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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Williamsburg County
John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-002391

THE STATE,

Respondent,

vs.

JUSTIN MCBRIDE,

Appellant.

FINAL BRIEF OF RESPONDENT

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Third Judicial Circuit

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant's argument that the Circuit Court lacked jurisdiction was never raised below, and by statute, jurisdiction was in General Sessions, and the argument that prosecution of Appellant in General Sessions violated his constitutional rights is both incorrect and not preserved for review.

II.

The trial court did not err in declining a spoliation charge and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value. (Appellant's Issue II. A.).

III.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial (Appellant's Issue II. B.).

IV.

The trial court did not err in not allowing Appellant to cross-examine law enforcement about whether law enforcement made Victim submit to a polygraph examination (Appellant's Issue II.C.).

V.

The trial court did not err in instructing the jury on the legal principle that the testimony of a victim need not be corroborated and the trial court did not unduly emphasize this correct statement of law to the jury. Appellant was not prejudiced due to

the extensive instructions on credibility, the jurors' role as finders of fact, and the State's burden of proving guilt beyond a reasonable doubt. (Appellant's Issue II.D.).

VI.

The trial court did not err in denying the motion for directed verdict as sufficient evidence of a sexual battery was presented for a reasonable juror to find Appellant guilty. (Appellant's Issue III).

VII.

McBride was not subject to custodial interrogation and therefore did not need to be advised of his rights, and further, McBride received the only relief he requested, so no issue remains for this Court to review. Additionally, McBride did not renew any objection to his statement before the jury and any error is harmless beyond a reasonable doubt. (Appellant's Issue IV).

STATEMENT OF THE CASE

Appellant McBride was indicted for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor in December 2010. McBride was tried by jury before the Honorable John C. Hayes, III, on October 28-30, 2013. McBride was found guilty of criminal sexual conduct with a minor in the first degree and acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced McBride to twenty-five years' imprisonment.

STATEMENT OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Appellant McBride. She was thirteen years old at the time of the trial. ROA. p. 81. McBride was sixteen years old at the time he sexually assaulted Victim, who was his cousin. ROA. p. 100.

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus. The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is McBride's mother. She knocked on the door and McBride answered and let her in.[1] She was alone in the house with McBride. McBride was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted McBride to begin a violent sexual assault. ROA. pp. 82-86.

McBride took out his penis and told Victim to "jerk it." ROA. p. 87, lines 5-6. He grabbed Victim's hand and put it on his penis. McBride grabbed Victim's head and pulled her toward his penis. ROA. pp. 87-88. Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.

---

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. ROA. p. 171, lines 4-6.

> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
>
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?
>
> A: Nasty.
>
> Q: And it went on your shirt. Is that a yes?
>
> A: Yes, ma'am.
>
> Q: Okay. And then you did what?
>
> A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

ROA. p. 89, lines 5-16. Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. ROA. pp. 89-90.

When Victim came out of the bathroom, McBride was spraying perfume all around the living room. ROA. p. 92. McBride tried to pull down her pants; he would pull them down, and Victim would pull them back up. ROA. p. 92. Victim testified that McBride tried to put his penis in her butt. Victim testified it hurt. ROA. p. 92. line 25 – p. 93, line 8.

Victim pushed McBride off her, and she ran to the front door. McBride blocked

her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Her mother (Mother) was there. When Mother asked what was wrong, Victim did not reply. She was scared McBride would come over to the house. But Mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when McBride had his arm around her neck. She hurt the next day when she was making a bowel movement. ROA. pp. 93-100. Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." ROA. p. 99, lines 3-8.

On cross-examination, Victim explained the following:

> Q: So he grabbed your head like this?
>
> A: No, with his hand.
>
> Q: With his hand? Where was the rest of his arm?
>
> A: Still back here.
>
> Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?
>
> A: Yes, sir.
>
> Q: And pushes down?
>
> A: Yes, sir.
>
> Q: Now does it go in your mouth?
>
> A: Yes, sir.

ROA. p. 113, lines 1-13. Victim verified her answer upon further cross-examination:

> Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?
>
> A: It went in my mouth. That's when the stuff came out of

> his manhood and went in my mouth.

ROA. p. 113, lines 19-24.

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with McBride to hear his side of the story. ROA. pp. 168-171.

