STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-000448

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DANIEL WILLIAM SPADE,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted in Spartanburg County for criminal sexual conduct with a minor in the first degree. On February 24-26, 2014, Appellant was tried before the Honorable R. Keith Kelly and a jury. The jury found Appellant guilty, and Judge Kelly sentenced Appellant to thirty-five years. A timely notice of appeal was served and filed.

ARGUMENT

Overview of Facts Presented at Trial

The victim's mother and Appellant met at work and ultimately had a child together, the victim, who was born in September of 2006. (R. p. 153-55). Appellant, who lived in Virginia at the time, first saw the victim in January or February of 2007. (R. p. 155). Sometime in the year 2007, Appellant filed an action in family court seeking visitation with the victim. (R. p. 155-56). The victim's mother married her husband David in December 2007. (R. p. 155, lines 20-21). The victim referred to David as "daddy." (R. p. 155, lines 23-24). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Appellant's parental rights. (R. p. 156-57). The action was not successful and a visitation schedule was thereafter established. (R. p. 157). In the summer of 2010, the victim, then almost four years old, went to Virginia to visit with Appellant. (R. p. 158). The next two visitations took place in South Carolina in September 2010 and October 2010. (R. p. 159-63).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (R. p. 130-31; p. 161). During this visit, Appellant took the victim to the hotel's pool. (R. p. 142-44). At one point he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (R. p. 142, lines 5-15). Appellant told the victim that if she "didn't do it," he wouldn't take her home to her mother. (R. p. 144, lines 1-2).

Following the September visit, the victim's mother noticed some behavioral changes in the victim. (R. p. 161). The victim wet herself in her car seat, which was unusual for her. (R. p. 161-62). After having a bath, the victim started crying

uncontrollably. (R. p. 162). She pulled away from her mother, hid herself in the corner, and wet herself again. (R. p. 162, lines 2-4). The victim was unable to control herself and was almost making herself sick. (R. p. 162, lines 3-5). When the victim's mother asked what was wrong, the victim said "I don't know." (R. p. 162, lines 5-6). Thereafter, the victim developed problems sleeping and was suddenly terrified of the dark. (R. p. 164). One night the victim's mother found her barricaded under a small play table in her room, asleep. (R. p. 165, lines 1-9). The victim also began to complain of stomach aches and headaches, and would sometimes revert back to speaking like a two-year-old. (R. p. 164, lines 4-6). Sometimes she would "break down completely" and there was no consoling her. (R. p. 164, lines 6-8). Sometimes she would hide behind a door and not come out for anywhere from five to thirty minutes. (R. p. 164, lines 8-10). When she finally did come out, she wanted her mother to hold her. (R. p. 164, lines 10-12). After the October 2010 visit with Appellant, the victim's mother decided to seek counseling for the victim. (R. p. 167).

That same month, the victim began counseling with Kim Rosborough. (R. p. 167-68). At the time counseling began, the victim's mother had no idea that sexual assault was an issue. (R. p. 168, lines 11-16). Instead, the goal of the counseling was to figure out the cause of the victim's anxiety and to try to ease any anxiety she may have had regarding her visits with Appellant. (R. p. 169). Following the commencement of counseling, the victim had no further in-person visits with Appellant. (R. p. 170, lines 14-18). Also following commencement of counseling, the victim's mother noticed an improvement in the victim's anxiety symptoms. (R. p. 170, lines 1-3 & 23-24).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (R. p. 242-43). The grandmother was in shock regarding the disclosure, but after a day or two she told her husband about it. (R. p. 243-44). Her husband, the victim's grandfather, reported the disclosure immediately to the victim's family court guardian ad litem. (R. p. 246, lines 24-25). He also called Kim Rosborough, the victim's counselor at that time, and reported the disclosure. (R. p. 207-208). In response, Ms. Rosborough referred the victim for a forensic interview at the Child Advocacy Center. (R. p. 208, lines 1-12). The victim's mother found out about the allegation from her parents around this time. (R. p. 170-71).

Tabitha Webber, a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on several different dates in April and May of 2011. (R. p. 251-52). During the course of these interviews, the victim made a disclosure of sexual abuse that occurred "at a hotel with a pool" in South Carolina. (R. p. 252-53). Following the interviews Ms. Webber made a report to law enforcement. (R. p. 253). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (R. p. 263). The victim disclosed sexual abuse during the counseling sessions and provided a specific time period and location. (R. p. 274). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (R. p. 272-74). Appellant's parental rights were terminated in family court in November of 2012, and the victim's last name was subsequently changed to that of her adoptive father. (R. p. 181, lines 2-8).

I. Appellant's issue regarding panic attacks is not preserved for review where Appellant received the relief he requested below and had no problem with the judge's limitation on the evidence. Regardless, Appellant's issue is patently without merit because his contentions are without factual support in the record.

Relevant Facts

Following the testimony of four State's witnesses, Appellant's counsel informed the judge that he wished to proffer some testimony from Dale Smith, the victim's grandmother. (R. p. 225, lines 8-18). Ms. Smith was called to the stand and briefly examined by Appellant's counsel. (R. p. 226-28). Ms. Smith testified that she was the victim's maternal grandmother and that she saw the victim on a regular basis. (R. p. 226, lines 10-16). She recalled testifying in a family court proceeding in October 2012, and in that proceeding, she testified that she observed the victim having panic attacks. (R. p. 226, lines 17-22). The term "panic attack" was not defined by defense counsel or the witness. Ms. Smith then stated the following: (1) she had, on one occasion after October 2012, observed the victim have a panic attack in her backyard when she was alone with the victim; (2) prior to October 2012, she had never observed the victim having a panic attack when she was alone with the victim; (3) she had never, before October 2012, observed the victim having a panic attack when only herself and her husband were present; (4) she had never observed the victim having a panic attack when only herself and the victim's mother were present; (5) she had never observed the victim having a panic attack when only herself and the victim's adoptive father, David Jolley, were present; (6) she had never observed the victim having a panic attack when only herself, the victim's mother, and the vicitm's adoptive father were present; (7) the victim's adoptive father was not present for the panic attack the victim had in the witness's

backyard after October 2012; (8) both the victim's mother and the victim's adoptive father were present during all of the panic attacks she had observed prior to October 2012. (R. p. 226-28). On cross-examination, Ms. Smith testified that the following persons were present during the panic attacks she witnessed prior to October 2012: herself, her husband, the victim's mother, the victim's adoptive father, and the victim's little brother. (R. p. 229, lines 3-5).

