the indictment "irregular" and that since there was "a problem on its face," the indictment was "defective" and should be quashed. (July 17, 2012, Tr.p.5, line 11-p.7, line 5).

The trial judge and Appellant then had a brief discussion about this Court's 1981 opinion in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981), including the oft-cited dissent written by Chief Justice Lewis.[4] Appellant acknowledged it was not the practice

[4] In Capps, this Court criticized the practice of using a solicitor as the sole witness before the grand jury to provide a summary of the evidence, and strongly suggested the State abandon the practice unless no alternative was available. Id. at 62, 275 S.E.2d at 873. In State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the Court reiterated the holding in Capps and prosecutors were again cautioned to avoid the practice of appearing as the sole witness before the grand jury. Id. at 391, 377 S.E2d at 301. Finally, in State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993), the Court stated: "we take this opportunity to

in Greenwood County for the solicitor to be a witness before the grand jury, but nevertheless argued that since "we don't know who was there," this created "a problem with the four corners of the indictment" and that as a result the indictment was not valid. He argued, "I don't think the State gets the benefit of the courts [sic] speculating about all of the possible things that could have been done for it to be done correctly." The trial judge asked: "Why should you get the benefit of the speculation that Mr. Haden wasn't here? I mean, I don't know that." Assistant Solicitor Swilley commented that since the indictment had been "true billed" by the grand jury, he could not see how it would be deficient. (July 17, 2012, Tr.p.8, line 14-p.11, line 21). The trial court ultimately ruled as follows:

> Mr. Grose, I share with you your concerns about the current status of the Grand Jury practice in our State. However, I don't know any authority that would require me to quash the indictment based on the identity of the witness. <u>The indictment itself sets forth the allegations for listing of a witness on the form, on the back of the indictment. If that is inaccurate, without any further showing would not be sufficient to render the indictment defective</u>. Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe, does that and I know the Federal Courts do it. And there have been many assaults on the Grand Jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

(July 17, 2012, Tr.p.11, line 22-p.12, line 13) (emphasis added).

On appeal, Appellant first recounts this Court's decisions in <u>Capps</u> and <u>Anderson</u> and then asserts: "In order to comply with the requirement of <u>Anderson</u> and assure that the solicitor is not the sole witness before the Grand Jury, the State must candidly

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explicitly prohibit the practice of prosecutors appearing as the sole witness before the grand jury." <u>Id.</u> at 187, 439 S.E.2d at 836. Notably in <u>Anderson</u>, the assistant solicitor admitted a prosecutor had been the sole witness before the grand jury and acknowledged: "It has always been the practice of our office to do that." <u>Id.</u> at 186, 439 S.E.2d at 835.

disclose the identity of the witnesses testifying before the Grand Jury." (Brief of Appellant, p.13). However, Anderson says nothing about disclosing the identity of witnesses. Since Appellant never alleged the solicitor was a witness in the grand jury proceedings against Appellant, much less the sole witness, the Anderson prohibition is inapplicable to the facts in the present case. In any event, the face of the indictment clearly identifies a witness from the Sheriff's Department rather than an assistant solicitor.

Appellant nevertheless argues the indictment is "irregular on its face." He claims: "[i]t is undisputed that Investigator Haden was not in South Carolina and did not testify during the presentment of the 2012 indictment," and complains that "[a]t trial the State contended it did not have to present any evidence whatsoever about the procedures surrounding the Grand Jury presentment or the identity of the testifying witness." Appellant argues that position is "contrary to the settled practice of taking testimony during an evidentiary hearing." He relies on three cases in support of this argument;[5] however, each of those cases involved a true facial irregularity on the indictment which left a doubt as to whether it had in fact been "true billed" by the grand jury. In Grim, the case was remanded for a hearing to determine whether the indictment was "true billed" because, although signed and dated by the foreman of the grand jury, it did not indicate the action taken by the grand jury. Grim, 341 S.C. at 65, 533 S.E.2d 329-30.