Detective Hamlet testified that McBride gave the following statement:

> He opened the door and asked why was she over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

ROA. p. 173, line 13 – p. 174, line 2. Detective Hamlet testified to the statement without objection from McBride.

On cross-examination, McBride elicited the following testimony from Detective Hamlet:

> **Q: Did the second interview [with Victim], did it involve possible penetration?**
>
> **A: Yes.**
>
> **Q: Did the first one indicate that at all?**

A: Orally.

Q: Okay. What about on her bottom?

A: Not on the first one.

Q: So it changed.

A: It was added.

ROA. p. 202, lines 11-19 (emphasis added).

Mother testified she arrived at home on time for the bus, or at least she thought so. However, Mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before. But now Victim walked by Mother without discussion. Mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Mother inquired about where she had been. Mother testified Victim also had a stain on her shirt that smelled like deodorant. ROA. pp. 217-224.

Mother went next door and asked McBride what happened. McBride claimed Victim walked in the bathroom on him. Mother told McBride that she did not believe him. Mother decided it was best to leave at that point, since McBride's mother was not home. Another of Mother's sisters (not McBride's mother) called police. ROA. pp. 226-229.

Later that night, Mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom.

Victim told Mother it hurt when she was trying to go to the bathroom. ROA. pp. 229-230; p. 235.

Law enforcement failed to take Victim's clothing during the interview. Mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. ROA. pp. 237-240; p. 250.

Lieutenant Thomas Dean McCrea testified that the officer described by Mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. ROA. pp. 261-26.

Samantha Cooper, Victim's aunt, testified she confronted McBride with Victim's allegations, and he told her he did not mean to do it. Cooper understood McBride's comments to be a confession. Cooper was enraged. She went running after McBride, and he ran inside his house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. ROA. pp. 267-274.

ARGUMENT

I.

Appellant's argument that the Circuit Court lacked jurisdiction was never raised below, and by statute, jurisdiction was in General Sessions, and the argument that prosecution of Appellant in General Sessions violated his constitutional rights is both incorrect and not preserved for review.

McBride claims the trial court did not have subject matter jurisdiction over him for criminal sexual conduct with a minor in the first degree and assault with intent to commit criminal sexual conduct with a minor in the first degree. Of course, General Sessions has the power to hear criminal trials for those charges. Further, McBride bases his argument on a statutory argument that is contradicted by case law and the plain meaning of the applicable statutes. McBride, for the first time on appeal, argues alternatively that if there is jurisdiction, then it is unconstitutional. This claim also lacks merit.

Appellant relies on S.C. Code Ann. § 63-19-1210 to argue the trial court should have remanded the matter to family court. Section 63-19-1210 requires the following:

> (1) If, during the pendency of a criminal or quasi-criminal charge against **a child** in a circuit court of this State, it is ascertained that **the child** was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case . . . to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section.

(Emphasis added). "Child" is defined as follows under S.C. Code Ann. § 63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, McBride was not a child when he sexually assaulted his cousin.

While McBride suggests uncertainty on the issue of jurisdiction in his brief, the question was already soundly answered. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, McBride conflates an issue of personal jurisdiction with an issue of subject matter jurisdiction. Subject matter jurisdiction is merely the power for a court to hear a certain class of cases. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). General Sessions has the power over criminal charges such as criminal sexual conduct with a minor in the first-degree and assault with intent to commit criminal sexual conduct with a minor in the first-degree. On the other hand, the applicability of the Children's Code to a particular person is a matter of personal jurisdiction. Shedden v. State, 265 S.C. 334, 338, 218 S.E.2d 421, 422 (1975) ("It has been held that a juvenile may waive

his right to be treated as such either by his failure to plead his age or by entering a guilty plea."); Ex parte Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived.").

In the instant case, no objection to having the matter heard in General Sessions, including any accompanying constitutional infirmities, was raised to the trial court. Accordingly, this whole argument is not preserved for this Court's review. An argument not raised to and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Even constitutional issues must be raised below to be preserved. State v. Byram, 326 S.C. 107, 112-13, 485 S.E.2d 360, 362-63 (1997) (a constitutional issue must be presented to the trial court to be preserved for review); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (holding failure to raise constitutional issue at trial precluded its consideration on appeal). Accordingly, this Court should not review this issue.

Further, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of

proceedings against children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, McBride committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be punishable by up to life imprisonment. McBride violently assaulted a cousin living right next door to him in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over McBride's charges.