Appellant's counsel subsequently argued that "[t]his is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act." (R. p. 232, lines 7-10). He continued, "[w]hat we are trying to do is give potentially other reasons, non-criminal reasons, why the panic attacks are occurring, not necessarily issues that she's having a panic attack to go as to what her biological father did." (R. p. 232, lines 11-14). Finally, Appellant's counsel stated he was not attempting to establish third-party guilt but was trying to establish an "explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did." (R. p. 232, lines 15-19).

The trial judge told Appellant's counsel he was free to call an expert witness to testify that panic attacks could be caused by a number of other things in a child's life. (R. p. 232, lines 22-25). The judge also indicated Appellant's counsel could ask the State's own expert similar questions. (R. p. 233, lines 1-4). However, he ruled that "this court looks at this as sort of a back door to third-party guilt, and I have already ruled on that yesterday in pre-trial motions. And the defendant has failed to show that the proper

evidence is inconsistent with his guilt, so I'm not - I'm not going to allow that in." (R. p. 233, lines 3-8). Nevertheless, the judge stated he would allow questions about what was going on when the panic attacks occurred, where the child was, what the child was doing, or whether or not she was being disciplined at the time. (R. p. 233, lines 9-20). The judge cautioned that the questions about this should be framed in a way that avoided simply pointing the finger at the victim's adoptive father and insinuating that because he was present at the time of a panic attack, perhaps he was the one who abused the victim. (See R. p. 233, lines 21-23). After clarifying that he would indeed be permitted "to ask what was going on without mentioning a specific individual," Appellant's counsel stated, "Thank you." (R. p. 234, lines 10-13).

When Ms. Smith was later called to testify, Appellant's counsel did not cross-examine her regarding panic attacks at all.[1] (See R. p. 245-47). In fact, Appellant's counsel did not question any subsequent witness regarding panic attacks. (See R. p. 238, line 15 – p. 239, line 14; p. 254, line 3; p. 274, line 24 – p. 275, line 17; p. 277, lines 16-17). Appellant did not call any defense witnesses. (R. p. 280, lines 12-21). In closing argument, Appellant's counsel mentioned panic attacks only one time when he noted that the victim's mother, who was trying to have Appellant's parental rights taken away, was the one who presented testimony about the victim having panic attacks after visting with Appellant. (See R. p. 306-14; p. 311, lines 2-7). Note that Appellant's counsel previously had a full opportunity to cross-examine the victim's mother regarding her testimony about the victim's panic attacks and other symptoms of anxiety. (See R. p. 153-98).

[1] The prosecutor also did not ask Ms. Smith about panic attacks during direct examination. (R. p. 240-45).

Discussion

Appellant now contends on appeal that the trial court erred in "excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than [Appellant] were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter." (Brief of Appellant, p. 5). This issue is not preserved for appellate review and is patently without merit where it is wholly without support in the record.

Following his proffer, Appellant received the relief he requested - i.e., to be permitted to ask questions regarding the circumstances surrounding the victim's panic attacks - and had no complaints about the trial judge's ruling. (See R. p. 234, lines 10-13). The trial judge even told Appellant's counsel that he could call an expert witness, or question the State's witness, regarding potential alternative causes for panic attacks. (R. p. 232, line 22 – p. 233, line 4). Although defense counsel apparently made a subsequent decision to abandon the issue, this decision could not have been a result of the trial judge's ruling since the trial judge's ruling permitted counsel to fully explore the issue of alternative causes of the panic attacks short of actually attempting to place factually unsupported blame for the victim's panic attacks upon the victim's adoptive father. (R. p. 232-34). Where Appellant received the relief he requested below and made no complaint about the limitations of the judge's ruling, he should not be permitted to complain on appeal. See State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (an issue is not preserved for review if the objecting party accepts judge's ruling on a particular matter and does not contemporaneously make an additional objection indicating his dissatisfaction with any limitations); State v. Sinclair, 275 S.C. 608, 610,

274 S.E.2d 411, 412 (1981) (holding that where the defendant received the relief requested from the trial court, there is no issue for the appellate court to decide); State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (where defendant received the relief she sought she could not be heard to complain on appeal); State v. Parris, 387 S.C. 460, 465-66, 692 S.E.2d 207, 210 (Ct.App.2010) (holding where a defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide).

Regardless, this issue is patently without merit where it is wholly without support in the record. Initially, it is unclear what exactly Appellant is contending he should have been allowed to introduce but was prevented from doing so by the trial judge. (See Brief of Appellant, p. 5-8). To the extent Appellant is alleging he should have been allowed to introduce testimony and/or argument that the victim's panic attacks happened only in the presence of the victim's adoptive father, this testimony has no factual support in the proffer presented by Appellant's counsel and, in fact, no factual support in the record **whatsoever**. (See R. p. 225-29). Appellant presented no factual or expert testimony supporting an identifiable alternate cause or trigger for the victim's panic attacks despite the fact that the judge's ruling allowed him the opportunity to present testimony in this regard.[2] There was absolutely no evidence that any person's physical presence triggered the victim's panic attacks. Moreover, although he did not do so, Appellant's counsel was

[2] In the State's view, Appellant has, on appeal, improperly conflated "panic attacks" - which have a very specific definition - with the victim's other various anxiety-related symptoms. (See Brief of Appellant, p. 5-8). See American Psychological Association. *Diagnostic and Statistical Manual of Mental Disorders.* 5th ed. Washington, D.C.: American Psychological Association, 2013 (see § 300.01, defining "panic attack" as "[a]n abrupt surge of intense fear or intense discomfort that reaches a peak within minutes, and during which time four or more [specified symptoms] occur."). Defense counsel's proffer below asked the victim's grandmother only about "panic attacks," and his argument to the judge was similarly limited. (See R. p. 226-34). Any extension of the issue to the victim's other symptoms of anxiety is therefore not preserved for review. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

free to argue to the jury that the State failed to prove that the victim actually had panic attacks or that the victim's panic attacks were the result of any abuse by Appellant. (See R. p. 306-14). In sum, Appellant's issue is unpreserved for appellate review and is clearly without merit. Appellant is not entitled to reversal on this ground.

