STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

THE STATE, ...RESPONDENT,

v.

LARRY DURANT, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly denied Appellant's motion for a mistrial after the judge revealed to jurors that Appellant was also indicted for three counts of third-degree criminal sexual conduct with a minor and forgery because the trial judge informed the jurors the State was proceeding on only the charge of second degree criminal sexual conduct with a minor and instructed them indictments are notice documents which are not evidence of the commission of a crime. Further, any alleged error in the admission of those charges was rendered harmless because the underlying behavior which merited those charges was introduced through the State's trial witnesses.

II. The trial judge did not err in admitting the testimony of witnesses A.R., T.H., and D.B. because it was admissible evidence of a prior scheme or plan under South Carolina law, including Rule 404(b), SCRE, State v. Wallace, and State v. Lyle.

III. The trial judge did not err in finding the testimony of witnesses A.R., T.H., and D.B. were admissible as evidence of Appellant's prior bad acts when the incidents against Victim and the witnesses were more similar than dissimilar. Due to the close degree of similarity among the bad acts, their probative value substantially outweighed the danger of unfair prejudice to Appellant.

IV. The trial judge did not err in issuing an Allen charge because the charge was addressed to all three groups of jurors: those in favor of finding Appellant guilty, those opposed, and the individual who refused to vote. Moreover, the judge did not identify the juror who refused to vote, he instructed all jurors to keep an open mind and consider the positions of the other jurors, and he told jurors that if they failed to reach a unanimous decision a new jury would be selected and the State would retry the case.

V. The trial judge properly denied Appellant's motion for a new trial based on an alleged Brady violation of failing to disclose witness Ulanda McRae's prior criminal history because the State was unaware of said history, did not suppress the information, and the evidence was immaterial to Appellant's guilt or punishment because McRae's testimony was cumulative to that of other trial witnesses.

VI. This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge.

STATEMENT OF THE CASE

On October 23, 2014, the Sumter County Grand Jury indicted Appellant for second-degree criminal sexual conduct (CSC) with a minor. On May 23, 2016, the State proceeded to a jury trial before the Honorable Roger M. Young, Sr. Shaun Kent, Cameron Blazer, and David Weeks represented Appellant; Assistant Attorneys General of South Carolina KinliAbee and David Ferndandez represented the State. The jury found Appellant guilty as charged and the trial judge sentenced him to twenty years' incarceration.

On May 27, 2016, Appellant moved for a new trial based on an alleged Brady violation. On June 8, 2016, the trial judge convened a hearing on the motion. After hearing the arguments from counsel, the trial judge denied the motion.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Pretrial Matters

Reference to Appellant's Indictments

While polling the prospective jurors, the trial judge stated:

> I guess at this point, I should let you know. I didn't have the indictments in front of me to read them out to you, burt Mr. Durant is charged with [CSC] with a minor between the ages of 11 and 14. And, also, three counts of criminal sexual conduct third degree and a charge of forgery.

Trial counsel immediately informed the trial judge he had "something to bring up at another point in time. The trial judge continued, stating the purpose of his comments was to inform the prospective jurors the case involved "allegations of sexual abuse." He noted Appellant had pled not guilty to the charges and the State had the burden of proving them. The State requested a brief sidebar, after which the trial judge informed the jurors he had made a mistake: he noted his law clerk, who was not present that day, had sent him a list of charges when Appellant faced only a single charge, second-degree CSC with a minor. He asked the jurors to "not consider . . . in any way or hold [those charges] against [Appellant]." (Tr.p.31, line 17–Tr.p.32, line 19).

The trial judge also explained an indictment is a charging instrument used to put a person on notice for the crime for which they are to appear at trial. Again, he told the prospective jurors he was incorrect in mentioning the additional charges, and followed my explaining an indictment does not create a presumption of guilt and is not evidence of a crime. (Tr.p.32, line 20–Tr.p.34, line 21).

The trial judge reiterated that the jurors must ultimately determine guilt based on the evidence presented at trial and that they were required to apply the law as instructed by the judge. (Tr.p.42, line 20–Tr.p.43, line 10).

Following the selection of the jury, both parties made several motions. Trial counsel thanked the trial judge for issuing a corrective instruction after referencing the forgery and third-degree CSC charges. However, he was concerned that reference to those charges tainted the jury pool, particularly if the evidence of Appellant's other bad acts were not admitted at trial. Trial counsel believed that even if the other victims were allowed to testify, knowledge that Appellant was charged for his actions against those victims would corroborate their testimonies. Accordingly, trial counsel stated he was not requesting a mistrial but instead a continuance to obtain a new jury panel. (Tr.p.65, line 8–Tr.p.67, line 5).

In response, the State argued no further action was needed because the trial judge issued a clear, corrective instruction immediately after referencing the additional charges, particularly because the trial judge told the prospective jurors that the other charges did not exist. Further, any harm in his statements would depend on whether Appellant's other victims ultimately testified at trial. Finally, the State noted jurors will not necessarily believe Appellant is facing criminal charges for his other bad acts simply because the State is presenting witnesses to testify about those actions. (Tr.p.67, line 7–Tr.p.68, line 4).

The trial judge apologized again, admitting he thought the State was going to trial on all charged crimes. However, he stated he believed the curative charge adequately remedied his mistake and "any motion for a mistrial or a continuance [was] denied." (Tr.p.68, lines 17–25).

