STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No. 2014-001714

THE STATE, .....RESPONDENT

v.

CHRISTOPHER TERELL GILYARD, .....APPELLANT.

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# FINAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether Appellant's claim that the trial court erred in refusing his request for a circumstantial evidence jury charge pursuant to State v. Logan is preserved for appellate review where his request was untimely and, to the extent this Court finds it was preserved, whether the trial court properly denied the request where: (1) it had already given the Grippon circumstantial evidence charge two times without objection, (2) the State's case relied almost entirely upon direct evidence rather than circumstantial evidence, and (3) the charge given was an accurate statement of the law.

2. Whether trial court properly charged the jury with language from the rape shield statute where the jury asked a question about testimonial evidence, elicited by Appellant during trial, of a specific instance of the victim's sexual conduct.

3. Whether trial court properly charged the jury, pursuant to § 16-3-657 of the South Carolina Code, that the testimony of a sexual assault victim need not be corroborated.

## STATEMENT OF THE CASE

Christopher Terell Gilyard (Appellant) was indicted at the September 2013 term of the grand jury for Charleston County for second-degree crimninal sexual conduct (CSC) with a minor (2013-GS-10-5833). He was represented by Assistant Public Defenders Charles Cochran and Annie Andrews of the Ninth Cirtuit Public Defender's Office. Respondent (the State) was represented by Assistant Solicitors Debbie Herring-Lash and Shannon N. Elliott of the Ninth Circuit Solicitor's Office. (R.p.1). On July 28-August 1, 2014, Appellant proceeded to trial by jury before the Honorable Deadra L. Jefferson pursuant to which he was found guilty as indicted. He was sentenced to thirteen (13) years' imprisonment. (R.p.366-368; R.p.356, lines 19-25). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent now follows.

## STATEMENT OF FACTS

In the summer of 2012, Appellant rented space in the fourteen-year-old victim's mother's beauty salon where he worked as a barber. On the afternoon of July 11, 2012, when the victim's mother was away, Appellant intercepted the victim as she was coming out of the bathroom. He began touching her chest and when she tried to get away he pushed her face-down onto the floor. Appellant then flipped the victim over, forcibly removed her shorts and underwear, and raped her. (R.p.50, line 13-p.56, line 12; p.118, line 1-p.122, line 13).

### Pretrial Motions

After voir dire and jury selection, the trial court addressed several pretrial motions including Appellant's July 30, 2014, "Motion to Offer Evidence" and "Offer of Proof of Evidence" which were submitted in writing pursuant to section 16-3-659.1 of the South Carolina Code.[1] Appellant asked the court to admit evidence of specific instances of the victim's sexual activity with persons other than the defendant. The trial judge said she would hear that motion in camera at the time the relevant witnesses were offered and would make a contemporaneous ruling on admissibility at that time. She cautioned the parties there should be no reference to the proposed evidence during opening statements. Appellant objected to this limitation from the court and argued that since the evidence would allegedly go towards the victim's motive for bias he should be allowed to reference it in his opening. The judge disagreed and kept the limitation in place. (R.p.9, line 2-p.10, line 9; p.12, line 12-p.14, line 2).

[1] Section 16-3-659.1 of the Code, which generally prohibits the admission of evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct, is commonly referred to as the "rape shield" statute. See State v. Tennant, 394 S.C. 5, 11, 714 S.E.2d 297, 300 (2011) (analyzing the "rape shield" statute); State v. McCoy, 274 S.C. 70, 73, 261 S.E.2d 159, 161 (1979) (describing section 16-3-659.1 as a "shield statute").

## Trial

Shortly thereafter the jury was sworn. (R.p.17, lines 1-8). The trial judge gave a preliminary jury charge which included instructions on the jury's duty to determine the believability of each witness. (R.p.18; SROA.p.1-8). During opening statements, the solicitor presented the State's theory of the case and named the witnesses he intended to call in support of that theory, including the victim and her mother. He then described grooming behavior Appellant used to gain the victim's trust, the sexual assault in the salon, the subsequent threat Appellant made in an attempt to secure the victim's silence, and the delay in the victim's eventual disclosure of the assault. (R.p.19-p.24). In response, Appellant presented his theory of defense, which consisted of his claim that the victim was lying about the sexual assault. He said: "Anybody who has ever been alone with a teenage girl for any length of time could be sitting where [Appellant] is sitting today because of a story that a 14 year old girl told." Appellant said: "her story is a lie." (R.p.25-p.26).

The State called the victim as its first witness. Now sixteen years old, she described being in high school, her plan to become a cosmetologist, and how for several years she had been helping out in her mom's beauty salon, Shear Beauty. In the summer of 2012 she went to the salon nearly every day and often was accompanied by her three year old nephew. The victim's mother, her aunt Angie,[2] and Appellant, all worked at the salon. The victim identified Appellant in the courtroom and described the layout of the salon. She testified Appellant worked there for approximately a month that summer but stopped coming into work sometime the week of July 16th. (R.p.29, line 1-p.35, line 8).

[2] Angela Fuller.

