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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

SC Court of Appeals

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY JAMES WRIGHT,

APPELLANT

APPELLATE CASE NO. 2015-000636

FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

### Preservation

The Record clearly reflects that defense counsel made his objection sufficiently for the trial judge to understand the objection and articulate a lengthy response. Defense counsel asked the Court “not to take into consideration any of the incident reports that didn’t result in conviction.” (R.O.A. 181, ll. 8-10). Defense counsel then had a brief opportunity to explain the basis for his objection, at least in part, before he was interrupted by the Judge. Defense counsel explained that he was “not prepared to cross-examine those witnesses or find out more about...” (R.O.A. 181, ll. 10-11). At this point the Court cut off defense counsel’s argument and powerfully overruled the objection. (R.O.A. 181, ll. 12-25, T R.O.A. 182, ll. 1-15).

Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) *citing* Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). Defense counsel was able to fairly raise the issue to the trial court in such a manner that the Judge was able to understand exactly what the objection was and rule against it. The objection was clear and the response by the Court was clear. Therefore, it is preserved for appeal.

Further, it would have been unreasonable for defense counsel to continue to argue with the Court’s ruling after it was so strongly articulated by the Court. Such argument is

prohibited by Rule 18, SCRCrimP. Additionally, further argument by defense counsel would have been a reckless move immediately before his client's sentencing, especially after the Judge said "[D]on't sit there and tell me I can't consider it." (R.O.A. 182, ll. 3-4).

#### Abuse of Discretion

In overruling defense counsel's objection to the contested unsubstantiated information, the Judge made the following statement:

I will be glad to place it under where it is. You know, it was no conviction; but that happens so frequently in domestic violence cases where the victim refuses to prosecute and the prosecutor doesn't have any independent evidence of it. It is right rampant throughout the history of South Carolina and other states. And you know that, and the solicitor knows that.

(R.O.A. 182, ll. 7-13). In this statement the Judge expresses his personal opinion regarding domestic violence cases in general and expresses that he is going to use this belief and bias in such a way to assume that the prior allegations presented in this case were likely true. The Court then considered this information against the Defendant in sentencing. It is clear that the Court determined that the Defendant's history showed a pattern of abusive behavior despite the facts that there was no known history of violence between the Defendant and the victim and his only prior convictions were a 17 year old possession of cocaine, a 14 year old simple assault, and a 3 year old assault and battery. (R.O.A. 172, ll. 14-25, R.O.A. 173, ll. 1-14, R.O.A. 166, ll. 17-25, R.O.A. 167, ll. 1-15). The Court sentenced the defendant to the maximum sentence possible in this case. (R.O.A. 185, ll. 15-18).

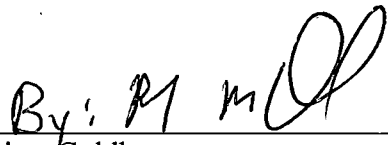
The State argues that the Defendant was provided with a "meaningful opportunity to explain any discrepancy and inform the trial court of any alleged errors within the incident reports" and "never indicated he needed more time to prepare a response." (Initial Brief of

Respondent, 18-19) This is clearly not true. Defense counsel stated: “We are not prepared to cross-examine those witnesses or to find out more about...” (R.O.A. 181, ll. 10-11). Accordingly, defense counsel informed the court that he did not have the opportunity to explain any discrepancies or challenge the information, as should be allowed as discussed in State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976), State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976).

CONCLUSION

This court should consider defense counsel's objection to be preserved as counsel fairly raised the issue to the trial court and the trial court had an opportunity to rule on the issue. It is clear that the trial court understood the substance of the objection and ruled accordingly. This court should also find that the trial judge abused his discretion in considering information presented from past incident reports that did not result in conviction as the judge considered those allegations to be true based on the Court's personal bias and beliefs regarding domestic violence cases in general.

Respectfully submitted,

  
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Kristy Goldberg

Robert M. Dudek  
Appellate Defender

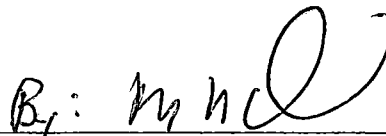
ATTORNEYS FOR APPELLANT.

This 30th day of June, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

June 30, 2016

By: 

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STATE OF SOUTH CAROLINA  
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Appeal from Charleston County

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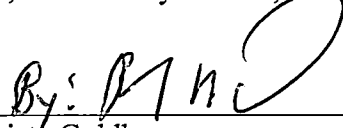
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CERTIFICATE OF SERVICE

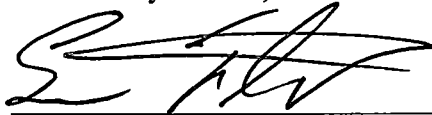
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The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, this 30<sup>th</sup> day of June, 2016.

By:   
\_\_\_\_\_  
Kristy Goldberg

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 30<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022.