Lyle[5] *Hearing*

[5] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

Prior to trial, the State proffered the testimony of Appellant's victims beginning with K.R., the victim from whom Appellant's second-degree CSC with a minor charge originated. K.R. began attending Appellant's church when she was five years' old. Her aunt, Ulanda McRae, was one of Appellant's "armor bearers" (members of the church with additional responsibilities ranging from helping Appellant prepare for a service or standing guard outside the door to his office) and her grandmother, Lizzie Johnson, helped manage the churches' finances. K.R. testified her first sexual interaction with Appellant occurred in 2012, when she was thirteen and in the eighth grade. Appellant ordered one of his armor bearers retrieve her for a special "prayer session" during which he inserted his fingers into her vagina. Appellant claimed the prayer was to help her "not like girls" and avoid diseases. The assaults continued over time, usually Wednesdays, Fridays, and Sundays and occurred in his offices at both of his churches and progressing to sexual intercourse. The intercourse would occur with K.R. lying on Appellant's desk with him standing. During one such session of intercourse, K.R. noticed Appellant's penis had a pink pigmentation on parts, but flesh colored elsewhere. Appellant often remarked he wanted K.R. to "have his baby." (Tr.p.72, line 21–Tr.p.83, line 5).

A.R., K.R.'s cousin and McRae's daughter, recounted her abuse by Appellant. She began attending Appellant's religious services at age four, and would show up at the church Tuesdays or Wednesdays, Fridays, and Sundays for worship services, bible studies, and other groups. The first incident of abuse occurred in 2012 when she was eighteen. Appellant had summoned her to his office for a special prayer session to ensure she "wouldn't get any diseases and no harm would come to [her] body," including unplanned pregnancies. Instead, he inserted his fingers into her vagina. Eventually, Appellant began having sex with A.R., bending her over his desk while he stood. A.R. recalled Appellant's penis had "specks of pink" pigmentation all over his

penis, but that the remainder was normal. Their sexual relationship terminated on Mother's Day of 2013. When A.R. terminated the relationship, Appellant claimed she would no longer be blessed and things in her life, including her applications to colleges and general health would be negatively impacted. During cross examination, she recalled that on a few occasions Appellant gave her small amounts of money, no more than $20. (Tr.p.92, line 9–Tr.p.106, line 17).

T.H., another victim testified regarding her experiences with Appellant. She began attending Appellant's church around the age of four. Her mother was a member of the church choir and a Sunday school teacher. T.H. went to the churches Wednesdays, Fridays, and Sundays for worship services and other activities. When she was approximately "fourteen or fifteen,"[6] Appellant invited her into his office for a special prayer session to protect her from sexually transmitted diseases, breast cancer, and other things which could harm her. Instead, he fondled her breasts and vagina. This behavior occurred for a couple months, with Appellant summoning T.H. to his office through the use of his armor bearers. The abuse ended when she disclosed these incidents to her mother and her "God sister," A.R. (Tr.p.112, line 1–Tr.p.122, line 23).

D.B., the final victim who testified could not recall her exact age when she started attending Appellant's churches, but knew she was "really young." Her mother was an usher and her nephew was an armor bearer. Her first encounter with Appellant occurred when she was thirteen, around 2012 or 2013, after one of his armor bearers asked her to go back to his office. When she arrived, Appellant informed D.B. he wanted to pray for her, to protect her and that if she refused his request "something bad" would happen to her. Later, when Appellant discovered D.B. had a bladder infection, "prayers" to heal that ailment were included in their sessions. After

[6] On cross-examination, Appellant admitted she may have actually been sixteen when the abuse occurred. (Tr.p.116, line 1–Tr.p.118, line 10).

Appellant discovered D.B. was pregnant with another man's child, he claimed he could "bump the seed" out of her. When D.B. tried to end the relationship, Appellant claimed the blessings promised to her and her family would not occur and that "something bad" would happen to them. The abuse occurred for approximately a year, during which Appellant would assault her in his offices and his home. During that period, he would penetrate D.B.'s vagina with either his fingers or his penis. When they had intercourse in his office, D.B. would lie on the desk while Appellant stood. She noticed Appellant had a pink discoloration over much of his penis. On cross-examination, D.B. recalled Appellant also gave D.B.'s mother $500 for an abortion. (Tr.p.124, line 5–Tr.p.132, line 15).

At the conclusion of D.B.'s testimony, the State moved for the evidence to be admitted at trial as evidence of a common scheme or plan under Rule 404(b), SCRE. The State referenced the five factors cited in Wallace for evaluating common scheme or plan evidence: (1) the ages of the victims when the abuse occurred; (2) the relationships between the victims and perpetrators; (3) location(s) where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of occurrence/type(s) of sexual battery inflicted on the victims. Comparing the testimonies of K.R. and the other victims, the State noted the victims' testimonies portrayed very similar patterns of abuse: (1) the victims were all teenagers, ranging from thirteen to eighteen years old; (2) all of the victims were dedicated members of Appellant's churches whom started attending at a young age and spent multiple days a week attending services and other events; (3) all of the victims were abused in his church offices, and the victims who reported intercourse stated it occurred with them on Appellant's desk while he stood; (4) All the victims asserted they were lured back to Appellant's office with claims he needed to pray for their health and/or wellbeing; and (5)

K.R., A.R., and D.B. reported both digital penetration and vaginal sex while T.H. reported inappropriate touching of her vagina and breasts. (Tr.p.132, line 24–Tr.p.136, line 20).

Due to the overwhelming similarities among the victims' testimonies, the State argued the probative value of admitting the testimonies of A.R., T.H., and D.B. substantially outweighed the danger of unfair prejudice to Appellant and demonstrated a common scheme or plan of Appellant to use his position, established relationships with the victims, and coercion to sexually assault all four witnesses. (Tr.p.136, line 21–Tr.p.137, line 17).