In Pringle, the indictment was stamped "True Bill," but wasn't signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Pringle claimed the lack of a signature meant he was never indicted and, therefore, the trial court lacked subject matter

[5] State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); & State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995).

jurisdiction[6] to try him. Id. Based on this facial irregularity, the State offered evidence that the regular indictment procedure was followed and the indictment was published in open court. This Court affirmed the denial of post-conviction relief and held: "While it is preferable for the grand jury foreman to sign the true bill, the foreman's signature is not essential to the validity of the indictment when the indictment is in writing and published by the clerk." Id. at 410, 339 S.E.2d 128 (citing State v. Creighton, 10 S.C.L. 256 (1 Nott & McCord 1818)).

Finally, in Bultron, as in Grim, the indictment was signed but was not otherwise stamped or marked as "true bill" or "no bill." Bultron, 318 S.C. at 328, 457 S.E.2d at 619. Relying on Pringle, the Court of Appeals noted: "A facial irregularity in an indictment does not render the indictment invalid where the indictment is in writing and published by the clerk." Id. Thus, the only two requirements for a facially valid indictment appear to be that it be signed by the foreperson, and that it be marked "true bill." Likewise, the "settled practice of taking testimony" appears only to apply in cases where one of these two requirements is lacking, resulting in a true "facial irregularity."

Although Appellant alleges the indictment is "irregular on its face," this is simply not the case. On its face, the 2012 indictment: (1) is marked "true bill," (2) is signed by the foreman of the grand jury, and (3) identifies "Chris Haden, Greenwood County Sheriff," as a witness. Thus, Appellant's argument actually amounts to a claim of an irregularity in the proceedings by which the indictment was procured, which turns on his

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[6] When Pringle was decided in 1986, confusion existed in South Carolina jurisprudence between the sufficiency of the indictment and the subject matter jurisdiction of the trial court. In State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 498 (2005), this Court addressed that confusion and explained: "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts only serves to confuse the issue." Id. at 101, 610 S.E.2d at 499.The Court went on to hold that: "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury it sworn and not afterwards." Id.

unsupported assertion that Chris Haden did not appear. The State submits the trial court properly concluded Appellant failed to meet his burden to present evidence supporting his allegation regarding the grand jury proceedings. Batchelor, supra; Brownfield, supra. Appellant did not present any actual evidence in support of his motion to quash. He presumes Officer Haden did not testify before the grand jury in 2012, and argues the appearance of Haden's name on the 2012 indictment reveals "actual" abuse of the grand jury process. But actual abuse would require either: (1) evidence rather than speculation that Haden was not present, or (2) consent, an admission, or some other acknowledgment from the State that Haden did not appear as a witness before the grand jury. Here, unlike in Anderson, there was no such admission or consent. Indeed, Assistant Solicitor Hodges simply noted he did not participate in the grand jury proceedings which resulted in issuance of the 2012 indictment.

Appellant argues it was incumbent upon the State to disprove his claims about officer Haden,[7] but this is not what the law requires. Indeed, Appellate decisions preclude inquiry into the factual basis of an indictment by the grand jury, and the secrecy of grand jury proceedings are inviolate. Evans v. State, 363 S.C. 495,611 S.E.2d 510 (2005); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). The burden falls squarely upon on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated. Batchelor, supra. Here, Appellant failed to demonstrate actual abuse in order to quash the 2012 indictment. Other than sheer speculation, Appellant presented no evidence to substantiate his claim that the State acted

[7] In a footnote, Appellant notes the State could not claim surprise by his motion to quash because defense counsel called attention to the issue during the previous hearing on June 18-19, 2012. He comments that the State had a month to prepare; however, Appellant fails to acknowledge he also had a month to prepare, yet did not produce any evidence to support his allegation that Investigator Haden was not present.

improperly in obtaining the 2012 indictment at issue. Therefore, the trial court did not abuse its discretion in refusing to quash the indictment, and that decision should be affirmed.

II.

Appellant's cruel and unusual punishment claim is not preserved for appellate review because it was not raised to and ruled upon by the trial court, and to the extent it was preserved, the trial court did not impose cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution where: (1) GPS monitoring is not punishment, and (2) even if this Court now finds it is punishment, it is proportional to Appellant's offense.