II. The trial judge properly concluded that defense counsel's stated reason for striking Juror 199 was not gender-neutral where he struck the juror because she was a "grandmother" and only females can be grandmothers. Counsel's additional proffered reasons for the strike, including age and retired status, were tainted by the discriminatory reason.

Relevant Facts

After the first jury was selected, the State contended that Appellant made strikes based upon gender and requested that the court require Appellant to set forth gender-neutral reasons for his strikes. (See R. p. 91-92). The State noted that five of Appellant's six strikes were strikes of female jurors, but agreed that the strike of Juror 119 was appropriate because that juror had been a victim of sexual abuse. (R. p. 91, lines 19-21). In response, defense counsel told the judge he struck Juror 199 because she "is a retired grandmother. We didn't feel like she would be appropriate." (R. p. 92, lines 14-15). Defense counsel also told the judge he struck Juror 13 because "[t]hat was the grandmother and her age." (R. p. 93, lines 4-7). The judge asked counsel to explain what he meant in striking her because she was "a grandmother." (R. p. 93, lines 8-9). Defense counsel responded, "It's prejudicial to our client. We felt that given the age and the retired nature and the number of kids she has, we didn't feel like she would be an appropriate juror for our case. (R. p. 93, lines 10-13). When asked again about his reason for striking Juror 199, counsel stated it was "the same thing." (R. p. 93, lines 17-19). Counsel elaborated that his reason was "age and background" since the juror was

"65 years old and has three children and divorced." (R. p. 93, lines 23-24). He stated "[w]e felt she would be prejudicial." (R. p. 93, lines 24-25).

Counsel for the State pointed out that the jury was "not a jury of [Appellant's] peers," instead, it was "a jury of his male peers." (R. p. 94, lines 14-15). The jury panel consisted of ten men and two women. (R. p. 95, lines 1-2). Defense counsel pointed out that he had four strikes remaining but seated two female jurors. (R. p. 95, lines 1-7). The judge then stated that he had concerns about defense counsel's strike of "a grandmother" because "that by its very nature implies she's female. Nobody else can be a grandmother." (R. p. 95, lines 8-11). Defense counsel responded that "[i]t's the age, as well as the fact that we felt she was [a] retired grandmother, we felt that she just would not be – we felt it would be more prejudicial to my client. It had nothing to do with the fact that she's a female. It's a combination of those." (R. p. 95, lines 12-16). The solicitor argued that "in their answer [itself] I think they are giving you gender – grandmothers." (R. p. 97, lines 6-8). The solicitor also stated that there were men on the jury panel the same age as the women who were struck for being grandmothers. (R. p. 97, lines 11-13; see also p. 95, lines 22-24).

The trial judge ruled that he was going to grant the State's motion as to Jurors 13 and 199. (R. p. 97, lines 17-23). He found that one of the reasons given for the strike - that the jurors were grandmothers - was not gender-neutral because "[o]nly females can be grandmothers." (R. p. 97, lines 20-22). The judge stated he was granting the motion despite defense counsel's additional argument regarding "the age of the individual." (R. p. 98, lines 17-20).

Applicable Law

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court concluded that the Equal Protection clause forbade the use of peremptory challenges to strike jurors because of their race. In J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), the Court extended Batson and held that the Equal Protection clause also prohibited gender-based discriminatory strikes. See, e.g., State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995).

Our Supreme Court reiterated the procedure the trial court is to follow for a Batson hearing in State v. Evins:

> After a party objects to a jury strike, the proponent of the strike must offer a facially race neutral explanation. Once the proponent states a reason that is race neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike.

State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) & State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999)).

A trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly

within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)).

In Payton v. Kearse, our Supreme Court rejected the "dual-motivation" doctrine in Batson cases. 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998). Instead, "South Carolina follows the 'tainted' approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike." State v. Rayfield, 357 S.C. 497, 503, 593 S.E.2d 486, 489 (Ct. App. 2004) (citing Payton 329 S.C. at 59, 495 S.E.2d at 210). Therefore, "[t]he challenged party should not have an opportunity to convince the judge that he would have struck the juror regardless of the discriminatory reason." Payton, 329 S.C. at 60, 495 S.E.2d at 210.

Discussion

Appellant argues that the trial judge erred in determining that Juror 199 was improperly struck where defense counsel specifically stated the juror was struck for her age and for being retired. However, as mentioned above, South Carolina has rejected the dual-motivation doctrine; thus, a gender-based reason for a strike taints any other proffered reasons for a strike. See Payton at 59, 495 S.E.2d at 210. Here, defense counsel's initial reason for striking Juror 199 was because she was a "retired grandmother." (R. p. 92, lines 14-15). Saying a person is a retired grandmother is another way of saying that the person is a retired older ***female***. As the trial judge properly pointed out, only ***females*** can be grandmothers. Cf. Payton at 55-60, 495 S.E.2d at 208-10 (since only whites can be "rednecks," a strike motivated in part because the juror was a "redneck" was not race-neutral on its face; the attorney's other proffered reasons for the strike were tainted by the discriminatory reason). Since Appellant's strike

of Juror 199 was at least in part motivated by gender, the strike was improper under Payton and the trial judge properly concluded that the strike was not gender-neutral. See Payton at 56, 495 S.E.2d at 208 ("Here, because the reason offered was not race-neutral on its face, we need not reach the third step of the analysis."). Accordingly, it was not error for the trial judge to grant the State's Batson motion.[3]