In response, trial counsel argued he disagreed with the Supreme Court of South Carolina's prior case law regarding bad act evidence. He claimed Lyle "is still good law" but believed "there is no common scheme or plan exception or no rape exception or no sex trauma exception" for Lyle evidence. He conceded the case would be admissible pursuant to Wallace, but believed the Supreme Court's decision was incorrect because other bad act evidence is, essentially, propensity evidence. He asseverated that Wallace made the common scheme or plan a "counting contest" between similarities and dissimilarities, with such evidence being introduced if there are simply more similarities than dissimilarities. (Tr.p.137, line 19–Tr.p.142, line 6)

Trial counsel also argued the facts alleged by the witnesses made the acts more dissimilar than similar, claiming: (1) A.R. and T.H. were really "adults" when their abuse occurred, as they were ages 18 and 16, respectively; (2) K.R. never testified Appellant threatened her; and (3) not all of the witnesses supplied certain details during their testimonies, such as whether Appellant locked the door[7] before engaging in the sexual acts or specific references to Appellant's

[7] At the hearing, trial counsel concede "most" of the victims testified Appellant locked the doors to his offices when he engaged in the acts. (Tr.p.145, line 22–Tr.p.146, line 1).

prosthetic legs,[8] differences in the timing of the abuse, and only two witnesses reported receiving money from Appellant. (Tr.p.142, line 7–Tr.p.147, line 6).

In reply, the State argued trial counsel was attempting to "split hairs" with his arguments, noting the "inconsistencies" counsel argued were irrelevant to establishing Appellant's common scheme or plan because Appellant has control over his own actions, he could not control the victims' actions, changes in behavior, or the things they experienced as a result of his actions. Looking at the important facts, such as three victims' ability to identifies Appellant's penis, along with their consistent recitation of Appellant's actions, showed the bad act evidence was admissible under Wallace and 404(b), SCRE. (Tr.p.147, line 7–Tr.p.149, line 6).

The trial judge, after noting he could not overrule Supreme Court precedent, noted the instant case was "one of the more compelling 404(b) cases [he's] ever come across." He found Appellant's acted similarly with each victim. Appellant targeted impressionable teenage girls, using his connections with them and "the psychological ploy of prayer" and their inherent trust in his position of pastor to his advantage. Additionally, the abuse against each victim occurred during the same general timeframe and in the same locations, he found the State "far exceeded its burden" in demonstrating these testimonies were admissible evidence of a common scheme or plan. Accordingly, the trial judge allowed the evidence to be introduced at trial. (Tr.p.149, line 7–Tr.p.151, line 20).

After ruling on pretrial motions, the trial judge issued preliminary instructions to the jurors. He noted an indictment is a notice document and not evidence of Appellant's guilt and that Appellant was presumed to be not guilty of his crime and that it was the State's burden to prove otherwise. He informed the jury it's duty was to evaluate the facts of the case, but that he

[8] The record reflects Appellant is a double amputee. (Tr.p.73, line 19–Tr.p.74, line 10).

was the ultimate authority on the law applicable to the case and the jurors were required to apply the law as instructed. (Tr.p.218, line 9–Tr.p.226, line 4).

Trial

Evidence

K.R., A.R., T.H., and D.B. provided testimonies consistent with what they presented during the pretrial hearing. (Tr.p.281, line 7–Tr.p.302, line 3; Tr.p.314, line 1–Tr.p.331, line 5; Tr.p.359, line 21–Tr.p.371, line 12; Tr.p.394, line 24–Tr.p.409, line 3).

McCrae, A.R.'s mother and K.R.'s aunt, testified regarding her experiences with Appellant's churches. She would attend various functions at the church three to four days a week, where she served as a youth director, secretary, altar worker, Sunday school teacher, kitchen committee member, and armor bearer. She confirmed armor bearers assisted Appellant on a "personal level." She claimed she was unaware of Appellant's private prayer sessions with A.R. and K.R. until she overheard them in a bathroom in her home discussing a sexual assault. She confronted them over the conversation, at which time they disclosed they were sexually assaulted by Appellant. McCrae informed Johnson of the abuse and heard her confront Appellant via telephone. She recalled Appellant eventually broke down and cried, apologized, and requested to meet with her, Johnson, K.R., and A.R. (Tr.p.302, line 21–Tr.p.313, line 6).

Johnson met Appellant in 1995, and helped him establish his first church. Over the years, she served in various capacities within Appellant's churches, including treasurer, superintendent, and secretary. She remained active with Appellant's institutions until McCrae informed her of his abuse of K.R. and A.R. She confronted him over the phone and later at one of his churches, at which point a tearful Appellant asked her to help his wife run the church after he stepped down from his position. (Tr.p.410, line 20–Tr.p.418, line 7).

On cross-examination, Johnson testified she and Appellant briefly dated and lived together for a while when they first met. After their relationship ended, she moved into another home owned by Appellant located at 805 Murray Street. Appellant eventually deeded the property to her. Later, after Appellant was indicted for his crimes, a dispute arose over ownership of the property. The deed transferring the property to Johnson was dated September 16, 2009, and filed November 4, 2009. A second deed, dated November 1, 2009 and filed May 13, 2013, transferred the property back to Appellant. Notably, this deed was filed just a few weeks after McCrae and Johnson confronted Appellant over his abuse of K.R. and A.R. (Tr.p.418, line 16–Tr.p.445, line 13).