The solicitor then announced the parties had a matter of law and the jury was excused from the courtroom. The State proffered testimony regarding two interactions between Appellant and the victim which occurred before the sexual assault. First, the victim explained how Appellant sometimes let her use his phone to check her social media accounts while they were at the salon. She asked Appellant not to tell her mother and they made a "pinky swear" on the agreement. Second, the victim described an incident where Appellant removed the belt from his pants and began hitting her with it. It began playfully but then started hurting her. A couple of days later the victim's mother said she did not want the victim going into Appellant's "room" at the salon anymore. Appellant objected to this evidence on grounds that both incidents were inadmissible prior bad acts; however, the trial court overruled the objection. (R.p.37, line 7-p.45, line 2).

The jury returned and the victim described the two earlier interactions with Appellant to the jury. She then gave detailed testimony about the sexual assault. On the afternoon of Wednesday, July 11, 2012, the victim's mother was away from the salon working at a local nursing home. The victim was in the salon with Appellant, Angie, and the victim's three-year-old nephew. While the boy was eating, Angie left for the day, leaving the victim and the child alone with Appellant. After Appellant got the child down for his nap, the victim went to the bathroom. As she was coming out, Appellant was standing in the doorway partially blocking her exit. He began touching the victim's chest. When she told him to get off of her and tried to get away Appellant pushed her to the floor. Appellant then flipped the victim over and started forcibly removing her clothes. She tried to stop him but Appellant told her to: "shut the F up." He then

removed her shorts and underwear and tossed them to the side before starting to have intercourse with her. The victim believed Appellant ejaculated or was about to ejaculate by the way he was holding his hand as he withdrew and rushed to the bathroom. (R.p.46, line 1-p.56, line 9).

After the rape, Appellant went back to his station. The victim cleaned up in the bathroom and went to sit under a hair dryer while Appellant packed up his stuff to leave. Appellant told the victim not to tell anybody what happened or he would kill her. After Appellant left, the victim's brother Timothy and Timothy's ex-girlfriend Ashley arrived at the salon with sandwiches. The victim did not tell them what had happened. She testified she was not planning to ever tell anyone but eventually told her mom when she specifically asked what had happened between her and Appellant. The jury was then excused so the trial court could address another matter of law. (R.p.56, line 10-p.60, line 15).

**Rape Shield Statute: S.C. Code § 16-3-659.1**

The solicitor announced that her direct examination of the victim might be finished depending on whether the court was going to grant or deny Appellant's motion under the rape shield law. Appellant described the evidence he was seeking to introduce and argued why he believed it was admissible despite the limitations set forth in the rape shield statute. Relying in part upon State v. Finley[3] and State v. Lang,[4] he argued that even though his proposed evidence did not specifically meet the exceptions in the statute, it nevertheless should qualify for admission because the incidents he hoped to prove were relevant to the credibility of the victim and her mother. Appellant asked to proffer the

[3] 300 S.C. 196, 387 S.E.2d 88 (1989).

[4] 304 S.C. 300, 403 S.E.2d 677 (1991).

evidence through cross-examination of the victim. The solicitor argued the cases were distinguishable from Appellant's case and the evidence should be excluded. The trial court ruled Appellant would be allowed to create an in camera proffer at the end of his cross-examination; however, because Appellant had failed to provide an adequate offer of proof to meet an exception under the rape shield law, the proposed evidence would be inadmissible. (R.p.61-p.79).

**Trial - Continued**

Appellant proceeded to cross-examine the victim, focusing on inconsistencies between her testimony and her prior statements about the sexual assault. (R.p.80-p.106). The jury was then excused and Appellant was permitted to proffer testimony from the victim on two issues; however, those two issues were not the same things listed in his pretrial motion pursuant to the rape shield law. He asked the victim about a statement she made to Appellant during the assault and a set of statements she allegedly made to DSS during an unrelated child welfare investigation. The solicitor advised the court the State had no objection to testimony on the first issue and the judge said it would be allowed; however, the trial court ruled any testimony on the second issue was inadmissible as irrelevant and as having a tendency to mislead the jury. Appellant then concluded his cross-examination with questions about the statement the victim made to Appellant during the assault. (R.p.107-p.117). Appellant did not proffer any testimony from the victim regarding instances of prior sexual conduct he previously argued should be admitted under the exceptions to the rape shield statute.

Next, the State called Angela Fuller to the stand. In the summer of 2012 she worked with the victim's mother, Tralane Bell, at Ms. Bell's beauty salon. Ms. Fuller

rented space at the salon from Ms. Bell and said she worked Tuesday through Friday from approximately 8 a.m. to 6 p.m. She explained she sometimes had late days or early days depending on her clientele and that those days varied from week to week. Ms. Fuller knows both the victim and Appellant and she testified she remembered at least one day in 2012 when she left the victim and Appellant alone at the salon. On cross-examination she said she could not remember a particular day when she left both the victim and her nephew with Appellant, but Ms. Fuller was not able to say for certain that it never happened. (R.p.123-p.128).