Appellant argues the trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. He acknowledges this Court's recent decision in In re Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013), which found GPS monitoring is not punishment, but contends the record in the present case provides additional information about the reality of electronic monitoring, and asks this court to revisit the analysis used in Justin B. The State submits Appellant's Eighth Amendment argument should be dismissed as unpreserved for appellate review because it was not timely raised to the trial judge, and alternatively denied and dismissed as without merit because Appellant has failed to demonstrate sufficient reason for this Court to consider a departure from its well-reasoned analysis in Justin B.

Issue not Preserved for Appellate Review

Under South Carolina law, an objection must be made on a specific ground. State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). For an issue to be properly preserved, it has to be raised to and ruled on by the trial court. Id.; State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground." Stahlnecker, 386 S.C. at 617, 690

S.E.2d at 570. Furthermore, to be timely for purposes of error preservation, an issue must be raised at trial and not for the first time in a post-trial motion. State v. Taylor, 399 S.C. 51, 63-64, 731 S.E.2d 596, 603 (Ct. App. 2012) (holding that an issue first raised in a post-trial motion is insufficient to preserve it for review on appeal where it was not first raised at trial). Here, Appellant's cruel and unusual punishment argument is not preserved for appellate review because that specific ground was first argued in his post-trial motion, and therefore was not timely raised to the trial court.

After the verdict, the solicitor noted: "Mr. Carrier would be required to have lifetime GPS monitoring as part of his sex offender registry." (July 17, 2012, Tr.p.175, lines 2-16). Appellant responded: "On a legal matter . . . the State has already brought up a lifetime electronic monitoring. Our Supreme Court has recently cut back on that." (Tr.p.178, lines 9-13). Appellant referenced a case "out of Greenville" where "the Court was required after finding a violation of probation, to order life with GPS monitoring." He claimed this Court did not address a number of issues that were raised in that appeal, one of which was "sort of a due process issue" about "whether GPS is imposed without some kind of specific determination." Appellant asked the trial court to find that a "hearing" or some other due process "mechanism" is required before the electronic monitoring could be extended beyond the length of the actual sentence imposed. He did not mention the Eighth Amendment and never argued imposition of lifetime electronic monitoring would somehow constitute cruel and unusual punishment. (July 17, 2012, Tr.p.178, line 12-p.179, line 17) (emphasis added). Appellant was subsequently sentenced by Judge Hill to fifteen (15) years' imprisonment and was placed on

mandatory electronic GPS monitoring as prescribed by statute. (July 17, 2012, Tr.p.181, line 23-p.182, line 7; Sentencing Sheet).

On July 30, 2012, Appellant filed a post-trial motion for a new trial, or in the alternative, to reconsider the sentence. In his written motion Appellant asked in part that the trial court to declare lifetime GPS monitoring unconstitutional as a violation of his right to due process, and for the first time, as a violation of the constitutional prohibition against cruel and unusual punishment. Specifically, he argued: (1) GPS monitoring is punitive; (2) that mandatory GPS placement without judicial review related to an assessment of an individual's risk of reoffending violates due process; and (3) that GPS monitoring constitutes cruel and unusual punishment because it is disproportionate to the severity of his crime and because of the significant financial burden of having to pay for the use of the GPS monitor. (Motion for New Trial dated and filed July 30, 2012). On August 9, 2012, Judge Hill issued a one-page written order finding: "these motions are without merit, and therefore denied." (Order dated August 9, 2012, and filed August 14, 2012).

Because Appellant's Eighth Amendment cruel and unusual punishment argument was raised for the first time in his post-trial motion, it was not timely raised to the trial court and is not preserved for appellate review. Taylor, 399 S.C. at 63-64, 731 S.E.2d at 603. Likewise, the trial court's blanket written order denying the post-trial motions is not sufficient to constitute a "ruling" on a specific issue that was not timely raised to the trial court and does not save the argument from dismissal. In any event, even if this Court finds the Eighth Amendment issue is preserved, the States submits lifetime GPS monitoring cannot constitute cruel and unusual punishment because: (1) as determined in

Justin B., it is not punishment, and (2) even if punishment, it is nevertheless proportional to Appellant's crime.