Samara Samuels, a notary, testified she notarized the deed transferring September 16, 2009 deed and saw the parties sign the document. However, her signature on the November 1, 2009 deed transferring the property back to Appellant was not signed by her. Further, she noted Appellant's wife notarized part of that second deed, which she should not have done because Appellant's wife personally benefitted from the receipt of the property. (Tr.p.547, line 16–Tr.p.552, line 20).

Marvin Dawson, a forensic document examiner and expert in handwriting analysis, was hired by Appellant to analyze the two deeds. Using writing samples provided to him by the defense along with machine copies of the deeds,[9] he claimed: (1) Appellant's signatures in both the deeds were not likely genuine; (2) the same person did not sign Samuels's signature on the two deeds; (3) the same person signed Johnson's name on both deeds. However, he cautioned his results were based on "limited standards" because copies of the documents may not

[9] Dawson noted his analyses were impacted by the use of copies of the deeds because copies may not possess all of the characteristics of the original writings. He testified that he could compare the copies and originals in his home laboratory, but trial counsel insisted he give his opinion based on the copies he analyzed. (Tr.p.598, line 4–Tr.p.600, line 7).

accurately reflect all the characteristics of the original writings. He further noted he did not have writing samples from Samuels or Johnson to compare to the signatures.

(Tr.p.585, line 1–Tr.p.616, line 20).

Myer Whack, and armor bearer with Appellant's churches, testified he did witness K.R., A.R., T.H., and D.B. go into Appellant's offices for private meetings with him. Similarly, Elvin Vaughn, another armor bearer, admitted to seeing the four girls go into Appellant's for short meetings after services.[10] Both men admitted the walls to the office were made of cinder block and that they were not in Appellant's offices during his private "prayer sessions." Arlisa Vaughn, a trustee in charge of the churches' finances, testified she gave D.B.'s mother five-hundred dollars on the direction of Appellant's wife, and was only told the money was given to her as a loan. (Tr.p.625, line 4–Tr.p.654, line 12; Tr.p.682, line 21–Tr.p.689, line 16).

Jury Instructions and Allen Charge

At the conclusion of the parties' closing arguments, the trial judge instructed the jury on the law applicable to the case. Again, he noted an indictment is not evidence of guilt but merely a notice document, and the State had the burden of proving Appellant's guilt. He explained there were two possible verdicts in the case; guilty or not guilty, but that the verdict "must be unanimous." (Tr.p.750, line 15–Tr.p.759, line 24).

Approximately three hours after they were discharged for deliberations, the jury sent the trial judge a note claiming they were split. Most of the jurors were split between finding Appellant guilty or not guilty of the charged offense. However, a single juror refused to vote in any capacity. To address the situation, the trial judge decided he would issue a modified Allen

[10] On direct examination, Vaughn was asked whether he had seen the girls have "meetings or talks" with Appellant. Vaughn said he had not seen them have meetings with him "by themselves," but when asked to explain his response he only claimed that meetings the girls had with Appellant were short, lasting "two, five minutes tops." (Tr.p.653, line 19–Tr.p.654, line 4).

charge. Trial counsel objected to the charge, complaining such a charge could potentially target the members voting in the minority. (Tr.p.759, line 25–Tr.p.761, line 24).

The trial judge summoned the jury to the courtroom, and explained he understood different people "see things different ways" and thus have "different interpretations of what it is they believe is the right verdict. Not knowing the breakdown of the jurors' votes, he asked both the majority and minority jurors to consider the positions and viewpoints of the other jurors. He emphasized: (1) he was not trying to change their minds; (2) it was entirely possible that after considering the "other side," the jurors would not change their positions; (3) if the jurors were unable to reach a unanimous decision, the court would obtain a new jury and retry the case; (4) he would not force the jurors to reach a unanimous decision if they did not reach one after further deliberation. (Tr.p.762, line 2–Tr.p.764, line 21).

The trial judge also addressed the issue of the juror refusing to vote. Not knowing the identity of said juror and not attempting to identify him or her, he noted the juror's failure to vote was not helpful to the situation and would only ensure a mistrial even if the other eleven jurors reached a unanimous decision. He added he did not care how that person voted, but voting either guilty or not guilty was necessary for a unanimous verdict. After telling the jury they could deliberate for however long they wanted to that evening, he sent them back to the jury room for additional deliberations. Thirty-four minutes later, the jury returned to the courtroom with a unanimous guilty verdict. (Tr.p.764, line 22–Tr.p.766, line 22).

Post-Trial Brady Hearing

Following the verdict, trial counsel was contacted by Ronnie McCrae (Ronnie), Ulanda McCrae's ex-husband. Ronnie, who had been interviewed by trial counsel prior to trial, asked why he was not utilized at trial. He was shocked McCrae was permitted to testify without any

references to her prior criminal record. Trial counsel was unaware of the prior record and ran a public SLED catch to verify the information. Using McCrae's name, date of birth, and social security number, counsel ran a search that uncovered nine separate aliases/versions of her name. Trial counsel also discovered several criminal convictions associated with these names, including: (1) a charge for simple assault in 1991; (2) a shoplifting conviction in 1993; (3) a fraudulent check charge in 1995; (4) a forgery charge in 1995; (5) a conviction for driving under a suspended license in 1997; (6) a conviction for writing a fraudulent check in 1999; (7) a speeding charge and driving under suspension conviction in 2001; (8) a conviction for obtaining a signature under false pretenses in 2004; (9) a forgery charge in 2004; and (10) a nolle prossed charge for financial transaction card fraud in 2005. Notably, the 2004 conviction for obtaining a signature under false pretenses earned McCrae a sentence of six years' incarceration suspended upon the service of five years' probation and restitution. (Mot.Tr.p.2, line 5–Mot.Tr.p.5, line 14; Motion For a New Trial).