II.

The trial court did not err in declining a spoliation charge and Appellant was not entitled to dismissal based on lost evidence where no evidence indicates law enforcement acted in bad faith or the lost evidence had exculpatory value. (Appellant's Issue II. A.)

McBride argues that his due process rights were violated because the Victim's shirt was lost by law enforcement and that he was entitled to a spoliation instruction. McBride does not allege bad faith on the part of law enforcement and no evidence of bad faith exists. Further, the lost evidence did not have apparent exculpatory value. Finally, the requested charge is an unconstitutional charge on the facts and was improper.

McBride was not entitled to dismissal of the charge or exclusion of the photograph of the shirt. The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually on point with this matter. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed that semen on the clothes could have been

tested if refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue. The Arizona Court of Appeals reversed, finding, "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." Id. (citation and internal quotation marks omitted). Note the Arizona Court of Appeals holding closely tracks McBride's argument. Further note, as explained below, the Arizona Court of Appeals decision was reversed.

Youngblood held as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. Additionally, it is speculative at best that the shirt contained exculpatory evidence. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Accordingly, the issue lacks merit.

Additionally, McBride sought a spoliation instruction. Such an instruction is tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not

charge juries in respect to matters of fact, but shall declare the law."). In that vein, the trial court properly refused to charge the jury on "adverse inference." South Carolina case law indicates that in criminal cases, jury charges of this nature, on behalf of the State or the defense, are "not warranted except in the most unusual of circumstances." State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) ("[W]e entertain grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness."); see also State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) ("Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings.") (citations omitted); see also State v. Breeze, 379 S.C. 538, 547, 665 S.E.2d 247, 252 (Ct. App. 2008) (citing Simmons favorably but declining to decide whether a spoliation charge was warranted; instead this Court found no prejudice from any error in declining spoliation charge). Accordingly, the trial court did not err in declining to instruct the jury as McBride requested.

III.

Since no discovery violation occurred, the subject photographs were available for inspection, and there was no prejudice from the imagined violation, the trial court did not err in allowing the photographs to be admitted into evidence and in declining to grant a mistrial (Appellant's Issue II. B.).

McBride complains the prosecution violated Rule 5, SCRCrimP, by not making a better copy of the photographs depicting Victim wearing the shirt bearing the deodorant stain. McBride also makes a vague due process claim. The prosecution complied with Rule 5, McBride was not denied due process, and further, McBride was not prejudiced by the perceived violation.

Prior to the photographs' admission and out of the presence of the jury, McBride objected to the photographs. McBride remonstrated: "we were provided with a document that was black – blank. Well it wasn't blank, excuse me. It was black. It was a no color photo. The one that they're looking to place into evidence is a colored photo." ROA. p. 141, lines 9-13. McBride's counsel confirmed his law firm received discovery: "The law firm was able to acquire documents in regards to the case itself, which included these dark photographic images which you cannot make out." ROA. p. 141, lines 22-25.

McBride's counsel provided further explanation making clear he was aware of the existence of photographs he needed to inspect: "We have never been provided the colored photos in this particular case that we can actually view. We knew there was an image there. We didn't know what it was." ROA. p. 142, lines 16-19. Despite the fact counsel knew there were photographic images that were apparently difficult to make out, counsel never attempted to contact the prosecution or law enforcement to seek

information about the photographs or arrange an opportunity to view the photographs.

McBride's counsel was candid that he did not believe the perceived violation was intentional on the prosecution's part. McBride's counsel refreshingly noted the prosecutor's "high professional standards." ROA. p. 143, lines 1-13. McBride's counsel did not complain he needed further preparation due to his belated viewing of the photographs. Instead he complained the photographs might have helped him work out a plea deal with the prosecution. ROA. p. 143, lines 13-23.

The prosecutor noted in both a discovery response to McBride's first attorney, and then to the present counsel, there was reference both to a disk and pictures available for inspection and duplication. ROA. p. 145. Further, the incident report provided to counsel also indicated a white stain on Victim's shirt. ROA. p. 146, lines 8-13. As the prosecutor noted: "It's not as if they had no idea that there were photographs in the case, then all of a sudden in the morning of trial, I spring photographs on them. Judge, we gave them notice two years ago that there were photographs in this case." ROA. p. 152, lines 19-24.