Standard of Review

All statutes are presumed constitutional, and if possible, will be construed to render them valid. Justin B., 405 S.C. at 395, 747 S.E.2d at 776. A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt. Id. The party challenging the statute's constitutionality bears the burden of proof. Id.; In re Treatment of Luckenbaugh, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).

Jessica's Law

The Sex Offender Accountability and Protection of Minors Act [the Act], also known in South Carolina as "Jessica's Law" was enacted in 2006, with an effective date of July 1, 2006. Pursuant to the original terms of the Act, any person convicted or adjudicated delinquent for the offenses of criminal sexual conduct in the first degree with a minor or committing or attempting a lewd act on a child under sixteen, with an offense date on or after July 1, 2006, was required to be ordered by the court to be monitored with an active electronic monitoring device for the duration of the time that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A) (2007). This provision was amended in 2012 by substituting references to criminal sexual conduct in the third degree for committing or attempting a lewd act upon a child under sixteen. S.C. Code Ann. § 23-3-540(A) (Supp. 2013).

GPS Monitoring is not Punishment

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: "Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted . . . ." S.C. Const. Art. I, § 15.[8] A determination of whether GPS monitoring requirements constitute cruel and unusual punishment rests primarily on whether GPS monitoring is a punishment at all. Justin B., 405 S.C. at 395, 747 S.E.2d at 776.

Since the late 1800's, the United States Supreme Court has focused on the legislative intent underlying the enactment of a statute in determining whether a statute is penal or civil. Doe v. Pataki, 120 F.3d 1263 (2nd Cir. 1997) (citing Hawker v. New York, 170 U.S. 189 (1989). The Supreme Court articulated a two-step analysis in United States v. Ward:

> First, we have set out to determine whether congress, in establishing the penalizing mechanism, indicated whether expressly or impliedly a preference for one label or the other. Second, where congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to the latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

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[8] The State acknowledges this Court has the authority and responsibility to interpret the South Carolina Constitution, and that under certain circumstances our constitution may afford protections beyond those recognized by the United State Constitution. However, Appellant's argument appears to be grounded solely on the cruel and unusual punishment clause of the Eight Amendment to the United States Constitution and not on State constitutional grounds. He makes a single reference to the South Carolina Constitution; however, he fails to make any argument as to how it might afford additional protection beyond existing Eighth Amendment jurisprudence.

448 U.S. 242, 248 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)). In considering the second step, the well-established practice in both federal and state courts in a variety of constitutional contexts has been to apply the factors enumerated in Kennedy v. Mendoza-Martinez[9] to help make the determination of whether the statute in question was so punitive in effect as to overcome the legislative intent. See e.g., Smith v. Doe, 538 U.S. 84, 97-106 (2003) (ex post facto); Hudson v. United States, 522 U.S. 93, 104-05 (1997) (double jeopardy); Simmons v. Galvin, 575 F.3d 24, 44-45 (1st Cir. 2009) (ex post facto); Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (ex post fact and due process); John Does 1-4 v. Snyder, 932 F.Supp.2d 803, 811-13 (E.D. Mich. 2013) (ex post facto); In re Alva, 92 P.3d 311, 325-26 (Cal. 2004) (cruel and unusual punishment); State v. Trosclair, 89 So.3d 340, 351-57 (La. 2012) (ex post facto). These factors, however, are neither exhaustive nor dispositive; they only provide a framework for the analysis. Smith v. Doe, 538 U.S. at 97. Moreover, while the Supreme Court has not explained the relative weight to be afforded each factor, it has recognized that no one factor is determinative as they "often point in differing directions." Hudson, 522 U.S. at 100-01.