Trial counsel moved for a new trial, arguing evidence of these prior convictions would have been critical evidence at trial because the case ultimately revolved around the credibility of the testifying witnesses, and the defense's strategy was to show the charges against Appellant were fabricated due to a property dispute between him and Johnson, McCrae's mother including allegations that Johnson forged Appellant's signature on a deed awarding her the real property upon which she lived. Trial counsel argued impeaching McCrae's credibility was also important because McCrae was the outcry witness who heard K.R. and A.R. discuss their assaults and the State used McCrae to add credibility to those victims' testimonies. (Mot.Tr.p.5, line 15–Mot.Tr.p.7, line 8; Mot.Tr.p.8, line 20–Mot.Tr.p.10, line 7).

However, trial counsel clarified he did not believe the State intentionally hid the evidence of McCrae's prior convictions, but that the State should have turned over the evidence pursuant to specific discovery requests made prior to trial, noting the State did provide him with Johnson's rap sheet prior to trial. Trial counsel further admitted he did not believe the State was aware of the importance of McCrae's criminal history prior to trail because he did not posit his theory that the allegations of sexual abuse were tied to a property dispute until after McCrae testified. (Mot.Tr.p.7, line 9–Mot.Tr.p.8, line 19).

The State explained it had been unaware of McCrae's criminal history due to a misspelling of her name (it used "Mcrae" instead of McCrae" as the last name). It also noted McCrae's various charges and convictions were under multiple names. Notably, her 2004 conviction for obtaining property under false pretenses was listed under the name, "Wanda Shoantela Riley,"[11] a name which would not have been requested by the State. Finally, the State claimed it was not in possession of McCrae's social security number when it ran its search, and relied on her name, date of birth, and ethnicity in its search. The State argued its failure to disclose McCrae's criminal history could not be a Brady violation because: (1) the evidence was not in the possession of or known to the State; (2) was not suppressed by the prosecution; and (3) McCrae's testimony was ultimately immaterial to Appellant's conviction because she was testified to the general operations of the church, hearing K.R. and A.R. discuss the abuse, and to observing Johnson call Appellant on the phone, all items presented by other witnesses. However, even if a Brady violation occurred, such a violation would not merit a new trial because the evidence was "merely cumulative or impeaching" of McCrae. (Mot.Tr.p.10, line 12–Mot.Tr.p.13, line 21; Mot.Tr.p.21, line 16–Mot.Tr.p.22, line 15).

[11] The trial transcript listed this name as "Yolanda Riley," but the SLED catch showed the first name associated with this conviction was "Wanda." (Mot.Tr.p.14, line 21–Mot.Tr.p.15, line 3; Motion for a New Trial).

In reply, trial counsel noted he, as a former solicitor, always used social security numbers when running background checks on witnesses given the mistakes that occur with name spellings. He also claimed it was odd, as a practical matter, the State failed to ask McCrae whether she had any prior convictions or other events in her past which could be used to impeach her at trial. Finally, trial counsel argued McCrae's social security number was in the State's possession at the time it ran its search because it was in her witness statement. Trial counsel also addressed the elements of Brady, claiming: (1) McCrae's criminal history was evidence "favorable to the accused" because her conviction for obtaining signatures under false pretenses supported the defense's theory of the case; (2) the information was in the State's possession because it had the right to run an NCIC search and McCrae was a witness for the State; (3) the information was unintentionally suppressed by the prosecution due to its own mistake; and (4) the evidence was material to Appellant's guilt because the entire case was based on the credibility of the witnesses. (Mot.Tr.p.16, line 4–Mot.Tr.p.21, line 15).

The trial judge denied the motion, finding: (1) the parties agreed the State's conduct was not intentional; (2) McCrae's prior charges/convictions were largely inadmissible due to their age; (3) the information was unknown to State and thus was not suppressed; and (4) McCrae's testimony was immaterial to guilt because it was the testimonies of the four victims which proved Appellant's guilt. (Mot.Tr.p.22, line 16–Mot.Tr.p.26, line 1).

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a mistrial after the judge revealed to jurors that Appellant was also indicted for three counts of third-degree criminal sexual conduct with a minor and forgery because the trial judge informed the jurors the State was proceeding on only the charge of second degree criminal sexual conduct with a minor and instructed them indictments are notice documents which are not evidence of the commission of a crime. Further, any alleged error in the admission of those charges was rendered harmless because the underlying behavior which merited those charges was introduced through the State's trial witnesses.

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 appellant; (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); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "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. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). 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); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an

issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late."). A party may not argue one issue at trial and a different issue on appeal. State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000). Additionally, an issue conceded at trial cannot be later argued on appeal. See State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); also State v. Bryant, 372 S.C. 305, 315–16, 642 S.E.2d 582, 588 (2007) (where defendant conceded below that the court's ruling was not prejudicial, he may not later assert on appeal that the same ruling was prejudicial).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller at 171, 731 S.E.2d at 320.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme

measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524. 728 S.E.2d at 496.