Next, the State called Ms. Bell, to the stand. She testified about her family members including her daughter and her son Timothy. Ms. Bell then described her beauty salon, Shear Beauty, and explained how Appellant and Ms. Fuller were both renting space and working at the salon during the summer of 2012. She also explained her work schedule and how she frequently left the salon during the day to work at several local nursing homes. Ms. Bell testified the victim would often come to the salon with her during work hours to help. Over Appellant's objection, she described both the pinky swear incident and the belt incident previously recounted by the victim. (R.p.129-p.139).

Next, Ms. Bell testified about the victim's initial disclosure of the sexual assault. She said that when Appellant stopped coming to work, she repeatedly tried to call him and that during one of those calls the victim became very upset. Ms. Bell pulled her car over and asked the victim to tell her what was going on. At that point, the victim disclosed the sexual assault. The victim told her it happened in back of the salon. She said the victim was afraid and very upset. After the disclosure, Ms. Bell immediately went looking for Appellant. When she didn't find him, she went to a friend's house and

tried to call 911. She and the victim subsequently talked to the police and were referred to the Lowcountry Children's Center. Ms. Bell said she took the victim to a doctor to have her tested for STDs and that the victim then went to counseling for approximately six months. (R.p.139-p.144).

Appellant cross-examined Ms. Bell on the details of her testimony, eventually asking about taking the victim to the doctor to test for STDs. (R.p.145-p.159). The exchange proceeded as follows:

> Q: Okay. And you took her to the doctor to have her tested for S-T-D's but you did not tell the doctor about her allegation of sexual assault.
>
> A: No.
>
> Q: And he did not examine her; do a physical examination in that regard because he was not aware of the allegation, correct? Yes or no?
>
> A: No. Permission to speak freely?
>
> THE COURT: Ma'am, you can explain your answer.
>
> A: Okay. My daughter was statutory raped a year before while she – a year before an incident happened with her. I was embarrassed. I just felt like because I told him she was uncomfortable with him playing with her like that being an adult he would understand. But he saw – to me I feel like he saw her as an easy target ---
>
> MR. COCHRAN: --- Your Honor ---
>
> A: --- so I was embarrassed to tell my doctor yet again that this happened to her a second tme. So no, I did not.
>
> MR. COCHRAN: I believe we have a matter of law, Your Honor.
>
> THE COURT: Approach.
>
> [Whereupon, an off the record bench conference is held]
>
> THE COURT: Continue.
>
> Q: [Mr. Cochran] So you testified that you were embarrassed. You were embarrassed or [the victim] was embarrassed and that's why you didn't go over that with the doctor?

> A: I was embarrassed because I felt like I failed my child. I trusted him. I accepted this man into my home and my business. I trusted this man with my child. I was embarrassed.

(R.p.159, line 20-p.161, line 2) (emphasis added). The jury was then sent out and Appellant proffered additional cross-examination regarding the prior statutory rape and statements Ms. Bell allegedly made to a therapist at MUSC about that incident. After hearing arguments from Appellant and the State, the trial court ruled the proffered testimony was inadmissible for a variety of reasons and prohibited Appellant from pursuing the line of questioning any further. The judge commented it was unfortunate the prior sexual assault was even mentioned since the court had previously ruled it inadmissible; however, she noted it was a logical response to the questions asked by Appellant and that it was limited in scope and did not open the door to further evidence about prior sexual conduct of the victim. (R.p.169-p.185).

The following day, Ms. Bell completed her testimony and the State called Ashley Whaley to the stand. Whaley is the victim's brother Timothy's girlfriend. She remembered an occasion when she went to the salon and found only Appellant, the victim, and the sleeping child present. (R.p.187-p.195).[5] Next, Detective Sergeant Michael Niblock testified for the State. On July 18, 2012, a day after the incident was reported to the police, Niblock went to the scene to interview Ms. Bell. He did not bring a forensic unit to gather physical evidence and he did not order a sexual assault exam on the victim because the passage of time since the incident rendered those actions unlikely to produce any useful information. (R.p.200-p.209). Alexis Mannson, a social worker at

[5] As noted by Appellant (Brief of Appellant, p.4), the trial took four days. The State hereby adopts a similar citation convention as used by Appellant by citing days 1, 2, and 4 of the trial to the consecutively paginated transcript as "Tr." and day 3 of the trial to the separate and independently paginated transcript as "July 31, 2014, Tr."

the Dee Norton Lowcountry Center, testified she interviewed the victim in August of 2012. The victim disclosed the time and place of the sexual assault and then Mannson referred her for counseling. (R.p.209-p.214).

Detective Leslie Ambrose of the Charleston Police Department testified about her investigation, which consisted primarily of interviewing the victim, Ms. Bell, and Angela Fuller. The victim again disclosed the time and place of the sexual assault. (R.p.214-p.231). Finally, the State called Dr. Donald Elsey to the stand. He was offered as an expert in the dynamics of child sex abuse and was admitted without objection. Dr. Elsey described delayed disclosure, grooming, recantation, and typical emotional reactions to the disclosure of sexual abuse. (R.p.232-p.246). After the State rested, Appellant renewed all motions and objections previously raised and then moved for a directed verdict. That motion was denied. After being advised of his right to testify, Appellant elected not to take the stand and the defense rested. (R.p.247-p.260).