Initially, the State submits a cruel and unusual punishment analysis is not required because this Court has already determined GPS monitoring is a civil remedy rather than punishment. Justin B., 405 S.C. at 408, 747 S.E.2d at 783. Appellant claims the record

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[9] 372 U.S. 144, 168-69 (1963). The factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes to play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. This analysis requires weighing of all of the above factors. Only a clear finding of congressional intent to punish under the factors will evidence a punitive effect. Id.

in the present case "provides the Court with additional information about the reality of electronic monitoring." That additional information, however, consists solely of cherry-picked excerpts from a transcript of a probation violation hearing in State v. Anthony Nation, first provided to the trial court as an attachment to Appellant's post-trial motion. As explained above, Appellant's cruel and unusual punishment argument is not preserved for appellate review because it was not raised to the trial judge during trial. Because Appellant's Eighth Amendment challenge is not preserved for review, the State submits any supplemental information submitted after his trial in an attempt to support that unpreserved challenge should not be considered by this Court. Without this "additional information" this Court has been presented with no new facts or different circumstances than it considered in Justin B. Thus, this Court has been given no legitimate basis on which to re-visit its earlier decision. In Justin B., the Court conducted a thorough analysis of GPS monitoring under the two-step process described in Ward, including application of the Mendoza-Martinez factors, and concluded GPS monitoring is simply not punishment. As a result, the Court properly determined it did not need to consider whether GPS monitoring constitutes cruel and unusual punishment. Justin B., 405 S.C. at 409 n.3, 747 S.E.2d at 783 n.3. The State submits that determination should stand.

To the extent this Court disagrees and concludes Appellant timely presented additional information and sufficient grounds to re-examine the constitutionality of GPS monitoring in South Carolina under the Eighth Amendment, the State submits that where, as here, the statute in question is so clearly intended to serve a legitimate, non-penal legislative purpose, the inquiry need not extend to consideration of the Mendoza-Martinez factors. First, the non-penal purpose of the Act is demonstrated by the

legislature's decision to include it in Article 7 of Chapter 3, Title 23, as an enhancement to the "Sex Offender Registry," which has already been determined to be non-punitive in nature. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Second, the title of the Act itself reveals legislative intent. It is called the "Sex Offender Accountability and Protection of Minors Act," indicating it is aimed at protecting minors and making sex offenders accountable, not at punishing them further for their crimes. Third, the preamble to the Act explains its purpose was: "To amend Section 23-3-540, relating to the electronic monitoring of sex offenders, so as to establish the persons who shall or may be electronically monitored and to establish the procedures for monitoring these persons." In other words, the Legislature passed the Act to monitor particular sex offenders, not to punish them. Fourth, the device itself is defined as one that: ". . . actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and reports the person's presence near or within a prohibited area or a person's departure from a specific geographic location." S.C. Code § 23-3-540(P) (2007 & Supp. 2013). This definition supports the legislative intent described by the location, title, and preamble to the Act. Finally, the primary effect of the law is to aid law enforcement efforts to investigate new crimes, which is clearly a non-punitive function of GPS monitoring. Based on these reasons, the State submits the Act's obvious purpose is not punitive; therefore, there it cannot constitute cruel and unusual punishment. See Smith v. Doe, supra; Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007); State v. Bare, 677 S.E.2d 518 (N.C. App. 2009), review denied, 702 S.E.2d 492 (N.C. 2010); Neville v. Walker, 878 N.E.2d 831 (Ill. App. 3d 2007), appeal denied, 897 N.E.2d 254 (2008).

In any event, the State submits that even under further analysis of the Mendoza-Martinez factors, Appellant, like Justin B., has not shown the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the intention of the legislature. First, GPS monitoring does not involve an affirmative disability or restraint. GPS monitoring is not incarceration, or even home detention. Appellant is not subject to any physical restraint. There is virtually no restriction on Appellant's liberty to travel, and nothing prevents him from changing jobs or residences. As long as he keeps the device charged, he is free to live, work, or travel as he chooses. Appellant contends the three hours of daily charging time referenced in the testimony from State v. Nation demonstrates GPS monitoring is an affirmative disability or restraint. But this claim smacks of disingenuity when one considers the myriad opportunities the average person has every day to charge the monitor while sitting or resting in close proximity to an electrical outlet. Appellant is not being denied movement at any specific time of the day. Therefore, the Act's GPS monitoring requirement does not impose an affirmative disability or restraint.