Initially, the State notes this issue is not preserved for appellate review. Trial counsel did not request a mistrial, specifically stating his motion was "definitely not for a mistrial." Accordingly, the trial judge could not have erred for failing to grant a motion which was never before him. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

On the merits, the trial judge's decision to proceed with the trial was proper in the situation. Before a formal motion was made, the trial judge issued a curative instruction to the potential jurors informing them he was mistaken about the other indictments against Appellant, the jury should disregard his statements, and indictments are merely notice documents and not evidence of a defendant's guilt. Accordingly, these corrective instructions cured any error. See State v. Weaver, 361 S.C. 73, 90, 602 S.E.2d 786, 794–95 (Ct. App. 2004) ("Generally, a trial judge's curative instruction is deemed to cure any error."); Council, 335 S.C. at 13, 515 S.E.2d at 514 (stating a trial judge should exhaust all other methods to cure prejudice before aborting an ongoing trial).

Finally, any alleged error in failing to order a mistrial is ultimately harmless in the case because a new set of jurors would still have been made aware that Appellant was behind other incidents of sexual assaults against minors and the alleged forgery of the deed. A.R., T.H., and D.B. all testified about their sexual assaults, the conduct underlying the other charges of CSC, at

trial and would have provided the same testimonies in any new legal proceeding. Moreover, the allegations of forgery would also have been presented in any new legal proceeding because discussion of the forged deeds was a central pillar of trial counsel's strategy. Accordingly, the trial judge's statements about Appellant's other indictments was merely cumulative to the evidence underlying those charges which would have been presented in any new proceeding. See Heller at 171, 731 S.E.2d at 320.

II.

The trial judge did not err in admitting the testimony of witnesses A.R., T.H., and D.B. because it was admissible evidence of a prior scheme or plan under South Carolina law, including Rule 404(b), SCRE, State v. Wallace, and State v. Lyle.

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). However, prior bad acts may be admissible when they establish: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 32–33, 446 S.E.2d 438, 439 (Ct. App. 1994).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Further,

even though the evidence . . . falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE).

"Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

Appellant argues the Supreme Court of South Carolina's ruling in Wallace is inconsistent with Rule 404(b), SCRE. He fails to recognize both Wallace and Rule 404(b), SCRE are statements of law consistent with Lyle, especially its explanation of common scheme or plan exception. In Lyle, the Supreme Court noted the same exceptions listed in Rule 404(b), SCRE were "well-established exceptions" to the common law rule that "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Lyle, 125 S.C. at 407, 118 S.E. at 806.

The State agrees with Appellant's base assertion that the admission of evidence of a defendant's prior or other bad acts merely to demonstrate his propensity for such a crime is unconstitutional. However, despite Appellant's assertions to the contrary, both federal and state laws recognize the propriety of using such evidence in limited situations in which it holds evidentiary value for the crime for which a defendant is charged. See, e.g., Rule 404, FRE; Rule

404, SCRE. In Lyle, the court specifically recognized guilt of a particular offense may be inferred from its similarities to other offenses when such strong similarities establish such a connection between the crimes that proving the other offenses excludes or tends to exclude the possibility the charged crime was not committed by a defendant. In other words, the Lyle court found prior/other bad act evidence must be relevant to crime for which a defendant is charged. See Alexander, 303 S.C. at 380, 401 S.E.2d at 148 ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). This requirement of relevance has existed in all of Lyle's progeny. See, e.g., Wallace, 384 S.C. at 432–34, 683 S.E.2d at 277–78.

Further, Appellant's argument that the Supreme Court will, in the future, find evidence of other bad acts is inadmissible propensity evidence is highly unlikely. In State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011), a majority of the Supreme Court affirmed this Court's earlier decision in which it found the trial court erred in allowing the State to introduce evidence of a defendant's other bad act based on the decision in Wallace without overruling, abandoning, or modifying the analysis in Wallace in any way. See Fonseca, 393 S.C. at 229, 711 S.E.2d at 906 ("The Court [] properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State's additional sustaining ground, and in so doing anticipated our decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009)." (footnote omitted)). Moreover, in Fonseca this Court did **not** find the prior bad act evidence to be inadmissible under the common scheme or plan exception due to the absence of logical relevancy to some matter at issue like intent or motive. State v. Fonseca, 383 S.C. 640, 649–50, 681 S.E.2d 1, 5–6 (Ct. App. 2009). Instead, the Court expressly determined the common scheme or plan evidence was not admissible in Fonseca's case because "[t]he State

provide[d] no compelling argument **of any similarities** between the two occurrences, or any argument to overcome the fact that the incidents [were] remote in time." Fonseca, 383 S.C. at 649, 681 S.E.2d at 5. Thus, as the Supreme Court directly recognized in its Fonseca opinion, this Court's analysis in Fonseca was fully consistent with its subsequent analysis and decision in Wallace. Fonseca, 393 S.C. at 229, 711 S.E.2d at 906.

Because the proper use of evidence of other bad acts is recognized under both federal and state law, the trial judge did not err in admitting evidence of Appellant's other bad acts pursuant to Rule 404(b), SCRE.

III.

