

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-000214

THE STATE,

Respondent,

v.

CARLOS A. RUIZ,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

ARGUMENT7

 The issue of whether the testimony of Letrice Smalls was improper bolstering or irrelevant was not preserved for appeal because Appellant did not make a specific, contemporaneous objection to bolstering and he did not receive a ruling to his objection for relevance. Even if Appellant successfully preserved the issue for appeal, Appellant did not suffer any prejudice from the contested testimony and any potential error was harmless because Appellant elicited the same testimony from Letrice Smalls on cross examination and from Appellant’s own witness, Victim’s Mother.

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases:

<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E.2d 691 (2003)	9
<u>State v. Freiburger</u> , 366 S.C. 125, 620 S.E. 2d 737 (2005)	10
<u>State v. Kelly</u> , 319 S.C. 173, 460 S.E.2d 368 (1995)	13
<u>State v. Key</u> , 256 S.C. 90, 180 S.E.2d 888 (1971).....	14
<u>State v. King</u> , 367 S.C. 131; 623 S.E.2d 865 (Ct. App. 2005).....	13
<u>State v. Kirton</u> , 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008).....	14
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013)	15
<u>State v. McKinney</u> , 258 S.C. 570, 190 S.E.2d 30 (1972)	14
<u>State v. Mitchell</u> , 286 S.C. 572, 336 S.E.2d 150 (1985).....	14
<u>State v. Prioleau</u> , 345 S.C. 404, 548 S.E.2d 213 (2001).....	10
<u>State v. Russell</u> , 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).....	10
<u>State v. Sheppard</u> , 391 S.C. 415, 706 S.E.2d 16 (2011)	10
<u>State v. Smith</u> , 245 S.C. 59, 138 S.E.2d 705 (1964).....	14
<u>State v. Thompson</u> , 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003).....	13, 14
<u>State v. Wannamaker</u> , 346 S.C. 495, 552 S.E.2d 284 (2001)	11

STATEMENT OF ISSUE ON APPEAL

The issue of whether the testimony of Letrice Smalls was improper bolstering or irrelevant was not preserved for appeal because Appellant did not make a specific, contemporaneous objection on bolstering and he did not receive a ruling to his objection for relevance. Even if Appellant successfully preserved the issue for appeal, Appellant did not suffer any prejudice from the contested testimony and any potential error was harmless because Appellant elicited the same testimony from Letrice Smalls on cross examination and from Appellant's own witness, Victim's Mother.

STATEMENT OF THE CASE

In January 2017, the Charleston County Grand Jury indicted Appellant for three counts of criminal sexual conduct with a minor in the first degree and three counts of criminal sexual conduct with a minor in the second degree. On January 9-13, 2017, a jury trial was held in the Charleston County Court of General Sessions with the Honorable Roger M. Young, Sr., presiding. Appellant was represented by Mary Ford, Esquire, and Nicholas Smit, Esquire of the Charleston County Public Defender's Office. The Respondent (the State) was represented by Assistant Solicitors Deborah Herring-Lash and Nina Savas of the Ninth Circuit Solicitor's Office. Court interpreters were utilized at trial, because Appellant did not speak English. At the conclusion of trial, the jury convicted Appellant of all six counts. Following the verdict, the trial judge sentenced Appellant to three concurrent life terms for each count of criminal sexual conduct with a minor in the first degree, and three concurrent terms of twenty years' imprisonment for each count of criminal sexual conduct with a minor in the second degree. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

The victim (Victim) in this case, who was born in 2003, lived with her mother (Mother) and Appellant from 2010 to 2015. (Tr. 119, 408, 443). Mother began dating Appellant in 2009. (Tr. 487). Shortly thereafter, Appellant began spending the night occasionally in Victim and Mother's home. (Tr. 488). In 2010, Appellant moved in with Victim and her Mother. (Tr. 443). On February 13, 2015, when Victim was eleven years old, she reported to school resource officer Tiffany Crider that she had been sexually assaulted by Appellant. (Tr. 399, 405). Upon hearing Victim's disclosure, Crowder contacted the Charleston County Department of Social Services (DSS). Crider and DSS then spoke with the Victim's family, including Mother and Appellant. (Tr. 407). As a result of Victim's disclosure, Victim and her brothers and sister were placed into emergency protective custody. (Tr. 408).