Second, GPS monitoring is not similar to those sanctions that have historically been regarded as a punishment. Historical punishments involved more than the collection of information or the protection of public, instead promoting goals such as humiliation or shaming. Here, the device is neither intended to draw specific attention to the individual wearer, nor to invite public condemnation. As technology advances, the tracking device is destined to become smaller and less obtrusive. It is more akin to requiring an individual to provide a photograph, fingerprint, or DNA sample - a method of identification or tracking - than punishment. In Justin B., this Court noted: "[Justin

B.] has failed to provide the Court with any evidence that the [GPS] monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices." Justin B., 405 S.C. at 406, 747 S.E.2d at 782. Here, Appellant has likewise failed to provide such information. Relying on the dissent in Bredesen, supra, he argues the GPS monitor is "on display at all times for the public." Yet, the only additional information in the portion of the transcript from State v. Nation indicates the device is plastic, would fit in the palm of your hand, and has a strap that is two inches wide. (Motion for a New Trial, Attachment, p.8 [Nation Tr.p.52], lines 6-10). These characteristics comport with this Court's analysis in Justin B., and its conclusions: (1) that "any resulting stigma is not a basic component of the regulatory scheme;" and (2) that "any unintended humiliation is a collateral consequence of a valid regulation." Id.

Under the third factor, courts consider whether the statute "comes into play upon a finding of scienter." Mendoza-Martinez, 372 U.S. at 169. Since Appellant's mandatory GPS placement is a direct result of his conviction for lewd act, it necessarily incorporates the element of scienter; however, the scienter test is generally downplayed by courts when evaluating sex offender regulations. Bredesen, 507 F.3d at 1007; Trosclair, 89 So.3d at 352-53. Therefore, the third factor is of little value in Appellant's case.

Fourth, use of a GPS device does not primarily promote the traditional aims of punishment: (1) retribution and (2) deterrence. While GPS monitoring may serve as a specific and general deterrent, it does not do so "to the exclusion of the provision's civil goals." Justin B., 405 S.C. at 407, 747 S.E.2d at 782. Indeed, promoting deterrence

does not take away from the legitimate, non-punitive purposes of protecting children and aiding in law enforcement.

Under the fifth factor, courts ask whether application of the statute necessarily depends on behavior which is already a crime. As with the third factor, placing Appellant on GPS monitoring is a direct result of his conviction for lewd act. Likewise, as with the third factor, this carries little weight in an analysis of Appellant's case because the regulatory scheme itself applies only to past conduct, which was a crime. Thus, criminal behavior is a necessary beginning point because recidivism is the statutory concern. Trosclair, 89 So.3d at 354.[10]

Sixth, as noted in Justin B., use of a GPS monitor clearly has a rational relationship to an alternative stated non-punitive purpose. That purpose is to protect children and to solve crime. A GPS monitor is not used solely for home detention. It is also used to monitor a person outside the home, allowing Appellant to move freely. In the future it can be used either to place him at a crime scene, or possibly confirm an alibi. Appellant acknowledges public safety and welfare are legitimate, non-punitive purposes for legislation, but contends there is no rational connection between those purposes and GPS monitoring. However, this Court has already concluded the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test. Dykes, 403 S.C. at 508, 744 S.E.2d at 510.

Seventh, and also as found in Justin B., there is no basis to conclude GPS monitoring is excessive in relation to the alternative stated non-punitive purpose. The burdens placed on Appellant by having to wear the device are far outweighed by the

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[10] By failing to mention either the scienter element or the criminal behavior element in Justin B., this Court appears to agree that they are not particularly germane to an analysis of the GPS monitoring statute.