As an additional sustaining ground, the State submits that - even assuming defense counsel's proffered reason for the strike was gender-neutral - it was pretext for purposeful gender discrimination. The solicitor pointed out on two separate occasions that similarly-aged men had been seated on the jury, and defense counsel failed to dispute the State's assertions and failed to respond to them at all. (See R. p. 95, lines 22-25; p. 97, lines 6-18; see p. 95-98). Obviously, defense counsel had the juror information sheets before him at trial and had the opportunity to view each individual juror as he or she was seated on the jury. The fact that defense counsel failed to dispute that similarly-situated male jurors were seated on the jury renders this an uncontested and undisputed issue below. Cf. State v. Smith, 328 S.C. 622, 626, 493 S.E.2d 506, 509 (Ct. App. 1997) (statement made in a person's presence was admissible under Rule 801(d)(2)(B), which excludes from the definition of hearsay a statement offered against a party in which the party has "manifested an adoption or belief in its truth," where under the circumstances one would expect the person to refute the statement if it was untrue (citations omitted)). Accordingly, where defense counsel's asserted reasons for the strike of Juror 199 were mere pretext for gender discrimination, the granting of the State's Batson motion should be upheld.

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[3] Since the judge found the reason not gender-neutral at step two of the Batson process, there was no need for him to proceed to step three of the process to determine whether or not the explanation was mere pretext.

III. Appellant's issue regarding the special prosecutor's duty of confidentiality to his former clients is not preserved for review where that specific issue was not raised or ruled upon below as a part of defense counsel's motion. In any event, the trial judge properly permitted a private attorney to assist the solicitor's office during Appellant's trial as a special prosecutor where the private attorney did not have a personal or financial conflict of interest; did not have control over Appellant's case to the exclusion of the solicitor; and where there is no assertion that the private attorney possessed or withheld any pertinent information or disregarded any of his obligations as a special prosecutor.

Relevant Facts

Prior to trial, defense counsel requested that the court not allow Douglas Brannon to serve as a special prosecutor in the case. (See R. p. 18-21). Counsel indicated he had received a copy of a letter appointing Mr. Brannon as a special prosecutor that morning. (R. p. 18, lines 1-10). Counsel did not dispute that the solicitor had the right to appoint a special prosecutor, but noted that he had no evidence "under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office." (R. p. 18, lines 11-16). He also argued that the fact that Mr. Brannon, in October of 2012, represented the mother and adoptive father of the victim in family court created an "inherent conflict of interests." (R. p. 18, lines 19-25). The trial judge denied Appellant's motion, stating that the solicitor had the right to appoint any licensed attorney to act as a special prosecutor and that he did not see a conflict of interest since Mr. Brannon had never represented Appellant. (R. p. 20, lines 7-16).

Issue Preservation

On appeal, Appellant now argues that Mr. Brannon's obligation of confidentiality to the victim's mother and adoptive father created a conflict of interest that violated

Appellant's due process rights. However, this argument is clearly unpreserved because it was not made to the trial judge below. Although defense counsel made a general argument about an "inherent conflict of interests," he failed to make any arguments regarding Mr. Brannon's duty of confidentiality. Because Appellant is now attempting to raise an argument that was not brought to the trial judge's attention and was not ruled on by the trial judge, the issue argued on appeal is not properly preserved. See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; the "purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal"); Morris v. Anderson County, 349 S.C. 607, 611 n. 4, 564 S.E.2d 649, 651 n. 4 (2002) (noting "[i]t is well-settled that appellants cannot raise new arguments or change their grounds between trial and appeal"); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (noting "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground ") (emphasis added); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a party may not argue one ground at trial and another on appeal); State v. Whitten, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct.App.2007) (finding an appellate court is limited by appellate rules that allow the court to consider only the precise question that

was before the trial judge and ruled upon by him or her); 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) (noting "[i]ssue 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," and until the trial court considers the matter and makes a ruling, an appellate court is unable to find error). Accordingly, this issue should be dismissed on error preservation grounds.

Discussion

Error preservation concerns aside, the trial judge properly allowed Mr. Brannon to serve as a special prosecutor in Appellant's case, and Appellant's contention that Mr. Brannon's service as a special prosecutor violated his constitutional rights is contrary to well-reasoned and settled precedent. In State v. Addis, a private attorney who had previously represented the victim's family in a civil claim against the defendant participated in the defendant's criminal trial alongside the solicitor. 257 S.C. 482, 486, 186 S.E.2d 415, 416 (1972). The civil claim was settled prior to trial. Id. In finding no error with respect to the private attorney's participation in the case, our Supreme Court found that "traditionally in this State private counsel has been permitted to assist the State in prosecutions." Id. at 487, 186 S.E.2d at 417. The Supreme Court also stated that "the defendant has no right to complain" where private counsel "participates in the trial of a case and does only what a solicitor should do." Id. Finally, the Supreme Court held: "We cannot say that the participation of private counsel violates the constitution or any statutory or common law principle. Such ruling would appear to be in keeping with the weight of authority." Id. at 487-88, 186 S.E.2d at 417.

In State v. Nichols, a 1997 murder case, the defendant asserted it was unconstitutional to allow the solicitor to use three private attorneys hired by the victim's family to prosecute his case. 325 S.C. 111, 119, 481 S.E.2d 118, 122 (1997). Our Supreme Court rejected his argument, ruling as follows:

> Private counsel's participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).
>
> In State v. Addis, 257 S.C. at 487–88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor. Id. A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding. State v. Mattoon, 287 S.C. at 494–95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 119, 481 S.E.2d at 122-23.