On March 16, 2015, a forensic interview was conducted of Victim by Dr. Donald Elsey. (Tr. 419, State's Exhibit #42). During Victim's interview and at trial, Victim detailed multiple instances of sexual abuse by Appellant. Victim testified that she was six years old when Appellant moved in with her family and began to sexually abuse her. (Tr. 123, 132). Victim could not remember specific dates, but did testify to specific occasions of abuse. On one such occasion Appellant inserted his fingers into Victim's vagina and kissed her breasts. (Tr. 126-27). On another occasion Appellant performed cunnilingus on Victim in her bedroom. (Tr. 130-31). On yet another occasion, Victim testified Appellant lured her into his bedroom with the promise of giving her candy and performed cunnilingus on her and inserted his penis into her vagina. (Tr. 132-34). On occasions when Appellant stuck his penis into Victim's vagina, Victim alleged that Appellant would "eventually pull it out, and then it would come out" or he "would have me use my hands", until "finally that white stuff came out." (Tr. 156, lines 9-16).

Victim testified about details of Appellant's room, including a mirror on the ceiling and a diaper changing pad that would be placed on the bed underneath Victim when Appellant abused her. (Tr. 134-35, 142-43). Victim testified that Appellant would use both male and female condoms after she started having her period. (Tr. 144-45, 147). Additionally, Appellant would use a cream out of a tooth paste-like tube and place it on the Victim's vagina. (Tr. 148-49). Occasionally Appellant would use gloves during sexual encounters and afterward he would put his condom inside the glove and put it deep into the kitchen trash. (Tr. 160). Appellant also stored food in his room that he would withhold from Victim and her siblings in exchange for sexual acts with Victim. (Tr. 151-52). Victim also accused Appellant of shaving her pubic hair. (Tr. 154-55).

In 2012, Appellant was involved in a severe car accident. (Tr. 446-47). Victim testified that the assaults completely stopped during his recovery. (Tr. 157). Once the assaults resumed, Appellant would no longer use his penis on a regular basis, but would usually perform oral sex on Victim. (Tr. 158). When Appellant did try to use his penis after the accident "he never used it as he used to" and Victim did not "think he was successful" when he did try. (Tr. 158, lines 18-22). Mother testified that Appellant's penis no longer worked, but he did utilize a number of devices to get his penis to work again. (Tr. 452-53). Victim's brother and sister both confirmed that Victim would occasionally be alone with Appellant in his room and then emerge with food. (Tr. 307-08, 328-29). Victim's sister stated that once she looked underneath Appellant's door frame and witnessed Appellant on top of Victim "kind of vibrating" (Tr. 331-32, line 10).

At trial, the State called Letrice Smalls, a DSS foster care worker, to testify regarding her experience in abuse cases where one parent is non-abusive and non-believing of the abused child, and DSS requirements for returning an abused child to a non-abusive parent. Appellant

objected to Smalls' testimony on the grounds of relevance. (Tr. 353). Upon hearing Appellant's objection, the trial court inquired: "Is she offering some sort of opinion? What is she testifying about?" (Tr. 353, lines 23-24). The State responded: "That it's not unusual at this point the children remain in foster care." (Tr. 353-54, lines 25-1). The trial court did not rule on the objection and Smalls proceeded to answer the State's remaining question. (Tr. 354). Appellant did not object to the final question by the State or Smalls' answer to that question. (Tr. 354). On cross examination of Smalls, Appellant asked at least four separate questions about what Mother would have to do to meet DSS requirements to have her children returned. (Tr. 355-58). Specifically, Appellant's questions were tailored to inquire whether Mother believed Victim, and how that belief or non-belief affected her status with DSS. (Tr. 355-58).

Appellant presented evidence in his own defense. Appellant's primary witness was Mother. In Mother's direct testimony she testified on multiple occasions that she did not believe that Victim had been sexually abused by Appellant. (Tr. 472-74). Mother also said it was her understanding that she "had to say that I believed [Victim] and I had to say things happened that way." (Tr. 485, lines 17-19). Mother went on to say that DSS "tried to pressure me many different ways, a lot of times" to say that she believed Victim. (Tr. 486, lines 12-13). Appellant continued to emphasize this theme in closing argument. Appellant argued:

You heard a lot from [Mother] and from Ms. Smalls, the DSS worker, about [Mother] not being able to have the kids back, and that's why she's such a credible witness, because all she has to do is say the magic words: I believe. It doesn't have anything to do with the fact that [Appellant] is currently staying with her because he wasn't there for months and months and months, and they never would give her the kids back. They wouldn't give her kids back now if [Appellant] wasn't there. She has to say, I believe.