Rule 5 was complied with. Under Rule 5(a)(1)(C):

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

In the instant case, it is apparent that McBride's counsel was made aware there were photographs available for inspection. It is further clear McBride was aware he was

in possession of less than perfect copies of photographs and yet made no attempt to attain better copies or see the originals. Accordingly, the trial court correctly found the State complied with Rule 5. State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991) (where solicitor had open file policy, the defense attorney was allowed to inspect the file, and the defense attorney admitted that he probably inspected the file, the solicitor substantially complied with Rule 5).

Further, the trial court has discretion to determine what remedy, if any, is necessary to protect the defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In the instant case, McBride was unable to demonstrate actual prejudice from the purported violation. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). McBride did not seek a continuance, did not state the need for further investigation or preparation, and failed to note the need for any additional witnesses. Indeed, McBride failed to indicate how the time he already had prior to the photograph being admitted was not sufficient to view the

photographs. It was just two photographs, all counsel had to do was look at them. See State v. Lunford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) (finding no reversible error where defense counsel did not seek additional time to study materials and prepare for further cross-examination); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (finding no abuse of discretion in trial court's denial of motion to suppress following late disclosure where defendant was permitted to view and copy the State's file and defendant never requested a recess in order to review the file); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (subsequent history omitted) (finding the state's failure to produce discovery material consisting of a taped interview with the prosecution witness until the morning jury selection began did not warrant a dismissal or a mistrial where the trial court allowed defense counsel to listen to the tape before the witness took the witness stand and the trial court delayed cross-examination until the next day); Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.5, at 545-46 (1984) (a defendant's failure to request a continuance when a disclosure of exculpatory evidence is first made at trial "is often viewed as automatically negating any claim of actual prejudice.").

As to McBride's ambiguous Brady or due process argument, it simply lacks substance. The evidence is not exculpatory. See State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (2014) ("Favorable evidence is either favorable exculpatory

evidence or favorable impeachment evidence."); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct. App. 2005) ("Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt.") (citation omitted). The "violation" did not leave McBride with inadequate time to prepare. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial.").

In the instant case, there was no Rule 5 violation, the trial court did not err in denying the motion for mistrial, and there is no prejudice accruing from the perceived Rule 5 violation. Further, no due process violation occurred. Rule 5 was available as a matter of procedural due process, and a remedy short of dismissal or suppression of the photographs might have been available if McBride sought anything other than a windfall.

IV.

The trial court did not err in not allowing Appellant to cross-examine law enforcement regarding whether law enforcement requested Victim to submit to a polygraph examination (Appellant's Issue II.C.).

McBride claims the trial court erred in not allowing him to cross-examine law enforcement about whether law enforcement requested Victim to submit to a polygraph examination. McBride makes this claim based on S.C. Code Ann. § 16-3-750, which allows law enforcement in some cases to request a victim of a sexual assault submit to a polygraph examination. However, the statute does not provide for the admissibility of the request or results of a polygraph examination at a criminal trial, and it would be poor policy for law enforcement to subject child victims of sexual assault to a polygraph examination in all but the most extreme cases. Such a proposed line of questioning was properly excluded by the trial court.

Under S.C. Code Ann. § 16-3-750:

> A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

Notably, this provision allows law enforcement to request a polygraph examination of the victim only if the credibility of the victim is at issue, which would necessarily be due to the subjective view of the law enforcement agency. Further, no part

of the statute provides for the request, failure to request, or failure to submit to a polygraph be admitted into evidence. Of course, the statute does not provide that the results of the polygraph are admissible.

The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 534 S.E.2d 586, 594 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001).

Our Supreme Court has held that evidence of the results of a polygraph "or the defendant's willingness or refusal to submit to one is inadmissible." State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999). In Johnson, the Supreme Court found no error in denying a mistrial motion made when a detective testified that he asked the defendant if he would be willing to submit to a polygraph examination, but before the detective testified about the defendant's reply to the detective's request. Id. The Supreme Court, however, found no error because the reference to the polygraph was inadvertent and a curative instruction was provided. Id. at 90, 512 S.E.2d at 801. The Supreme Court has also opined that "the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable." State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001).

In State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996), Wright argued the results of his polygraph examination, which showed deception, should be allowed to prove his subsequent confession was involuntary. The Supreme Court found the trial court did not abuse its discretion in finding the test was inadmissible "considering the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant." Id. at 256, 471 S.E.2d at 702.