**Charge Conference**

At the close of all evidence, the trial judge held a charge conference. She advised she would charge the jury on the respective roles of the judge and jury and the jury's duty to judge witness credibility. The trial judge then said: I will give them . . . a general instruction on the direct and circumstantial evidence from State v. Grippon[6]." She said she would charge the presumption of innocence, reasonable doubt, the defendant's right not to testify, and the elements of the crime. The trial judge then advised she would instruct the jury on language from South Carolina Code Section 16-3-657 "which is the testimony of the victim need not be corroborated." Appellant objected to the noncorroboration charge, arguing it essentially tells the jury the State's case is adequate,

[6] 327 S.C. 79, 489 S.E.2d 462 (1997).

which is extremely prejudicial. The trial judge overruled the objection. She noted existing case law provides that the language in the statute is an accurate statement of law and held that under the circumstances the charge would not constitute a comment on the facts. Appellant said he had no other exceptions to the proposed jury charge described by the court. (R.p.261-p.265).

**Closing Arguments, Jury Charge, and Verdict**

The parties then made closing arguments. The solicitor noted the judge would be charging the jury that the victim's statement does not need to be corroborated; however, she explained this simply means the State is not required to produce eyewitnesses or DNA evidence to convict. Instead, she said, the entire case "comes down to credibility, the credibility of [the victim] and what she told you happened to her on July 11th, 2012." The solicitor described all of the evidence admitted during trial including Dr. Elsey's testimony about delayed disclosure and the dynamics of sex abuse. She then said: "You are the sole judges of credibility in this case. The judge will instruct you of that." (R.p.266-p.276). Appellant responded with his own closing argument and his theory of defense: that the victim is simply lying. He argued the initial lie about a sexual assault evolved and expanded as the victim talked to more people, but that the rest of the evidence, or lack thereof, did not support her story. (R.p.276-p.285).

The trial judge then charged the jury on the law, starting with an instruction about the respective roles of the judge and jury and an instruction that it was the jury's exclusive duty to determine the facts. Specifically the judge charged:

> . . . Since you, the jury are the sole judges of the facts in this case, you are not to infer anything from what I've said during the progress of this trial in ruling upon the admissibility of evidence or otherwise, or anything that I say now to you during the course of this instruction, that I

have any opinion about the facts. The law does not allow me to have an opinion about the facts. This is a matter solely for you, the jury, to determine.

(R.p.286, lines 16-23). The trial court then charged the jury on its duty to judge the credibility of witnesses and on expert witnesses. (R.p.285-p.289).

In regard to direct and circumstantial evidence the trial court charged:

> Ladies and gentlemen, there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness.
>
> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is there greater degree of certainty required to circumstantial evidence than of direct evidence. You should weigh all of the evidence in this case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty. Conversely, if you are convinced of the guilt of the defendant beyond a reasonable doubt, then you must find him guilty.

(R.p.289, lines 7-23). The court then charged the State's burden of proof, the presumption of innocence, reasonable doubt, the defendant's right not to testify, and the elements of the crime. (R.p.289-p.293).

In regard to the victim's testimony, the trial court charged: "I further instruct you that South Carolina Code Section 16-3-657 provides that the testimony of a victim need not be corroborated." (R.p.293, lines 16-18). At the end of the charge, Appellant said he had no exceptions and the case was sent to the jury. (R.p.293-p.295).

After deliberating for approximately 30 minutes, the jury sent out the following question: "During [Ms. Bell's] testimony, she mentioned [the victim] was involved in a statutory rape one year prior; is that statement admissible? Second question: What type

of statutory rape?" (R.p.297, lines 5-12). The trial judge proposed answering the first question with a general charge about the consideration of evidence and the jury's duty to weigh that evidence. In regard to the second question, she proposed instructing the jury pursuant to the rape shield statute. Appellant objected to the instruction under the rape shield statute, arguing that since he was not allowed to offer his proposed evidence under the statute, an instruction would be improper. He also argued that because the testimony came in without objection and was not stricken from the record, the jury should not be told they could not consider it. The trial judge reminded Appellant he was the one who elicited the reference to the statutory rape from Ms. Bell even though the rape shield law prohibits such evidence. She held that because that testimony was now in evidence, and because the jury was asking questions, she should instruct the jury regarding the statutory limitations. (R.p.297-p.304). The trial judge instructed the jury:

> In response to your second question: What type of statutory rape? I instruct you as follows. Under South Carolina law, you cannot consider specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct in making a decision in this case and in your deliberation of this matter on the guilt or innocence of the defendant. Under South Carolina law, those matters cannot be considered.

(R.p.303, lines 13-21).