purpose - to protect children and solve crime. Appellant may believe that mandatory lifetime monitoring makes the monitoring excessive; however, the State submits that children in the distant future are no less deserving of protection that children in the present. To the extent the GPS monitoring can actually accomplish its purpose, it can do so now or in the future. Statistical evidence demonstrates that sex offenders pose a high risk of re-offending. S.C. Code Ann. § 23-3-400 (Supp. 2013). Indeed, sex offenders pose a serious and increasing threat. McKune v. Lile, 536 U.S. 24, 33 (2002). This is why there is a national consensus for pursuing a "containment approach" to sexual deviance. In addition, and again as noted by this Court in Justin B., because Appellant is now entitled to seek judicial review of his continued compliance with the GPS monitoring requirements ten years after commencement of monitoring, Dykes, 403 S.C. at 508-09, 744 S.E.2d at 510, those requirements certainly cannot be considered excessive in relation to the purpose of the Act.

Thus, with the exception of the third and fifth Mendoza-Martinez factors, which, as explained above, should be given very little weight, the considerations here weigh heavily in support of concluding that the statutory scheme is not so punitive either in purpose or effect as to negate the intention of the legislature. Therefore, the State submits that even under a re-analysis of the Mendoza-Martinez factors in light of Appellant's "additional information," Appellant has not shown the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the intention of the legislature. This Court should follow the precedent set in Justin B. and once again find GPS monitoring is not punishment, and therefore, not cruel and unusual punishment.

Lifetime GPS Monitoring with the Possibility of Removal After Ten Years Is Constitutionally Proportional Punishment for Lewd Act Upon a Minor

Even if this Court chooses to reverse the precedent set in Justin B. and now finds GPS monitoring constitutes punishment, the State submits lifetime GPS monitoring with an opportunity to seek judicial review of continued compliance ten years after commencement of monitoring does not constitute cruel and unusual punishment, because it is proportional to Appellant's crime.

The United States Supreme Court notes that at its core the Eighth Amendment prohibits excessive sanctions. Atkins v. Virginia, 536 U.S. 304 (2002). Punishment is "excessive," and therefore prohibited by the Eighth Amendment, if it is not graduated and proportioned to the offense. Id. Thus, for Eighth Amendment purposes, the court conducts a proportionality analysis to determine whether the punishment is disproportionate to the crime committed. Atkins, 536 U.S. at 311 (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense); Solem v. Helm, 463 U.S. 277 (1983). Likewise, in analyzing the prohibition against cruel and unusual punishment in the South Carolina Constitution, our courts have recognized the concept of requiring a sentence to be in proportion to the crime. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977). Indeed our Courts have held that a sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). However, the prohibitions of the Eighth Amendment only forbid extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking to how society presently views a particular

punishment. State v. Wilson, 306 S.C. 498, 509-510, 413 S.E.2d 19, 26 (1992); see Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

The clearest and most reliable expression of society's contemporary values is derived from legislation enacted by the country's legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court's own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. The bar for cruel and unusual punishment is high. United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012). In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

Here, that burden has not been met by Appellant, either in an argument to the trial court, or in this appeal. Instead, Appellant simply asserts the duration of GPS monitoring coupled with the cost is so severe as to fall within the meaning of cruel and unusual punishment. The mere fact that the Legislature enacted a law requiring lifetime GPS monitoring for particular individuals who committed sex crimes against children is strong evidence that the alleged "punishment" is not excessive under community standards.

This is particularly true considering the nature of the "punishment" Appellant finds objectionable. As described in detail above, GPS monitoring is a far cry from incarceration, or any other traditional form of punishment. Indeed, as long as the person subject to GPS monitoring complies with requirements for maintaining functionality of the device, his or her liberty is virtually unrestricted. This not only weighs against finding that GPS monitoring is punishment, but also strongly weighs against finding it is disproportionate punishment to the crime. Indeed, ten years or more of GPS monitoring pales in comparison to fifteen years in prison, the maximum possible sentence for lewd act under former section 16-15-140 of the South Carolina Code. Additionally, the financial cost of GPS monitoring shrinks in significance when compared to the cost of incarceration, where the individual has an extremely limited opportunity to earn an income.