Many people may think, just as a parent, you should say – even if you don't believe, you should say it to get your kids back, and so maybe you believe that's the right thing to do as a parent. Maybe that's what [Mother] should have done,

but [Mother] can't do that because she can't lie. She can't lie, especially when it comes to having to sacrifice someone.

(Tr. 553, lines 1-17). Appellant's argument was essentially that Mother did not believe Victim and neither should the jury. Appellant argued that Mother wanted her children back and all she had to do to satisfy DSS was to say she believed her daughter, but she could not and would not do that, because she thought Victim was lying. At the conclusion of trial, the jury found Appellant guilty on all six counts. Appellant then filed his appeal.

ARGUMENT

I.

The issue of whether the testimony of Letrice Smalls was improper bolstering or irrelevant was not preserved for appeal, because Appellant did not make a specific, contemporaneous objection on bolstering and he did not receive a ruling to his objection for relevance. Even if Appellant successfully preserved the issue for appeal, Appellant did not suffer any prejudice from the contested testimony and any potential error was harmless, because Appellant elicited the same testimony from Letrice Smalls on cross examination, and from Appellant's own witness, Victim's Mother.

Appellant contends the trial judge erred in admitting the testimony of Letrice Smalls regarding Victim's status in foster care, because her testimony was irrelevant and it improperly bolstered the testimony of Victim. However, Appellant did not properly preserve this issue for appeal because Appellant did not make a specific, contemporaneous objection on the grounds of improper bolstering. Appellant did object to the State's initial question regarding Victim's foster care status based on relevance, but did not receive a ruling from the trial judge. Appellant then failed to object to the State's second question on the same subject or Smalls' answer. Even if we assume that Appellant properly preserved this issue for appeal, Appellant did not suffer any prejudice from the testimony, because as part of his trial strategy, he elicited the same testimony on his cross examination of Smalls and again through Mother in Appellant's case in chief. Any possible error caused by admission of this testimony is therefore harmless. Appellant's convictions and sentences should be affirmed.

A. Improper Bolstering and Relevance were not Appropriately Preserved for Appeal

Appellant contends the trial court erred in admitting the testimony of Letrice Smalls regarding Victim's status in foster care and the standards utilized by DSS in returning children to a non-abusive parent. Appellant did not properly preserve this issue for appeal. In analyzing

whether Appellant properly preserved this issue, it is instructive to review the relevant portion of the record. The following exchange occurred during the State's direct examination of Smalls:

Assistant Solicitor Herring-Lash: And have you worked with lots of families where the supportive parent of – the non-abusive parent is non-supportive and non-believing?

Deputy Public Defender Ford: Objection. I'm not quite sure where she's going.

Assistant Solicitor Herring-Lash: That's it about.

Deputy Public Defender Ford: Well, relevance to this case, Your Honor.

The Court: Is she offering some sort of opinion? What is she testifying about?

Assistant Solicitor Herring-Lash: That it's not unusual at this point the children remain in foster care.

Letrice Smalls: They remain in foster care? Yes, ma'am.

Assistant Solicitor Herring-Lash: What would have to happen for the Department of Social Services to return them?

Letrice Smalls: There would have to be a change of circumstances. Currently [Appellant] resides in the home with [Mother], and the other issue is that [Mother] doesn't believe [Victim], and because of this, the agency would feel that she's unable to protect.

Assistant Solicitor Herring-Lash: Those are all the questions I have, Ms. Smalls. Thanks. Please answer any questions Ms. Ford may have.

(Tr. 353-54, lines 15-14). The aforementioned questions and answers are the testimony that Appellant contends was admitted in error by the trial judge. In the aforementioned exchange, Appellant does not object to Smalls' testimony based on improper bolstering. However, Appellant contends in his brief that trial counsel did in fact object to Smalls' testimony based on improper bolstering or vouching for Victim. This is a mischaracterization of the record by Appellant. A thorough review of the record clearly shows that Appellant raised these objections

to the testimony of Dr. Carol Swieciki, the expert witness called immediately after Smalls, but not to Smalls' testimony. The relevant portion of the record reads as follows:

The Court: Folks, we've got two more witnesses that we want to get in today. One of them's real short. One may take in the neighborhood of half hour, 30 minutes. What I want to do right now is take a break to use the restroom, if you need to make a phone call, but rather than 5:00, it might be somewhere 5:30, maybe 6:00, but – I hope not that late, but we want to get these **two witnesses** in today, okay?