After further deliberations, several notes from the jury, replaying of portions of the testimony, an Allen[7] charge, and more deliberations, the jury sent out a note stating: "We would like to have wording on circumstantial and direct evidence." The trial judge advised she would answer the questions the following day and the trial recessed for the evening. (R.p.309-p.322). The next morning the trial judge announced she would

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

reinstruct the jury pursuant to Grippon is regard to direct and circumstantial evidence. She said she would also reinstruct on the presumption of innocence and reasonable doubt. Appellant said he took no exception and the trial court reinstructing the jury as announced. At the end of the reinstruction, Appellant again stated he had no exceptions and the jury resumed deliberations. (R.p.326-330). Shortly thereafter, Appellant told the judge he just became aware of a relatively new case, State v. Logan,[8] which addresses jury charges on direct versus circumstantial evidence. He objected to the charge previously given by the court and asked for a charge pursuant to Logan; however, the judge noted Appellant's objection was not contemporaneous and was therefore untimely. The judge commented that she was not aware of Logan changing anything in the prevailing law, but agreed to review the opinion. After a recess, the trial judge confirmer her earlier ruling that Appellant's objection and request to charge were untimely. She further noted that despite setting out new charging language in Logan, our supreme court specifically found there was no error in a trial court charging the language from Grippon. Finally, the trial judge noted Logan had questionable applicability because Appellant's case was primarily a direct evidence case based on the testimony of the victim rather that a substantial circumstantial evidence case. The court found that even if Appellant raised a timely objection there was no error because, when read as a whole, the jury instructions properly charged the law. (R.p.331-p.337). The jury ultimately found Appellant guilty as indicted and the trial judge sentenced him to thirteen (13) years' imprisonment. (R.p.336-368; R.p.338-p.357).

[8] 405 S.C. 83, 747 S.E.2d 444 (2013).

## ARGUMENT

### I.

**Appellant's claim that the trial court erred in refusing his request for a circumstantial evidence jury charge pursuant to State v. Logan is not preserved for appellate review because his request was untimely and, to the extent this Court finds it was preserved, the trial court properly denied the request where: (1) it had already given the Grippon circumstantial evidence charge two times without objection, (2) the State's case relied almost entirely upon direct evidence rather than circumstantial evidence, and (3) the charge given was an accurate statement of the law.**

Appellant argues the trial court erred in declining his request for a circumstantial evidence jury charge pursuant to Logan because it would have added substantially to the jury's understanding of circumstantial evidence as compared to the charge given by the trial judge. He seems to acknowledge his request for the charge was untimely but argues that under the circumstances of his case there was no reason to deny the request. Appellant argues that since only a short amount of time had passed before he requested the Logan charge, "it would have been a simple matter to provide the requested instruction." He claims the charge was particularly needed because the circumstantial evidence did not support the State's case. The State disagrees and submits all of these arguments are without merit.

Initially, any issue with the trial judge's instructions to the jury was not properly preserved for appellate review because Appellant did not request a charge pursuant to Logan at the charge conference and did not object to the Grippon circumstantial evidence charge either before or after it was first given. Appellant specifically stated he took no exception to the trial judge's jury instructions and only objected after the Grippon charge was presented to the jury, without objection, a second time after the jury resumed its

deliberations. However, regardless of any issue preservation concerns, the trial court properly rejected Appellant's request where giving the Logan instruction after twice giving the Grippon charge without objection would have been inconsistent and confusing to the jury, where the State's case was based almost entirely on direct evidence, and where the charge given was an accurate statement of the law. Furthermore, even assuming the Logan charge should have been given when the trial court was recharging circumstantial evidence, any error was harmless in light of the jury charge as a whole. The trial court properly rejected Appellant's request for a Logan charge and his conviction should be affirmed.

**Argument is not Preserved for Appeal**

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the Petitioner; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993).

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regard to raising

and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to Rule 20, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). The rule in South Carolina "is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976).

In Lundy v. Lititz Mut. Ins. Co., Inc., 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957), this Court considered whether an objection to a jury instruction first raised when that instruction was presented to the jury for a second time was sufficient to preserve an issue with the instruction for appellate review. In Lundy, the trial judge instructed the jury on the applicable law at the conclusion of trial. Id. Once his jury charge was finished, the trial judge excused the jury and inquired of counsel if there were any objections to the charge or if any additional instructions were desired. Id. Defense counsel did not object to the charge as given but did ask the trial judge to present an additional instruction to the

jury. Id. In response to that request, the trial judge recalled the jury, instructed them in the manner requested, and then presented further instructions to the jury that were "substantially the same" as instructions he had presented during his initial jury charge. Id. Subsequently, after the jury reached a verdict adverse to the defendants, one of the defendants appealed, arguing the trial judge's further instructions violated the constitutional prohibition against judicial comments on the facts. Id. On appeal, this Court indicated it believed the challenged instructions constituted an unconstitutional comment on the facts. Id. However, this Court declined to reverse the case because it found the defendant's constitutional objection to the instructions had been waived. Id. In reaching that conclusion, this Court stated:

> [I]n the main charge . . . , the Court gave substantially the same instructions as those now complained of. If appellant thought these instructions violated Article 5, Section 26 of the Constitution, which we are inclined to think they did, counsel should have made timely objection when the jury was excused at the conclusion of the main charge. They waived the objection by failing to do so. Appellant cannot now complain of the Court's repeating substantially the same instruction to which counsel failed to object when given an opportunity to do so.

Id. (citations omitted).