The reasoning of Nichols and Addis applies squarely in Appellant's case.[4] The Seventh Circuit Solicitor's Office maintained control of Appellant's case and Mr. Brannon merely served as a "third chair" and assisted with some aspects of the trial, including arguing two motions, examining one witness (the victim's therapist), and

[4] As Appellant points out in his brief, our Supreme Court in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), discouraged the practice of appointing private counsel to prosecute criminal cases. Note, however, that in Mattoon, the private attorney appointed to prosecute the case was the sole prosecutor and no one from the solicitor's office was present during trial. Mattoon at 494-95, 339 S.E.2d at 868-69. In any event, despite the statement of discouragement in Mattoon, the decisions of our Supreme Court have consistently upheld the use of special private prosecutors when attacked by the defendant. The Nichols case reiterates this view.

presenting the State's closing argument. (See R. p. 19, lines 7-9; see Brief of Appellant, p. 12). Further, in Appellant's case, unlike in Nichols, Mr. Brannon did not "simultaneously" represent an interested party; instead, his representation of the victim's mother and adoptive father concluded in October of 2012, more than a year and three months before Appellant's trial. (See R. p. 18, lines 20-23). Mr. Brannon stood to gain nothing (other than a sense of personal satisfaction, perhaps) from providing *pro bono* assistance to the State, nor has there been any contention that he attempted to use his authority as a special prosecutor in some improper way. (See R. p. 18, line 5). Therefore, contrary to Appellant's suggestion, Mr. Brannon was not "serving two masters at once." (See Brief of Appellant, p. 14).

Appellant's argument, in addition to not being preserved for review, is based on rank speculation that Mr. Brannon *might* have learned something during his representation of the victim's mother and adoptive father in the past that *might* have been helpful to the defense in this case, and assumes that Mr. Brannon failed to turn such information over to the defense. However, had the issue of privilege or confidentiality actually been raised below or brought to the trial judge's attention in some way, it most likely would have been revealed that Mr. Brannon's former clients - the victim's mother and adoptive father - had indeed waived lawyer-client confidentiality and agreed that Mr. Brannon could, consistent with his obligations as a special prosecutor for the State, turn over any pertinent information. There has been no contention, either at trial or on appeal, that Mr. Brannon actually possessed pertinent information that was required to be turned over to the defense. Further, there has been no contention at trial or on appeal that Mr.

Brannon, as special prosecutor, failed to actually comply with Brady or Rule 5 obligations.

The cases cited by Appellant in support of his position are distinguishable in that those cases involved situations where the private attorney simultaneously represented a financially interested party and was in total control of the prosecution. In Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), private attorneys served as special prosecutors in a criminal contempt action regarding a violation of a trademark infringement injunction. The injunction and consent decree contained a liquidated damages provision in the amount of $750,000 for a violation of the injunction. Id. at 805. The private attorneys were appointed by the district court and, significantly, the United States Attorney's Office had no involvement in the case at all. Id. at 791-92. Because the private attorneys simultaneously represented Vuitton in the trademark matter, and in light of the $750,000 liquidated damages provision for a violation of the injunction, there was the potential for "private interest to influence the discharge of public duty." Id. at 805-806. Therefore, the private prosecutors were "interested" and their appointment was improper. Id. at 814. The Court refused to employ a harmless error analysis under these circumstances because the error was "fundamental" where the appointment of interested private prosecutors - with no involvement of the United States Attorney's Office - raised doubts about "the integrity of the criminal proceeding." Id. at 809-810.

In Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), the Fourth Circuit Court of Appeals held that the defendant's conviction for assaulting his wife was constitutionally invalid because the attorney prosecuting the criminal case simultaneously represented the defendant's wife in a divorce action then pending against the defendant, and the divorce

action was based upon the same assault involved in the criminal matter. Id. at 711-12. Significantly, the private prosecuting attorney improperly used his influence as a prosecutor because he offered to drop the criminal assault charge if the defendant would make a favorable property settlement in the divorce action. Id. A favorable settlement, of course, would have likely impacted the amount of his fee in the divorce matter. Id. at 713. Because of the prosecuting attorney's "self-interest" in the outcome of the criminal case, he was not in a position to exercise fairminded judgment with respect to prosecution of the criminal case. Id. at 712-13. This conflict of interest - wherein the prosecuting attorney was actively attempting to serve two masters at the same time - violated the defendant's due process rights. Id. at 714. A harmless error analysis was not appropriate because the *sole* prosecuting attorney was not "free to exercise the fair discretion which he owed to all persons charged with crime in his court." Id.

Appellant's case is totally different from both Young and Ganger. Again, Mr. Brannon merely assisted the State with the trial as a third-chair prosecutor and he did not have control over Appellant's prosecution from the inception of the case as did the attorneys in Young and Ganger. Furthermore, Mr. Brannon was not "interested" as were the private prosecutors in Young and Ganger because he was not simultaneously representing the victim's mother and adoptive father since that matter concluded in October 2012. Mr. Brannon performed his work as a special prosecutor *pro bono* and there was no possibility of pecuniary gain or unfair advantage in any pending, related civil matter. Accordingly, Young and Ganger do not apply to Appellant's case and there was no "fundamental" trial error here.

Notably, in a case subsequent to Ganger, the Fourth Circuit Court of Appeals

distinguished Young and held that although Young "flatly proscribes turning the prosecution completely over to private counsel for interested parties," it "certainly did not proscribe all participation by such counsel." Person v. Miller, 854 F.2d 656, 663 (4th Cir. 1988). The court then stated:

> We therefore read *Young* at least implicitly to approve (or certainly not to forbid) the practice of allowing private counsel for interested parties to participate formally with government counsel in the prosecution of contempt citations so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise in practice to the level of effective control of the prosecution. As indicated, we find authority for this rule of limited participation at least implicit in *Young* and we think it wholly conformable to *Young*'s underlying principles. Accordingly, we adopt it as the appropriate rule governing the participation of private counsel for interested parties in contempt prosecutions.

Id. The court also noted that the evil at which the Young rule was aimed - "the possibility that the criminal contempt sanction would be invoked and prosecuted by private counsel, operating in the adversarial mode, solely to secure advantage to his client and hence without regard for any interests of the defendant and the public in fairness of the criminal process" - is sufficiently guarded against, both in appearance and reality, by "the presence of disinterested government counsel effectively in a position and manifestly prepared to exercise control over the critical prosecutorial decisions - most critically, whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." Id. at 664. Significantly, the reasoning of this Fourth Circuit case is fully in keeping with Nichols and Addis.