....

The Court: Are you challenging the qualifications **of the expert**?

Deputy Public Defender Ford: No, in general, I'm not challenging qualifications. I would object to the testimony as essentially vouching or bolstering, but—

The Court: Assuming that she's correct and testifies, he or she, it won't be, but I guess what I'm getting at is are you going to challenge this person's expertise? Do you want to have a hearing?

Deputy Public Defender Ford: No, I don't challenge her qualifications.

(Tr. 348-49, lines 25-24) (emphasis added). The two remaining witnesses for the day were Smalls and Dr. Swieciki. Considering that the State only offered Dr. Swieciki as an expert, it is clear that Appellant's objection applied to Dr. Swieciki's testimony and not Smalls' testimony. Appellant even acknowledges this fact in his brief when he declares Smalls' testimony "was irrelevant because the opinion of a DSS witness (**a lay one at that**) that the alleged victim was telling the truth did not make it more or less probable that the jury should believe appellant was guilty." (Initial Brief of Appellant p. 13) (emphasis added).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). 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. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). “The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal.” State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). “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).

Here, Appellant failed to properly preserve any issues for appeal. Appellant failed to preserve the issue of Smalls’ testimony being improper bolstering because he did not make an objection on those grounds during Smalls’ testimony. The record clearly shows that the trial judge anticipated the jury only hearing two additional witnesses that particular day. (Tr. 348-49). The trial judge then asked Appellant if he had any objection to the State’s expert. (Tr. 349). The Appellant objected to the expert’s testimony on the basis of improper bolstering. (Tr. 349). The State only offered or even attempted to offer one of the remaining witnesses as an expert. (Tr. 349-83). The State offered Dr. Swieciki as an expert in the field of child abuse dynamics (Tr. 361-62). Appellant renewed his objection to Dr. Swieciki’s testimony when she testified and the objection was overruled. (Tr. 361). Appellant acknowledges in his brief that Smalls was merely a lay witness, not an expert. (Initial Brief of Appellant p. 13). Appellant never objected to Smalls’ testimony based on improper bolstering. (Tr. 350-58). Appellant’s only objection to Smalls’ testimony was on grounds of relevance. (Tr. 353). The issue of improper bolstering was never raised to the trial judge regarding Smalls’ testimony and it was not ruled upon. Therefore, Appellant’s alleged error of improper bolstering is not preserved for appeal.

Appellant also failed to preserve the issue of Smalls' testimony being relevant. Appellant first objected on the vague grounds "I'm not quite sure where she's going", then Appellant clarified that he was objecting based on relevance. (Tr. 353, lines 18-22). However, Appellant did not receive a ruling from the trial judge, nor did he object to the solicitor's follow up question or Smalls' answer¹. The trial judge asked the State about their purpose in asking the question, but he did not provide a ruling. The State then asked one final question of Smalls, which Smalls answered. Neither the State's follow up question, nor Smalls' answer were objected to by Appellant. Because the Appellant did not properly raise the issue to the trial judge and did not receive a ruling, the issue of relevance is not properly preserved for appeal.

Even if we assume for the sake of argument that Appellant was referring to the testimony of Smalls when he made his earlier objection to bolstering, Appellant's objection was not contemporaneous. Appellant cannot make an anticipatory objection to all future potential issues. An Appellant can make a motion *in limine*, but any ruling by the trial judge on that motion is not final and a contemporaneous objection must still be made at trial. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Here, Appellant didn't make a contemporaneous objection to the issue of bolstering and he didn't receive a ruling on the issue of relevance. Therefore, Appellant's issues are not preserved for appeal. Appellant's convictions and sentences should be affirmed.

B. Lack of Prejudice to Appellant and Harmless Error

Even if this Court determines that Appellant properly preserved his argument for appeal, Appellant did not suffer any prejudice from the contested testimony because he elicited the same testimony from Smalls on cross examination and through Mother on direct examination. It is

¹ Even if Appellant had received a ruling on his objection, Smalls' testimony was clearly relevant evidence, because Appellant made the DSS requirements imposed upon Mother to get her children back a central theme of his defense. (Tr. 355-56, 485-86, 553).

instructive to review the questions that were asked of Smalls by Appellant and the questions asked of Mother. The following questions were asked of Smalls by Appellant on cross examination:

Deputy Public Defender Ford: In this particular case, DSS won't even allow [Mother] the opportunity to do the other conditions until she admits that she believes [Victim]?