Just like the defendant in Lundy, Appellant failed to preserve any issue with the jury charge on circumstantial evidence by not timely and contemporaneously objecting either before or after the Grippon charge was given, and by affirmatively stating he had no exceptions to that charge. During the charge conference, Appellant did not raise any issue in regard to the judge's decision to give the Grippon circumstantial evidence charge. After that charge was then given to the jury, the trial judge inquired if Appellant had any exceptions and Appellant indicated he did not. See State v. Armstrong, 263 S.C. 594, 600, 211 S.E.2d 889, 892 (1975) ("At the conclusion of the charge, an opportunity

was afforded to counsel to make any objections thereto. No objection was made that the instructions given were inadequate nor were any additional requests made to the court. The failure to timely request a specific charge or charges constituted a waiver of any right to complain on appeal of asserted errors in the charge."). By failing to object to the Grippon instruction before or after the charge had been given and by allowing the jury to retire and begin deliberations without objection, Appellant waived any issue with the circumstantial evidence instruction. See Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection.").

Appellant then compounded his untimeliness when, after the jury was instructed and began its deliberations, it submitted a request necessitating further instruction on direct and circumstantial evidence. Before bringing the jury back out, the trial judge indicated she intended to re-instruct the jury on Grippon, exactly as she did before, and offered Appellant an opportunity to raise any exceptions to the proposed reinstruction. Once again, Appellant did not object or raise any issue in regard to the circumstantial evidence charge that had already been presented to the jury. Thereafter, the trial judge reinstructed the jury on circumstantial evidence pursuant to Grippon. Only after the trial judge had instructed the jury on circumstantial evidence for the second time did Appellant raise an objection to the Grippon charge and request Logan. As recognized by the trial judge, at that point in trial the proper time to raise a timely objection to the circumstantial evidence instruction had long since passed from both a procedural and practical standpoint. See State v. Williams, 319 S.C. 54, 56, 459 S.E.2d 519, 520 (Ct. App. 1995) ("The trial court had no obligation in this case to give the instruction that Williams requested because the time for Williams to properly request a particular

instruction had passed."). Just like the objection raised in Lundy, Appellant's untimely objection was insufficient to preserve his issue with the jury charge for appellate review.

**Standard of Review**

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). When reviewing the trial judge's jury instructions, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). So long as the jury instructions presented are substantially correct

and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

**Analysis / Discussion**

In State v. Logan, our Supreme Court considered whether the circumstantial evidence jury instruction from Grippon remained an appropriate statement of the law. 405 S.C. at 90, 747 S.E.2d at 448. Logan asserted that the charge from Grippon was invalidated by the Court's more recent decisions in cases involving challenges to the denials of directed verdict motions. Logan, 405 S.C. at 91, 747 S.E.2d at 448. However, the Court disagreed and found that the trial judge committed no error in instructing the jury on the law of circumstantial evidence in a manner consistent with the charge articulated in Grippon. Logan, 405 S.C. at 94, 747 S.E.2d at 449. The Court then went on to propose a new circumstantial evidence jury charge containing the following language:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452. Regarding the newly-articulated charge, the Court instructed that the charge should be provided "when so requested by a defendant[.]" Id. Thus, the Court modified its earlier holdings in Grippon and Cherry to allow trial judges to instruct juries on circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

Here, the trial judge committed no error in instructing the jury because she properly charged the jury on the relevant and applicable law. Specifically, the trial judge instructed the jury that Appellant was presumed innocent and that the State had the burden of proving Appellant's guilt for the indicted offense beyond a reasonable doubt and thoroughly and completely defined reasonable doubt for the jury. Furthermore, when instructing the jury on circumstantial evidence, the trial judge explained the relevant law to the jury in the manner specifically recommended in Grippon and expressly adopted as a correct charge on circumstantial evidence in Cherry. See Cherry, 361 S.C. at 601, 606 S.E.2d at 482 ("[W]e hold that the recommended language in Grippon is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction."); see also Logan, 405 S.C. at 94, 747 S.E.2d at 449 ("[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon."). Thus, by instructing the jury on all of the applicable law and in a manner expressly recognized by our Supreme Court as an appropriate statement of the law on circumstantial evidence, the trial judge committed no error in instructing the jury during Appellant's trial. See Sheppard, 357 S.C. at 665, 594 S.E.2d at 472 ("[T]he trial court is required to charge only the current and correct law of South Carolina.").

Just like the trial judge in Logan's case, the trial judge in Appellant's case instructed the jury in a manner consistent with the approved jury charge from Grippon. See Logan, 405 S.C. at 90, 747 S.E.2d at 447 (identifying the circumstantial jury instruction given in Logan's case, which contained virtually identical language to the circumstantial evidence jury instruction given in Appellant's case). As a result, the trial judge properly instructed the jury on the law of circumstantial evidence. See id. at 94, 747 S.E.2d at 449 ("[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon."). Notably, the Supreme Court in Logan did not find that the circumstantial evidence charge from Grippon reduced the State's burden of proof or constituted an incorrect statement of the law. See Logan, 405 S.C. at 100, 747 S.E.2d at 452-453 ("This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in Grippon and Cherry."). Instead, the Supreme Court simply proposed a new circumstantial evidence charge that could appropriately be given upon request. This is particularly true since, at the time Appellant finally requested the Logan circumstantial evidence charge, the trail court had already given the Grippon circumstantial evidence charge two times without objection. An inconsistent instruction on circumstantial evidence at that stage of the trial, even if it was also a correct statement of the law, would have sounded inconsistent to the jury and would have led to confusion. The trial court properly exercised its discretion to reject Appellant's untimely Logan request. Additionally, this was not a case where the State relied upon circumstantial evidence. In Logan, the Supreme Court's analysis centered around situations where "the State relies on circumstantial evidence to prove its case." Logan, 405 S.C. at 92, 747 S.E.2d at 449. Here, as recognized by both the State and Appellant at trial, proof of the