The trial judge did not err in finding the testimony of witnesses A.R., T.H., and D.B. were admissible as evidence of Appellant's prior bad acts when the incidents against Victim and the witnesses were more similar than dissimilar. Due to the close degree of similarity among the bad acts, their probative value substantially outweighed the danger of unfair prejudice to Appellant.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). An abuse of discretion occurs when the trial judge's conclusions either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). Furthermore, in reviewing such a ruling, the trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339–40, 665 S.E.2d 201, 207 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594

(Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The similarity between prior bad acts and the crime charged is particularly important when determining whether the prior bad act is admissible as evidence of a common scheme or plan. Specifically, the Supreme Court of South Carolina has held that when determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity. "Such evidence is relevant because proof of one is strong proof of the other." Wallace, 384 S.C. at 433, 683 S.E.2d at 277–78. "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id., 384 S.C. at 433, 683 S.E.2d at 278.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." State v. Collins, 409 S.C. 524, 534, 763

S.E.2d 22, 28 (2014) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

The trial judge did not abuse his discretion in admitting Appellant's prior convictions into evidence. The Supreme Court of South Carolina specifically requires a "close degree of similarity" between the prior bad acts and a defendant's charged crime before evidence of the former can be admissible at trial: to be admissible under Rule 404(b), SCRE, a defendant's prior bad acts must be similar to the crime with which he is charged, or else they would be irrelevant under Rule 401, SCRE. See, e.g., Wallace, supra; Cheeseboro, supra; Wilson, supra. The Court has often found that the probative value of evidence of similar prior bad acts outweighs the danger of unfair prejudice to a criminal defendant, even in situations in which the prior bad acts were convictions similar to one for which the defendant was on trial. See, e.g., Cheeseboro, supra; State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (finding the trial judge did not err in allowing evidence of defendant's two prior burglary convictions during his trial for first-degree burglary because they were offered to prove a statutory element of the charge).

In the case sub judice, Appellant's other alleged assaults shared striking similarities with his current charges, including: (1) the ages of the victims; (2) the locations of the assaults, with all victims experiencing assaults in both of Appellant's church offices; (3) the designation of the assaults as private "prayer sessions," (4) Appellant's claims that the sessions would cure the victims of any "ailments" and protect them from harm; (5) all four victims were active participants of the churches and attended services and meeting at least three nights a week; (6) Appellant abused the victims on his desks; (7) Appellant began his patterns of assault with each girl with inappropriate touching of their vaginas, which escalated to sexual intercourse with

K.R., A.R., and D.B.; (8) the three victims who saw Appellant's penis reported the same unique pigmentation issue; (9) the victims were abused during the same general time period.

These similarities, and others, show Appellant engaged in common scheme with each of the victims in which he used religion, his position of trust, and the promise of divine favor to abuse each of the teenage victims. The probative value of the victims' testimonies describing a nearly identical common scheme of abuse far outweighed the danger of unfair prejudice to Appellant. See Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."). Moreover, to the extent Appellant argues the prejudicial effect of admitting the other bad act evidence substantially outweighed its probative value, this argument was not made to the trial judge and is not preserved for appellate review. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Accordingly, the trial judge did not err in admitting the testimonies regarding Appellant's other bad acts as evidence of a common scheme or plan.

IV.

The trial judge did not err in issuing an Allen charge because the charge was addressed to all three groups of jurors: those in favor of finding Appellant guilty, those opposed, and the individual who refused to vote. Moreover, the judge did not identify the juror who refused to vote, he instructed all jurors to keep an open mind and consider the positions of the other jurors, and he told jurors that if they failed to reach a unanimous decision a new jury would be selected and the State would retry the case.

"Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence only if that failure was prejudicial to the defendant. State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011).

"An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments." State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), aff'd 387 S.C. 310, 692 S.E.2d 895 (2010). "Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." Tucker v. Catoe, 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)).

"In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel." Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). "Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views." Id. "A trial judge has a duty to urge, but not coerce, a jury to reach a verdict." Id. In Tucker, the Supreme Court of South Carolina adopted the standard established by the

United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. Those factors are:

> (1) Whether the charge spoke specifically to the minority juror(s);
> (2) The language of the charge, including statements such as "You have [] to reach a decision in this case";
> (3) Whether the trial judge inquired into the jury's numerical division, a question generally considered coercive; and
> (4) Weighing the length of time between the issuance of the Allen charge and the jury's return of a verdict (with verdicts returned "shortly after" the supplemental charge suggesting a possibility of coercion) against trial counsel's failures to object either to the charge itself or an inquiry whether the jurors believed further deliberation would result in a verdict.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237).

Viewed in conjunction with the Lowenfield factors, the trial judge's Allen charge was not unconstitutionally coercive. The trial judge spoke to both the majority and minority jurors, without knowledge of which jurors supported either verdict, and asked them to consider the positions of the other side. The trial judge knew the numerical breakdown of the jury, but did not inquire into such in open court because the information was offered freely in the jury's note. He informed the jurors: (1) he was not trying to change their minds; (2) it was entirely possible the jurors would not change their votes even after consider the other jurors' opinions; (3) if the jurors were unable to reach a unanimous verdict, the court would obtain a new jury and retry the case; and (4) he would not force jurors to reach a unanimous decision if they did not reach one after further deliberation. When speaking to the unknown juror who refused to vote either way, he did say the verdict had to be "unanimous one way or the other," but he also stated he did not care whether the juror voted for guilty or not guilty and that the act itself of voting was the only necessity for moving forward with the case. Viewed in conjunction with his statements to the entirety of the jurors, the trial judge clearly communicated he was not forcing any of the jurors, including the holdout, in any specific manner.

The final factor, the length of time between the Allen charge and the jury's verdict, also supports its constitutionality. While it is true the jury deliberated for only thirty-four minutes after receiving the charge, the pre-Allen deliberations lasted less than three hours and were impeded by a juror who refused to participate in the voting process. Given the post-Allen deliberations constituted nearly twenty percent of the jury's deliberation time and included all twelve jurors' participation, the thirty-four minute deliberation period was reasonable in the situation.