In State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985), which was a joint appeal by co-defendants Merriman and Mazzell, Mazzell argued that the trial court erred when it redacted a sentence from the immunity agreement of a cooperating co-defendant, Hogg, that required him to submit to a polygraph examination. Mazzell also sought to introduce the results of the examination that showed deception on the question of whether Hogg killed the victim. Id. at 85-87, 337 S.E.2d at 225-26. The Supreme Court found no error in the trial court's decision to redact the agreement. Id. at 87, 337 S.E.2d at 226.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004).

Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C.

201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004).

"The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus, a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

"A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

Whether law enforcement could have requested Victim take a polygraph test has no bearing on Victim's credibility. Of course, the results of a polygraph would not be admissible, which may have some bearing on why law enforcement would not want to conduct such a test. Further, subjecting a child-victim to a polygraph test in all but the most exceptional circumstances would be poor policy. The environment of a polygraph test would likely inhibit disclosure, plus the leading questions inherent in a polygraph

examination run counter to a format that should include non-leading questions in an interview conducted by skilled forensic interviewers. See State v. Michaels, 642 A.2d 1372, 1379 (N.J. 1994) (noting "a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.").

Instead, the child was brought to a trained professional for a proper forensic interview. The Legislature's preference for this approach is evidenced by S.C. Code Ann. § 63-11-310, which provides for the establishment of Child Advocacy Centers that in addition to various therapeutic services, are required to provide "(1) a neutral, child-friendly facility for forensic interviews" as a response to child maltreatment. A polygraph examination, which sends a clear message to a victim that they are not believed, is antithetical to this objective.

In the instant case, the trial court did not abuse its discretion in not allowing McBride to cross-examine law enforcement about whether a polygraph examination was attempted because it was not relevant and was far more prejudicial than probative. Pagan, supra.

Further, McBride is unable to show prejudice, since he failed to proffer what testimony would have been provided. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding the failure to raise argument against exclusion of testimony and to proffer witness's testimony, had it been allowed, resulted in the issue not being

preserved for review). A likely answer is that law enforcement did not polygraph the Victim because they believed her.

V.

The trial court did not err in instructing the jury on the legal principle that the testimony of a victim need not be corroborated and the trial court did not unduly emphasize this correct statement of law to the jury. Appellant was not prejudiced due to the extensive instructions on credibility, the jurors' role as finders of fact, and the State's burden of proving guilt beyond a reasonable doubt. (Appellant's Issue II.D.).

McBride argues the trial court should not have instructed the jury on the correct principle of law that the testimony of a victim need not be corroborated. This principle of law is useful for the jury to understand in sexual assault cases, does not diminish the State's burden of proof, and does not mislead the jury. The trial court properly instructed the jury and did not unduly emphasize the lack of a requirement for corroboration. Appellant was not prejudiced by the trial court's instructions.

S.C. Code Ann. § 16-3-657 provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." McBride was charged under S.C. Code Ann. §§ 16-3-655 and 656. In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court found it was not error to charge § 16-3-657 as long as the charge as a whole comports with the law. Relying on Schumpert, the Supreme Court subsequently ruled:

> A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006).

Noting Rayfield, this Court, in State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011), reviewed a jury instruction on §16-3-657 like the one provided in this case. In Hill, the court's charge consisted simply of the one-sentence statute followed by a charge on credibility. The instruction in the instant case was also one sentence, repeated once more at a later point in the instruction, following the instructions on the elements of the offense. Likewise, in State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011), this Court found the single-sentence charge was proper and not unduly emphasized.

In the instant case, the trial court advised the jury: "The testimony of victims in criminal sexual conduct cases need not be corroborated under the laws of the state." Tr. p. 367, line 24 – p. 368, line 1. After charging the elements of the offenses, the trial court stated: "Again the testimony of the victim need not be corroborated under the laws of this state." Tr. p. 369, lines 14-16. As in Rayfield, Hill, and Orozco, the no-corroboration instruction was not unduly emphasized.

As noted in Rayfield, the instruction serves an important purpose during the jury trial:

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

> defendant may be convicted solely on the basis of a victim's testimony.

Rayfield, 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added). Note the legislature has not corrected Rayfield's interpretation of its statute, despite meeting eight times since the decision was rendered.