Contrary to Appellant's argument on page 15 of his Brief, prejudice must be shown in order for Appellant to receive relief. In State v. Smart, 278 S.C. 515, 299

S.E.2d 686 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), a disqualification case, there existed a potential conflict of interest arising from the fact that one of the prosecutors in the solicitor's office had previously worked for the public defender's office during the pendency of the charges against him. Smart at 517-18, 299 S.E.2d at 687-88. The Supreme Court stated that although Appellant's claim had "merit in the abstract," there was no "constitutional grounding" for it and held that the defendant was required to show "actual prejudice" from the trial court's failure to disqualify the solicitor's office. Id. at 518, 299 S.E.2d at 688. The court rejected Appellant's assertion that prejudice must be "presumed," stating that "[c]reating artificial dilemmas does not relieve appellant of his burden to show actual prejudice in this case." Id. at 519, 299 S.E.2d at 688; see also State v. Chisolm, 312 S.C. 235, 238, 439 S.E.2d 850, 852 (1994) ("Appellant must show actual prejudice from the failure to disqualify the solicitor's office."); State v. Patterson, 324 S.C. 5, 19-20, 482 S.E.2d 760, 767 (1997) (no reversible error in denying the defendant's motion to disqualify an assistant solicitor where the defendant failed to allege any true conflict and failed to allege any actual prejudice from the assistant solicitor's participation in the trial); State v. Bell, 374 S.C. 136, 143-44, 646 S.E.2d 888, 892 (Ct. App. 2007) (absent deliberate prosecutorial misconduct (such as intentionally eavesdropping on a confidential conversation between the defendant and his attorney) or actual prejudice to the defendant, the trial judge did not abuse his discretion in refusing to disqualify the solicitor's office).

In sum, this case is controlled by Nichols and Addis, and under these cases, the

trial judge did not err in allowing Mr. Brannon to assist the State in Appellant's trial.[5] No actual prejudice has been alleged or shown, and Appellant is not entitled to reversal on this ground.

IV. Appellant's challenge to the appointment of a special prosecutor on the ground that the solicitor did not produce a commission from the governor is not preserved for review because Appellant failed to secure a ruling on this issue below. Regardless, there was no reversible error on this ground where Appellant has failed to show any prejudice.

Issue Preservation

"Our law is clear that a party must make a contemporaneous objection that is *ruled upon by the trial judge* to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011) (emphasis added). "To be preserved for appellate review, an issue must be both presented to *and passed upon* by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (emphasis added). "If the issue is raised but not ruled on, it is not preserved for appeal." Id.; see State v. Hudgins, 319 S.C. 233, 236, 460 S.E.2d 388, 390 (1995) (although appellant objected, the trial judge did not rule on the objection and appellant did not object further or request curative instructions; therefore, this issue was not preserved for review), *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d

[5] North Carolina and West Virginia, among other states, have adopted standards similar to those set forth in Nichols and Addis. In State v. Moose, 310 N.C. 482, 489, 313 S.E.2d 507, 512-13 (1984), the North Carolina Supreme Court stated that "where it is shown that the solicitor consented to the participation of a privately employed prosecutor and retained control and management of the prosecution, no reason exists why such an accepted and well-settled practice, in and of itself, should cause reversal of the case." North Carolina also requires actual prejudice: "The law in this State with respect to private prosecutors is clear: absent some evidence that the private prosecutor has in fact ignored the interests of justice in seeking a conviction, his assistance of the public prosecutor is not a per se constitutional violation." Moose at 488, 313 S.E.2d at 512. Similarly, the West Virginia Supreme Court of Appeals has stated: "At the appellate level, a complaint against a private prosecutor must be bottomed on an instance of the private prosecutor's misconduct that in some way prejudiced the defendant." Acord v. Hedrick, 176 W.Va. 154, 160, 342 S.E.2d 120, 126 (1986).

202 (1998); State v. Clute, 324 S.C. 584, 591, 480 S.E.2d 85, 88 (Ct. App. 1996) ("Moreover, after the trial court ruled that Clute was not in custody for purposes of Miranda, Clute failed to request a specific ruling as to the voluntariness issue pursuant to Jackson v. Denno. The [voluntariness] issue is therefore not preserved for appeal."), *overruled on other grounds by* State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); see also Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) (pointing out that "error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court"); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction rather than being a reviewing court. Since the trial judge was not requested to rule upon the foregoing question, and made no ruling thereabout, it is not properly before this Court for consideration.") (citations omitted); Harkins v. Greenville County, 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000) ("In order to be preserved for review, the lower court must rule upon the issue."); Townsend v. City of Dillon, 326 S.C. 244, 247, 486 S.E.2d 95, 97 (1997) (an issue not ruled on by the trial judge is not preserved for appeal); Town of Mount Pleasant v. Jones, 335 S.C. 295, 305, 516 S.E.2d 468, 474 (Ct. App. 1999) ("Because the municipal court judge and the circuit court judge specifically declined to rule on this issue, it is not properly before us for appellate review.").

Appellant argues that the trial judge erred in allowing Mr. Brannon to participate in the trial as a special prosecutor on the ground that the solicitor failed to produce a commission from the governor as required by S.C. Code § 1-7-470. However, although

counsel mentioned below that "I don't have any evidence under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office," (R. p. 18, lines 12-16), the judge did not issue a ruling on this particular point nor did counsel request that the judge include this issue in his ruling. (See R. p. 20, lines 7-20). In fact, the judge did not even rule that S.C. Code § 1-7-470 was applicable, since defense counsel conceded that the solicitor "does have the right to appoint a special prosecutor." (R. p. 18, lines 11-12). Accordingly, the issue was not properly preserved for appellate review. See, e.g., Watts, 321 S.C. at 167, 467 S.E.2d at 278.