The State submits taking all of this into consideration, the Act's mandate that Appellant be placed on lifetime GPS monitoring as a result of his conviction for lewd act upon a minor comports with currently prevailing standards of decency and does not violate the cruel and unusual punishment clauses of the United States and South Carolina Constitutions. This is particularly true where Appellant is constitutionally entitled to petition for judicial review and possible relief from GPS monitoring after ten years. Therefore, Appellant's argument should be dismissed and the trial court should be affirmed.

III.

The trial court properly denied Appellant's motion for a mistrial where no evidence was introduced at trial in violation of the Rule 801(d)(1)(D) "time and place" exception to the hearsay rule.

Appellant argues the trial judge erred in refusing to grant a mistrial when the State asked a witness if the victim approached that witness "pertaining to the incidents with Mr. Carrier," because the question violated the time and place exception to the hearsay rule found in Rule 801(d)(1)(D), SCRE. He contends that regardless of what testimony was elicited in response, he was prejudiced by the improper question itself because the credibility of the victim was such a critical issue at trial. Appellant concludes by claiming: "the improper question by the State constituted prejudicial corroboration testimony warranting a mistrial." (Brief of Appellant, p.28). The State disagrees and submits Appellant's argument is without merit.

Standard of Review

"The decision to . . . deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). Indeed, a mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989); See also State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). Moreover, "[t]he granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other

way." State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). The burden is on the moving party to establish both error and prejudice. Wasson, 299 S.C. at 510, 386 S.E.2d at 256. Appellate courts favor the exercise of the wide discretion of the trial judge in evaluating a mistrial request. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

Rule 801, SCRE

The South Carolina Rules of Evidence define hearsay as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The Rules, however, further provide that:

> A statement is not hearsay if . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Rule 801(d), SCRE.

Discussion/Analysis

Appellant argues: "the improper question by the State constituted prejudicial corroboration testimony warranting a mistrial." (Brief of Appellant, p.28). However, despite the trial court overruling Appellant's objection to asking about identity, Ms. Travis did offer testimony as to any hearsay from the victim. This is because: (1) the declarant/victim testified at trial and was subject to cross-examination; (2) the statement was consistent with the declarant's testimony; and (3) the statement was limited to the time and place of the incident. Since no improper evidence materialized as a result of the allegedly improper question, Appellant suffered no prejudice and the trial court

could not have abused its discretion in refusing to grant a mistrial. State v. Watts, 320 S.C. 377, 384, 465 S.E.2d 359, 364 (Ct. App. 1995); compare with State v. Sapp, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-46 (1988) (finding reversible error where the accused was unfairly prejudiced because the solicitor, over the accused's objection, was allowed to repeatedly cross-examine a witness in such a manner as to improperly force him to attack the veracity of another witness).

In any event, to the extent this Court considers the question itself rather that the testimony offered in response to that question, the State submits the question could not constitute improper corroboration because, though it identified Appellant, it did not reference a sexual assault, a time or place, or even whether the victim made a statement about the unspecified "incidents." Instead, the question was merely whether the witness was "approached" pertaining to "incidents" with Appellant. The victim could have "approached" Ms. Travis and not made a statement at all. Similarly, "incidents" could reference any number of occurrences, not necessarily the sexual assaults committed by Appellant. Thus, standing alone, the question asked by the assistant solicitor was not improper. Therefore, the trial court properly denied Appellant's motion for a mistrial, and that decision should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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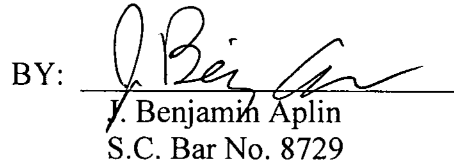
BY: 
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Columbia, South Carolina
March 24, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212777

THE STATE, ...RESPONDENT

v.

JAMES CARRIER,...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated March 24, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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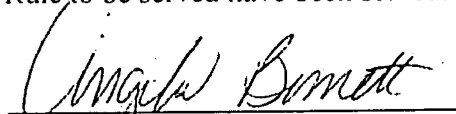
I further certified that all parties required by Rule to be served have been served. This 24th, day of March, 2014.



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