In Tucker, the Supreme Court of South Carolina stated the hour and a half post-Allen deliberation period was a "relatively short period of time" in that case because deliberations began at 1:33 p.m. on the first day, the jury became deadlocked around 5:00 p.m. that same day, and the jury received an Allen charge around 11:00 the following morning, returning with a verdict around 12:27 p.m. In total, the jury deliberated for approximately eight and a half hours, over half of that deadlocked before receiving the Allen charge. Id. at 485–88, 494, 552 S.E.2d at 713–14, 718. Here, unlike Tucker, the post-Allen discussions constituted a significant portion of the jury's deliberations and included a newly-participating juror. Also unlike Tucker, the jurors here spent a minority of the deliberations deadlocked.

Accordingly, the trial judge did not err in issuing his Allen charge.

V.

The trial judge properly denied Appellant's motion for a new trial based on an alleged Brady violation of failing to disclose witness Ulanda McRae's prior criminal history because the State was unaware of said history, did not suppress the information, and the evidence was immaterial to Appellant's guilt or punishment because McRae's testimony was cumulative to that of other trial witnesses.

Under Rule 5(a)(1)(C), SCRCrimP:

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

Under Rule 5, SCRCrimP, the trial court has discretion to determine what remedy, if any, is necessary to protect a defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996). The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See Newell, 303 S.C. at 476, 401 S.E.2d at 423 (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004); see also Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

"In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable

probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). This Court in Kennerly further explained: "In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) ("Evidence is not considered 'material' if the defense discovers the information in time to adequately use it at trial."). Further, "[t]he lack of demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial." 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also, Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court's failure to suppress evidence of a defendant's oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them, was upheld where the defendant was permitted to view and copy the prosecution's file and did not request a continuance or recess to review the prosecution's file).

In the instant case, Appellant fails to prove McCrae's criminal history rose to the level of a Brady violation. The record indicates the State was unaware of the criminal history.[12] Further, because the state was unaware of McCrae's record, the evidence was not suppressed by the

[12] In his brief, Appellant argues the State's "inadvertent oversight" was irrelevant in determining whether a violation occurred and cites to Gibson v. State, 334 S.C. 515, 528, 514 S.E.2d 320, 326 (1999) to support his proposition. (Br. of Appellant p.38). However, Gibson involved a factually-distinguishable situation in which the State disclosed some, but not all of the exculpatory information in its possession. Gibson, 334 S.C. at 526–27; 514 S.E.2d at 325–26.

prosecution. Finally, and most importantly, the evidence was immaterial to Appellant's conviction because it did not impact the credibility of the four victims' testimonies. Notably McCrae's testimony and criminal record were not even relevant to Appellant's theory of the case: trial counsel never alleged McCrae was involved in the property dispute which purportedly caused the victims to report their abuse. McCrae was an unimportant witness whose testimony was cumulative to other evidence presented at trial. Accordingly, the trial judge did not err in finding the State's failure to discover and disclose McCrae's criminal history was not a Brady violation justifying a new trial for Appellant. See Gathers, 295 S.C. at 481, 369 S.E.2d at 143 (1988). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

VI.

This Court should deny Appellant's request for a new trial based on the Cumulative Error Doctrine because said theory is not recognized under South Carolina law. Further, the issue is not preserved for appellate review because Appellant failed to present this ground for relief to the trial judge.

Appellant argues this Court should grant a new trial on the basis of the cumulative error doctrine. This ground was neither raised at trial nor in the motion for new trial and is therefore not preserved for review. The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)

Nonetheless, the cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.; see also State v. McEachern, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a criminal defendant to a fair trial, not a perfect one. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Further, our courts have addressed the issue of an unpreserved cumulative error doctrine, concluding the doctrine is not recognized when Appellant asks the court to consider any

unpreserved issues for review. See State v. Beekman, 405 S.C. at 238, 746 S.E.2d at 490 ("our appellate courts do not apply the plain error rule"); State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting appellant clearly sought for the appellate court to apply the plain error rule and stating as follows: "This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review. ") As in Beekman and Sheppard, Appellant asks this court to apply the plain error doctrine by combing the record for issues and arguing for the first time on appeal the cumulative effect of these matters deprived him of a fair trial.

Further, despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance. When the trial judge informed the jurors of the additional indictments against Appellant, he informed the jurors he was mistaken about those indictments and to disregard his earlier statements. The State presented relevant evidence of Appellant's other bad acts, and the trial judge properly found said evidence admissible pursuant to Lyle, Wallace, and Rule 404(b), SCRE. When the jurors were unable to reach a verdict, largely because a juror refused to vote, the trial judge issued an Allen charge consistent with state and federal jurisprudence. Finally, the trial judge correctly found the State's failure to disclose McCrae's criminal was not a meritorious Brady violation because the State was unaware of said history and it was ultimately irrelevant to the testimonies of Appellant's four victims.

Appellant's attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. This case does not warrant reversal on cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal

defendant to a fair trial, not a perfect one." Mitchell, 330 S.C. at 199-200, 498 S.E.2d at 647-48 (finding reversal on cumulative error doctrine not warranted). In the case at hand, Appellant received a fair trial.

CONCLUSION

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 2, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-001264

THE STATE, ...RESPONDENT,

v.

LARRY DURANT, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served this 2nd day of January, 2018.

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ATTORNEY GENERAL

January 2, 2018

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
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RE: State v. Larry Durant – Appellate Case No. 2016-001264

Dear Mr. Yarborough:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher
Assistant Attorney General
Bar Number 100231

WFS/
Enclosures

cc: Honorable Jenny A. Kitchings
(original and one enclosed)
Victim Advocacy Division