As in Rayfield, Hill, and Orozco, the jury in the instant case was charged extensively on reasonable doubt and the State's burden of proof. ROA. pp. 352-354. Like those cases, the jury was also instructed extensively on their role in determining credibility of witnesses and their role as finders of fact. ROA. pp. 354-355. The trial court did not err in the instant case in instructing the correct law.

VI.

The trial court did not err in denying the motion for directed verdict as sufficient evidence of a sexual battery was presented for a reasonable juror to find Appellant guilty. (Appellant's Issue III).

McBride argues there was insufficient evidence of a sexual battery to find him guilty. However, in the light most favorable to the State, evidence was sufficient for a reasonable juror to find McBride guilty of a sexual battery based on evidence of fellatio.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

"A person is guilty of criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S. C. Code Ann. § 16-3-655. Sexual battery is defined as "sexual intercourse,

cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." S.C. Code Ann. § 16-3-651(h).

The battery element has been interpreted broadly to cover even the slightest sexual contact. For instance, in State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986), the South Carolina Supreme Court found the six year-old victim's testimony that the defendant touched her with his penis, but could not remember whether he put it inside her body, sufficient to survive directed verdict where she also testified it hurt. The Supreme Court found this was sufficient evidence of an intrusion to survive directed verdict. See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989) (opining "neither Mathis nor the statute [section 16-3-651(h)] requires that there be evidence of penetration or intrusion of the victim's body. There must merely be evidence of intrusion by one person into another person's body.").

In State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), the Supreme Court similarly found evidence of an intrusion sufficient to survive directed verdict on the element of sexual battery as to the victim named Betty where Betty testified that Johnson touched Betty and it hurt, and the physical examination revealed an injury inside Betty's vagina. Id. at 85-86, 512 S.E.2d at 799.

In State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), this Court considered the proper definition of "cunnilingus" as defined by section 16-3-651(h) and ultimately rejected a restrictive definition that would require penetration. This Court observed that the act of cunnilingus is a statutorily enumerated type of sexual battery. In reaching that conclusion, this Court quoted a substantial portion of State v. Ludlum, 281

S.E.2d 159 (N.C. 1981). However, a particularly relevant passage quoted is the following:

> We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties.

Morgan, 352 S.C. at 371, 574 S.E.2d at 370-71 (quoting Ludlum at 162-63).

The Nebraska Supreme Court, in interpreting a provision similar to our own, found "where defendant has engaged the victim's mouth with the defendant's penis, the defendant has committed fellatio and thus been guilty of 'sexual penetration.'" State v. Gonzales, 366 N.W.2d 775, 777 (Neb. 1985).

The Minnesota Court of Appeals adopted a dictionary definition which defined fellatio as "oral stimulation of the penis" and determined oral stimulation would mean any stimulation by the mouth, tongue or lips. State v. Ptacek, 766 N.W.2d 355 (Minn. Ct. App. 2009).

In State v. Johnson, 413 S.E.2d 562 (N.C. Ct. App. 1992), two female children testified that the defendant inserted his penis into their mouth, but their lips never touched his penis. The court cited its state supreme court precedent defining fellatio as "contact between the mouth of one party and the sex organs of another." Id. at 563 (internal quotation marks and citation omitted). The court further explained: "The case law clearly holds that fellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person." Id. at 564. The North Carolina Court of Appeals found evidence to

support conviction, opining "it is logical to infer that when the penis of an adult male is placed in the mouth of a five year old child, a touching of some part of that child's mouth, however slight, will occur." Id. The court concluded as follows:

> Finally, we note that it would be an absurdity under the facts of this case to overturn defendant's convictions for first degree sexual offense. All the evidence points to an unwarranted and unwelcomed invasion by the defendant's penis into the mouths of these little children. The jury found that such activity occurred.

Id.; see Beltz v. State, 980 P.2d 474, 476 (Alaska Ct. App. 1999) (rejecting dictionary definitions advanced by appellant suggesting requirement of sexual stimulation and approving a dictionary definition defining fellatio as "a sexual activity involving oral contact with the penis"); State v. McParlin, 422 A.2d 742, 743 n.2 (R.I. 1980) (noting definition of fellatio as "the offense committed with the male sexual organ and the mouth" cited in Black's Law Dictionary 743 (4th ed. Rev. 1968)); Travis v. State, 98 A.3d 281, 287 (Md. Ct. Spec. App. 2014) (finding "[f]or the appellant to place his penis inside the lips and in contact with the teeth of the victim qualifies as oral-genital contact within the contemplation of the term 'fellatio'").[2]

In the instant case, McBride contends there is no evidence of oral contact or stimulation with his penis. On cross-examination, Victim explained the following:

> Q: So he grabbed your head like this?
>
> A: No, with his hand.