Discussion Regarding the Merits

Even assuming the issue was somehow preserved for review, Appellant's argument is without merit. S.C. Code § 1-7-470 states as follows:

> The circuit solicitor of the seventh judicial circuit may appoint a competent attorney, who is a resident of Spartanburg County, as assistant solicitor. He shall perform any and all of the duties and functions now or hereafter imposed by law upon the circuit solicitor in Spartanburg County, as the solicitor of the circuit shall authorize, designate and direct. The assistant solicitor shall be appointed by the solicitor of the seventh judicial circuit and shall after appointment be commissioned by the Governor; *provided, however,* the solicitor of the seventh judicial circuit shall have the right to remove the assistant solicitor from office at his pleasure, and in no event can the assistant solicitor be appointed for a period beyond the term of office of the circuit solicitor. The assistant solicitor shall receive from Spartanburg County as compensation for his services such sum per year as may be provided by the General Assembly, payable the first and fifteenth of each month, and eight hundred dollars per year for travel (emphasis in original).
>
> The assistant solicitor shall appear and represent the State in magistrates' courts when requested by the sheriff's department or the highway patrol located in Spartanburg County. He shall further prosecute appeals from magistrates' courts in that county.

Initially, it is not clear that S.C. Code § 1-7-470 is necessarily applicable to Appellant's case, since the Seventh Circuit Solicitor appointed Mr. Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid "assistant solicitor" as discussed in the statute.[6] The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), cited by Appellant, may be distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), in that case the private attorney was appointed as a "special assistant solicitor" and he had an agreement (presumably for pay) to prosecute "a series of obscenity cases" in the county. Regardless, even if the statute was applicable, it does not require that the governor's commission occur prior to the commencement of the service; it merely requires that the commission occur "after appointment." Had Appellant pressed the issue below and requested that the judge specifically address it, he may have come to learn that Mr. Brannon was in the process of being commissioned or that the process was going to be initiated within a reasonable time.

However, even assuming the statute did apply and that the "commissioned by the Governor" language was not complied with, Appellant has utterly failed to show prejudice, which he acknowledges would be required for reversal. (See Brief of Appellant, p. 16). See, e.g., State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test's results when no prejudice to the defendant was shown as a result of the implied consent statute's violation); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights

[6] As mentioned previously, defense counsel conceded that the solicitor "does have the right to appoint a special prosecutor." (R. p. 18, lines 11-12). Counsel did not reference a particular statute for this point.

and not to statutory violations...."). Contrary to Appellant's argument, the case of Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), does not illustrate prejudice by way of a due process violation because the case is distinguishable for the many reasons discussed above in the previous section. Appellant has failed to assert or prove actual prejudice and he is not entitled to reversal on this ground.

V. The trial judge did not abuse his discretion in denying Appellant's motion to exclude the testimony of the victim's counselor, and Appellant has failed to show any prejudice resulting from the delay in his receipt of some of the counseling records especially where Appellant was not entitled to the counselor's records in the first place under Rule 5, SCRCrimP.

Relevant Facts

On February 27, 2013, the Honorable J. Mark Hayes, II, filed an order that stated, in pertinent part: "The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson Loftis at this time; however, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to the trial of this case." (R. p. 3). Judge Hayes' order did not provide for any particular remedy in the event a violation occurred. On February 11, 2014, approximately two weeks prior to Appellant's trial, defense counsel filed a motion to exclude the testimony of Meredith Thompson Loftis on the ground that the State had not yet turned over all of Ms. Loftis' records and that "it is no longer a reasonable time prior to the February 24, 2014 call of the case." (R. p. 8). The motion also requested an in camera review of the issue prior to the admissibility of Ms. Loftis' testimony. (R. p. 8).

On February 24, 2014, the day the case was called for trial, defense counsel raised the issue of Judge Hayes' order and argued the State violated it by failing to turn over

records within a reasonable period of time prior to trial. (R. p. 34-35). Specifically, defense counsel asserted that although the State, on October 31, 2013, turned over records covering the dates of May 17, 2011 through February 16, 2012, it was not until "last week," February 20, 2014, that the State turned over records spanning the dates of February 23, 2012 through December 30, 2013. (R. p. 35, lines 15-21). Defense counsel also stated that no records for any dates after December 30, 2013, had been turned over. (R. p. 35, lines 21-23). Counsel argued, "in essence, Your Honor, four days before this trial was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27 of 2013." (R. p. 35, line 23 – p. 36, line 6).

In response, the State noted that the "twenty-two months" of records in fact included only twenty-five pages of counseling notes. (R. p. 36, lines 11-14). The solicitor noted that "[i]t was five pages that included some writings and then twelve pages that included drawings." (R. p. 36, lines 17-18). The solicitor also pointed out that the defense had access to the majority of Ms. Loftis' records prior to this; that defense counsel personally cross-examined Ms. Loftis in the family court trial that took place in October of 2012; and that the victim had made no new disclosures to the counselor. (R. p. 36, line 19 – p. 37, line 1). The solicitor argued that considering the "un-burdensome" nature of the records turned over four days prior to trial, the records were turned over within a reasonable amount of time. (R. p. 37, lines 2-4). The solicitor further noted that she had requested the records earlier from Ms. Loftis, but there were apparently some

issues with obtaining the records; however, the State turned over the records the morning after receiving them via fax at 8:06 pm on Wednesday, February 19, 2014. (R. p. 37, lines 10-17).

Defense counsel agreed that these records were turned over upon receipt and stated, "I'm not saying you withheld it." (R. p. 37, lines 16-21). However, he argued that the "legibility" of the records was an issue and having to "translate her handwriting in four days." (R. p. 38, lines 12-15). He also noted that his late receipt of the records prevented the defense "from being able to have any experts, should we have wanted to have an expert look [at] it." (R. p. 38, lines 18-21).

The judge then asked defense counsel if there was anything new or surprising in the records that had recently been turned over. (R. p. 39, lines 3-4). Defense counsel responded that he had learned the "number of appointments this child had with Meredith Thompson-Loftis in the year, plus, since the hearing, but nothing of major significance that I could see or that I could translate in the four days that I have had to take a look at it." (R. p. 39, lines 5-9). The judge responded that the records looked "pretty straightforward" and said that he was able to read Ms. Loftis' handwriting. (R. p. 39, lines 10-14). He also offered assistance with "translating" the records but defense counsel declined. (R. p. 39, lines 15-18). The judge then denied counsel's motion to exclude the testimony of Meredith Thompson-Loftis. (R. p. 39, line 19). Defense counsel stated, "All right. Thank you, Your Honor." (R. p. 39, line 20).