State's case relied entirely upon the credibility of the victim and her testimony about the sexual assault. This was direct evidence. Any additional circumstantial evidence in the case paled in significance. Because the State's case relied upon direct evidence rather than circumstantial evidence, the trial court did not abuse its discretion in rejecting Appellant's request for a Logan charge.

Finally, even assuming the trial judge somehow erred in failing to give the Logan instruction on circumstantial evidence, any error was entirely harmless because the trial judge fully and correctly instructed the jury on the State's burden of proving Appellant's guilt beyond a reasonable doubt. Logan, 405 S.C. at 94, n.8, 747 S.E.2d at 449 n.8.; See also 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). For all of these reasons, the State submits the trial court's refusal to give the Logan circumstantial evidence charge, after having twice given the Grippon circumstantial evidence charge without objection, did not constitute an abuse of discretion. Appellant's argument is not preserved for appellate review, and even if preserved, it is without merit. Appellant's conviction should be affirmed.

## II.

**The trial court properly charged the jury with language from the rape shield statute where the jury asked a question about testimonial evidence, elicited by Appellant during trial, of a specific instance of the victim's sexual conduct.**

Appellant argues the trial judge erred in charging language from the rape shield statute to the jury because the statute is a rule of evidence, not a jury charge. He contends that once testimony about the victim's prior statutory rape was admitted into evidence it became contradictory and confusing to the jury for the trial judge to limit the manner in which that evidence could be considered. Appellant argues the charge prevented the jury from fully considering the circumstances of Ms. Bell's behavior and that it amounted to a charge on the facts which improperly bolstered the creditility of both Ms. Bell and the victim. The State disagrees and submits these arguments are without merit.

### Standard of Review

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. at 165, 682 S.E.2d at 901. A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. at 213, 672 S.E.2d at 788. So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. at 425, 468 S.E.2d at 681.

### Analysis / Discussion

The trial court properly charged the jury with limiting language from the rape shield statute because, consistent with South Carolina law, the judge was attempting to restrict the improper use of that evidence. This is no more a charge on the facts than any other jury instruction that tells the jury to disregard inadmissible evidence, or which

limits the purpose for which evidence or the lack thereof may be considered by the jury. Trial courts regularly instruct the jury to disregard inadmissible evidence they might see or hear during trial. In addition, there are standard jury instructions regarding the failure of the defendant to testify, the absence of the defendant from trial, the prior criminal record of the defendant, prior bad acts, and the indictment itself, all of which limit how the jury may use such evidence during deliberations. Thus, contrary to Appellant's assertion, there is no inherent error or abuse of discretion simply because the trial court charges the jury with a limitation on evidence that has been admitted.

Particularly here, where the jury asked a question about a specific instance of the victim's sexual conduct which was elicited from her mother by Appellant during cross-examination, it was entirely appropriate for the trial judge to instruct the jury that the evidence could not be considered for an improper purpose. During cross-examination of Ms. Bell, Appellant's counsel pushed and pushed for an explanation as to why she had not asked the doctor who was testing the victim for STDs to also conduct a physical examination in regard to the sexual assault. Ms. Bell finally responded that the victim had previously been a victim of statutory rape and that Ms. Bell was embarrassed to admit to the doctor that she had allowed the victim to be in a situation where she could be sexually assaulted a second time. No further testimony about the prior rape was allowed. If anything, this evidence seems to make the victim more sympathetic because it indicates she has been victimized before. Telling the jury not to consider it in regard to the guilt or innocence of the defendant was more likely to help Appellant than be prejudicial.

The rape shield statute provides in relevant part:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the

> victim's sexual conduct is not admissible in prosecutions under Sections 16- 3-615 and 16-3-652 to 16-3-656; however, evidence of the victim' s sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

S.C. Code Ann. § 16-3-659.1. The only two conceivable ways the evidence of the victim's statutory rape might be considered by the jury were, as explained above, (1) to engender sympathy for her or, (2) in a manner specifically prohibited by the rape shield statute. Our appellate courts have repeatedly noted the rape shield statute prohibits the use of a victim's prior sexual conduct: (1) "to attack the victim's morality," Lang, 304 S.C. at 301, 403 S.E.2d at 678, or (2) "to attack the complainant's character by revelation of her sexual activity with a third party," Finley, 300 S.C. at 200, 387 S.E.2d at 90. See State v. Williams, 409 S.C. 455, 464, 761 S.E2d 770, 775 (Ct. App 2014); State v. Grovenstein, 340 S.C. 210, 216, 530 S.E.2d 406,409 (Ct. App. 2000). If not being considered by the jury in the victim's favor, the lone reference to the victim's prior sexual activity could only have been considered by the jury for this prohibited purpose. The trial judge appropriately attempted to prevent this improper purpose and specifically tied the limitations imposed to the particular statutory language in the rape shield statute. Rather than constituting an abuse of discretion, the State submits this was the best course of action for the trial judge to take to solve a dilemma of Appellant's own making. Under the circumstances of this case, it was not error to charge the jury with language from the rape shield statute.