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[2] Nor should actual penetration of the mouth be required to constitute fellatio. See In re S.M., 666 A.2d 177, 181 (N.J. Super. Ct. App. Div. 1995) ("We conclude that placing one's mouth on the penis of a male victim without inserting the victim's penis into the mouth falls within the legislature's proscription of prohibited acts. We conclude that the public is reasonably apprised of the legislative intent based upon concepts of common intelligence and ordinary human experience." (citation omitted)).

> Q: With his hand? Where was the rest of his arm?
>
> A: Still back here.
>
> Q: Okay. So he comes over like this and then pulled – grabbed your head with his hand like this?
>
> A: Yes, sir.
>
> Q: And pushes down?
>
> A: Yes, sir.
>
> Q: Now does it go in your mouth?
>
> A: Yes, sir.

ROA. p. 113, lines 1-13. Obviously, from context, McBride was referring to his penis when asking if "it" went into his mouth. His intention was verified when he tried to argue to Victim that this was inconsistent with her direct examination. However, Victim verified her answer as follows:

> Q: Now while the solicitor was asking you earlier, isn't it correct that you stated that it never went in your mouth?
>
> A: It went in my mouth. That's when the stuff came out of his manhood and went in my mouth.

ROA. p. 113, lines 19-24.

Additionally, cross-examination of Detective Hamlet confirmed that Victim reported oral penetration. ROA. p. 202, lines 11-15. Finally, the jury could logically infer that oral stimulation caused McBride to ejaculate absent evidence of another form of contact at that moment. Put in the light most favorable to the State, direct evidence supports the conviction, and the trial court did not err in denying the motion for directed verdict.

VII.

McBride was not subject to custodial interrogation and therefore did not need to be advised of his rights, and further, McBride received the only relief he requested, so no issue remains for this Court to review. Additionally, McBride did not renew any objection to his statement before the jury and any error is harmless beyond a reasonable doubt. (Appellant's Issue IV).

McBride dedicates little more than a page of his brief to argue that his Miranda[3] rights were violated. The reason for his truncated analysis may lie in the fact that the issue is clearly unpreserved. McBride successfully convinced the trial court to strike a portion of the statement and did not object when the remainder was published to the jury. This Court should not review the issues. Further, the statement was not the result of custodial interrogation, so Miranda does not apply.

During the pre-trial hearing, Detective Hamlet testified she went to McBride's house after speaking with Victim. ROA. p. 23. She spoke with McBride after getting permission from McBride's mother. ROA. pp. 33-34. Detective Hamlet explained she did not read McBride Miranda rights because he was not under arrest and because "[w]e were just trying to sort out who, you know, what happened." ROA. pp. 33-34 (direct quote, ROA. p. 34, lines 21-22). She testified that McBride's mother was present the whole time. Detective Hamlet testified McBride was not under arrest, not placed in handcuffs, and free to leave at any time. ROA. pp. 23-25. Detective Hamlet testified the conversation took place for roughly five to ten minutes. ROA. pp. 24-25.

Detective Hamlet testified she asked McBride if he knew why law enforcement was there and McBride responded "that they were trying to say that he touched his

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

cousin." ROA. p. 36, lines 3-9. Detective Hamlet next asked what happened and McBride gave his version of events. McBride admitted he let Victim inside the house and no one else was home. McBride told her they watched television. At some point, McBride went to the restroom. Victim came into the restroom while he was still using the restroom and he tried to conceal himself. He yelled at her to leave the bathroom. A short time thereafter she left to go home. ROA. pp. 26-27.

Following Detective Hamlet's in camera testimony, McBride specifically asked for only the initial statement – about the reason Detective Hamlet was interviewing McBride – to be suppressed. ROA. p. 38, lines 12-23. When given the opportunity to respond to McBride's argument, the solicitor asked for clarification that only the initial statement about why law enforcement was there was being challenged. McBride confirmed that was correct. ROA. p. 40, lines 11-17. **The trial court ruled in McBride's favor**, suppressing the answer to the initial question of whether McBride knew why law enforcement was there. ROA. p. 45, lines 8-21. When the remainder of McBride's statement to Detective Hamlet was published to the jury, **there was no objection.** ROA. pp. 172-173.