Later in trial, after Ms. Loftis testified that the victim was still a client of hers to date, defense counsel renewed his motion to exclude. (R. p. 267-68). He stated that if the victim is a continuing patient of Ms. Loftis, there must be records dated after

December 30, 2013 which had not been turned over. (R. p. 268, lines 17-22). He argued that the State was therefore not in compliance with Judge Hayes' order and asked that Ms. Loftis be excluded as a witness and that all of her testimony be stricken from the record. (R. p. 268, lines 22-25). The State noted that it was not in possession of any records dated after December 30, 2013. (R. p. 269, lines 2-8). Ms. Loftis then told the court she did have records for January 2014. (R. p. 270, lines 1-5). Over defense counsel's objection, the judge ruled that Ms. Loftis would not be excluded as a witness but would not be permitted to testify as to anything that occurred with respect to sessions after December 30, 2013, since defense counsel had not been privy to those records prior to trial. (R. p. 270-72).

Discussion

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v.

Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.").

Appellant argues that the trial court erred in refusing to exclude the testimony of Meredith Thompson Loftis due to the State's failure to turn over portions of her counseling records within a reasonable time prior to trial. However, despite Judge Hayes' order requiring the State to turn over the counseling records, Appellant was not in fact entitled to receive the counselor's notes under Rule 5. See State v. Trotter, 322 S.C. 537, 542, 473 S.E.2d 452, 455 (1996) (holding that counseling sessions do not constitute "physical or mental examinations" for purposes of Rule 5, SCRCrimP, and that even if they did, a counselor's notes from such sessions would not be subject to disclosure under Rule 5(a)(1)(D)); see also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Appellant essentially concedes as much in his Brief. (See Brief of Appellant, p. 17-18: "Arguably the notes from Ms. Loftis may not have been obtainable under Rule 5.") Nevertheless, Appellant asserts in his Brief that the State's violation of Judge Hayes' order in this case was "more" than a violation of Rule 5. (Brief of Appellant, p 17). To the contrary, in the State's view, since Appellant was not entitled to the counseling notes in the first place, any alleged violation of Judge Hayes' order is better classified as "less" than a Rule 5 violation. In that vein, Appellant's receipt of *any* of the counseling notes in advance of trial allowed Appellant to reap a benefit to which he was not entitled and that most defendants do not receive. Appellant cannot predicate

reversible error upon his failure to timely receive something he was never actually entitled to receive in the first place under our discovery rules.

In any event, Judge Hayes' order requiring the records to be turned over "within a reasonable time prior to the trial of the case" did not provide for a remedy in the event of noncompliance. (See R. p. 3-4). Therefore, it was up to the trial judge to determine whether or not a remedy was warranted, and if so, what remedy was appropriate under the circumstances. Cf. State v. Salisbury, 330 S.C. 250, 267, 498 S.E.2d 655, 664 (Ct. App. 1998) ("Even if the State failed to comply with Salisbury's Rule 5 request, the trial court had discretion to provide a proper remedy."), *affirmed as modified on other grounds by* 343 S.C. 520, 541 S.E.2d 247 (2001). Here, after learning (1) that the State did not intentionally withhold the records turned over the week before trial (as defense counsel conceded); (2) that the records contained only twenty-five pages, some with drawings, and that the records were "pretty straightforward;" and (3) that the records had little overall significance to the defense, the trial judge denied Appellant's motion to exclude Ms. Loftis' testimony. (See R. p. 34-39). It cannot be said that this decision was an abuse of discretion under these circumstances. Further, after discovering there were records that had not ever been in the possession of the State and that had not been turned over to the defense, the trial judge precluded the State from eliciting any testimony pertaining to those particular records. (See R. p. 267-72). Likewise, this was not an abuse of discretion and was a fair remedy.

Moreover, Appellant, at trial and on appeal, has failed to show any prejudice from the delay in his receipt of the records. See State v. South, 285 S.C. 529, 535-36, 331 S.E.2d 775, 779 (1985) (applying a harmless error analysis to a violation of a discovery

order in a death penalty case); cf. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) ("A violation of Rule 5 is not reversible unless prejudice is shown."). He has not asserted, at trial or on appeal, that any of the records, including the post-December records, contained anything relevant or material to either the State or the defense. In fact, Appellant did not even request that the post-December records be made a court's exhibit. (See R. p. 267-72). Significantly, although on appeal Appellant contends that "[a]t the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence," (Brief of Appellant, p 19), defense counsel below did **not** request a continuance of trial or request further time to consult with an expert.[7] Cf. Curtis v. Blake, 392 S.C. 494, 503, 709 S.E.2d 79, 83 (Ct. App. 2011) (pointing out that exclusion of a witness is a harsh sanction not to be lightly invoked and noting that the defendant could have but did not move for a continuance prior to the witness' testimony). Finally, as suggested above, it is impossible for Appellant to show prejudice from his failure to receive counseling notes which he was never entitled to receive in the first place. In sum, Appellant has failed to show that the trial judge committed a prejudicial abuse of discretion. Appellant is not entitled to reversal on this ground.

[7] Appellant has also failed to explain why the defense would need an expert to evaluate Loftis' counseling records. In fact, defense counsel's comment on lines 18-21 of page 38 of the record certainly suggests that the defense had no desire to consult with an expert and that counsel's contention dealt more with a hypothetical issue than an actual one: "Furthermore, Your Honor, just for the record, it does – you know, the fact that we got it [late] prevents us from being able to have any experts, *should we have wanted an expert to look [at] it*." Note also that Loftis' testimony about delayed and partial disclosure was entirely routine, and that this testimony, as well as her testimony regarding the victim's symptoms, was largely cumulative to that of other witnesses. (See R. p. 161-73; p. 194-97; p. 200-13; p. 251-53; p. 263-75).

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence for criminal sexual conduct with a minor in the first degree.

Respectfully submitted,

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June 22, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-000448

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DANIEL WILLIAM SPADE,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **C. Rauch Wise**, 305 Main Street, Greenwood, SC 29646, and **Kenneth P. Shabel**, 175 Magnolia St., Suite 201, Spartanburg, SC 29306, this **22nd** day of **June, 2015.**

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