To the extent this Court determines it was error to charge the rape shield statute to the jury, it was nevertheless harmless in the context of the entire jury charge, during which the trial judge repeatedly told the jury they were the sole judge of the facts. Specifically, the trial court charged in part: " . . . you are not to infer anything from what I've said during the progress of this trial in ruling upon the admissibility of evidence or otherwise, or anything that I say now to you during the course of this instruction, that I have any opinion about the facts. The law does not allow me to have an opinion about the facts. This is a matter solely for you, the jury, to determine." (R.p.286, lines 16-23). Any inference by the jury that the charge on the rape shield charge was a comment on the facts was disabused by the overriding instructions that the judge was not, and could not, comment on the facts. Thus, any possible error was harmless beyond a reasonable doubt. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996) (holding that where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.).

## III.

**The trial court properly charged the jury, pursuant to § 16-3-657 of the South Carolina Code, that the testimony of a sexual assault victim need not be corroborated.**

Appellant argues the trial court erred by instructing the jury that the victim's testimony did not have to be corroborated because the charge is error, the charge as a whole contained other serious errors, and the noncorroboration charge was unduly emphasized by placing it at the end of the charge. He then audaciously argues the charge was particularly prejudicial because no evidence existed except for the victim's inconsistent allegations. Thus, Appellant now attacks the noncorroboration jury charge by pointing to the absence of evidence corroborating the victim's testimony, proving that "such chauvinistic legal relics," (Brief of Appellant, p. 18), are not relics at all, but are alive and well in South Carolina, at least in the ambit of criminal defense arguments. The State submits Appellant's arguments are without merit because they have previously been raised to and rejected by both this Court and the South Carolina Supreme Court.

### Standard of Review

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009).

### Analysis / Discussion

Section 16-3-657 of the South Carolina Code (2003) provides: "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-

658." These criminal statutes, which encompass various forms and degrees of criminal sexual conduct, include criminal sexual conduct with a minor in the second degree for which Appellant was charged. S.C. Code Ann. § 16-3-655 (Supp. 2013). In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), our supreme court held it was not error to charge § 16-3-657 to the jury as long as the charge as a whole comports with the law. Id. at 509, 435 S.E.2d at 863. In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), the court recognized Schumpert and concluded that while a trial judge is not required to charge § 16-3-657, 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." Id. at 118, 631 S.E.2d at 250. Because the jury in Rayfield was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the court determined the trial judge fully and properly instructed the jury on those principles, and found the charge on § 16-3-657 was not error. In State v. Orozco, 392 S.C. 212, 708 S.E.2d 227 (Ct. App. 2011) this Court recognized the continuing validity of Schumpert and Rayfield, and the propriety of the § 16-3-657 jury charge.

The arguments made by Appellant are essentially the same as those raised and rejected by our courts in Rayfield and Orozco. As in those cases, the trial court here properly charged the jury that the State had the burden of proving the defendant guilty beyond a reasonable doubt, that the jury had the duty to find the facts and determine the credibility of the witnesses, and that the jury should disregard any indication from the trial judge that she might believe a fact to be true or not. Thus, the trial court thoroughly instructed the jury on the State's burden of proof and the jury's duty to determine the

facts and judge the credibility of witnesses. Further, the only charge given by the trial court in regard to the corroboration of the victim's testimony was in regard to CSC with a minor and was that "the testimony of a victim need not be corroborated." (July 31, 2014, R.p.293, lines 16-18). Thus, this single instruction was not unduly emphasized. Appellant suggests that by placing the instruction at the end, it was unduly emphasized; however, the opposite conclusion is equally as plausible. One could argue, and no doubt Appellant would argue if the circumstances were changed, that giving the instruction at the start of the charge would constitute undue emphasis. The State submits that regardless of where the noncorroboration charge appears, its impact must be gleaned from a review of the entire charge. Here, given the instructions as a whole, there was no reversible error and appellant's convictions should be affirmed.

## CONCLUSION

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

Respectfully submitted,

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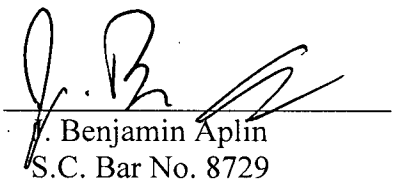
BY: 
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Columbia, South Carolina
September 30, 2015

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No. 2014-001714

THE STATE,.....RESPONDENT

v.

CHRISTOPHER TERELL GILYARD,.....APPELLANT.

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**CERTIFICATE OF COUNSEL**

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

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CHRISTOPHER TERELL GILYARD, .....APPELLANT.

**PROOF OF SERVICE**

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated September 30, 2015, 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 30th day of September, 2015.

Angela Bennett
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