The issue raised now on appeal is not preserved for review. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142,

587 S.E.2d 691, 693-94 (2003).

In the instant case, the trial court struck only a portion of the statement, **per McBride's request**. Therefore, McBride received the relief he asked for, leaving no issue for this Court to review. State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010) (finding there is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court).

Further, McBride waived further objection since he did not renew any remaining objection he might have when the statement was published to the jury. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary and subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

McBride's argument fails on the merits as well. The warnings were not required as the statement was not the product of a custodial interrogation. Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation. Id. at 477.

Custodial interrogations are made up of two key components: custody and

interrogation. State v. Whitner, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008). "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda, 384 U.S. at 444). In the present case, McBride was not in custody and indicated willingness to engage in what was clearly non-confrontational questioning lasting a mere five to ten minutes. Accordingly, Miranda would not apply in the present case.

In support of admission of the statement, the solicitor cited United States v. Parker, 262 F.3d 415 (4th Cir. 2001). In Parker, in support of the finding that the statement was admissible, the Fourth Circuit noted that Parker was in her own home during questioning. The Fourth Circuit also noted that a relative was allowed to enter the interview room twice during questioning. Further, Parker was never told that she was not free to leave. Id. at 419. In the instant case, the fact that McBride was in his own home and his mother was present weighs heavily in favor of admissibility. Detective Hamlet testified she even asked McBride's mother for permission to question McBride, which she provided. ROA. p. 25, lines 4-11.

Under the totality of circumstances, McBride was not in custody, and therefore, Miranda would not apply. State v. Kerr, 330 S.C. 132, 146, 498 S.E.2d 212, 219 (Ct. App. 1998) (finding DUI suspect not in custody under totality of circumstances) (citation omitted); see also In re Drolshagen, 280 S.C. 84, 310 S.E.2d 927 (1984) (finding juvenile questioned by school officials in the principal's office while police officers were present was not in custody for purposes of Miranda).

The reason, of course, McBride's counsel sought admission of the remainder of

the statement, as opposed to suppression, was that the statement constituted about the best defense possible. Therefore, it is not surprising that trial counsel did not object to the portion of the statement published to the jury. Therefore, any conceivable error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). Exclusion of evidence is reversible only where error and prejudice are shown. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 575 S.E.2d 77, 83 (2003). In the instant case, the statement did not provide much of a defense, but it was the only defense or alternate explanation, so therefore it was not prejudicial – it was just not terribly helpful for McBride. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 29, 2015

RECEIVED
JUN 29 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Williamsburg County
John C. Hayes, III, Circuit Court Judge

THE STATE, Respondent,

v.

JUSTIN MCBRIDE, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Andrew B. Greenlee, Esquire, P.O. Box 2047, Winter Park, Florida 32790-2047, Wendy J. Keefer, Esquire, 1643B Savannah Hwy., Suite 226, Charleston, SC 29407 and Adam Owensby, Esquire, P.O. Box 21043, Charleston, SC 29043.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of June, 2015.

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ALAN WILSON
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June 29, 2015

RECEIVED
JUN 29 2015
SC Court of Appeals

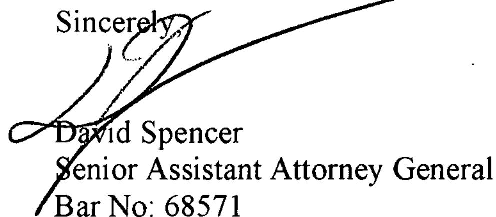
VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S. C. 29211

Re: **State v. Justin McBride**
Appellate Case No: 2013-002391

Dear Ms. Kitchings:

Enclosed please find the original and fourteen (14) copies of the **Final Brief of Respondent** along with **proof of service**, in the above-referenced matter for filing in your office. By copy of this letter, we are serving opposing counsel with this brief today.

Sincerely,



David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: Andrew B. Greenlee, Esquire (2 copies)
Wendy J. Keefer, Esquire (2 copies)
Adam Owensby, Esquire (2 copies)
Victim Services (with enclosure)