Smalls: I wouldn't say that DSS wouldn't, but the experts with the LCC made a recommendation that clarification needs to be completed before parenting.

Deputy Public Defender Ford: So assuming [Appellant] could be out of the house, all [Mother] has to do is say, I believe [Victim]?

Smalls: And then there's also the issue that there's been a finding against [Appellant].

....

Deputy Public Defender Ford: Because [Mother] doesn't believe. We're talking about [Mother's] parental rights?

Smalls: That is part of the issue, yes.

Deputy Public Defender Ford: She would have been able to get her kids back, more than likely, a long time ago if she had just said, I believe [Victim], and [Appellant] is not in the house?

Smalls: Because I'm not an expert in that, I'm not exactly sure. I can't say yes or no. I'm not sure.

(Tr. 355-56). Appellant clearly elicits more detailed responses regarding how DSS determines whether an abused child should be returned to a non-abusive parent than he contends were improperly allowed by the trial judge when the State asked similar questions. Appellant elicited similar testimony again when he called Mother as a witness in his defense. During Mother's direct examination, she was asked the following questions:

Deputy Public Defender Ford: Do you want your children back?

Mother: Of course I do.

Deputy Public Defender Ford: And why won't they give you your kid's back? What was indicated to you?

Mother: Well, because they're saying that I haven't done the clarification.

Deputy Public Defender Ford: What do you need to do to complete the clarification?

Mother: When I began to understand what they wanted, what the clarification was, it was that I had to say that I believed [Victim] and I had to say that things had happened that way.

....

Deputy Public Defender Ford: Do they want you to say that you believe [Victim]?

Mother: They have always pressured me.

Deputy Public Defender Ford: Have you been able to do that for them?

Mother: They have tried to pressure me many different ways, a lot of times.

(Tr. 485-86). Appellant clearly elicits testimony from Mother about why DSS will not return her children to her. Appellant then emphasized the fact that Mother did not believe Victim in closing. (Tr. 553). Appellant repeatedly emphasized that Mother should be considered a credible witness, because DSS told her she merely had to say she believed her child, but even with this incentive Mother could not do that because she could not believe her daughter's lie.

In ruling on the admissibility of evidence, the trial judge has considerable latitude and his ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id. "Whether an error is harmless depends on the circumstances of the particular case." State v. Thompson, 352 S.C. 552,

562, 575 S.E.2d 77, 83 (Ct. App. 2003). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). “Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” Thompson, 352 S.C. at 562, 575 S.E.2d at 83. “Error is harmless when it could not reasonably have affected the result of the trial.” Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)). “The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.” State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008).

As an initial matter, Appellant waived his objection on relevance by not only failing to reserve his previous objection, but also by eliciting the same allegedly offensive testimony in his case in chief. See State v. McKinney, 258 S.C. 570, 190 S.E.2d 30 (1972), State v. Smith, 245 S.C. 59, 138 S.E.2d 705 (1964). However, even if this Court were to find that Appellant properly preserved the alleged error for appeal and did not waive his prior objection, any error did not prejudice Appellant and is therefore harmless. Appellant made the relationship of Mother and DSS a central theme of his defense. After initially objecting to Smalls’ testimony on the basis of relevance, Appellant then proceeded to ask Smalls at least four times about Mother not believing Victim and how that affected Mother getting her kids back. Subsequently, Appellant asked Mother at least four times why DSS had not given her kids back. Appellant completed his strategy by then arguing in closing that Mother simply had to tell DSS she believed Victim to get all of her kids back. However, Appellant argued, Mother could not and would not do this, because “she can’t lie. She can’t lie, especially when it comes to having to sacrifice someone.”

(Tr. 553). The obvious implication from this argument is that Mother did not believe Victim, therefore the jury should not either.

It is therefore disingenuous for Appellant to argue that he was prejudiced in some way by Smalls' testimony. Smalls merely testified that it is DSS procedure not to return a child to a home where the non-abusive parent does not believe the child has been abused². Rather than minimizing this point, Appellant expanded upon Smalls' answers and emphasized them in his defense. Appellant not only expanded on this testimony when he cross-examined Smalls, but he called Mother to directly ask her whether DSS would return her children if she believed Victim. Appellant then used DSS' reasons for not returning Victim and Mother's refusal to comply with DSS requirements as a central pillar of his closing argument. Because Appellant used DSS' standards and Mother's failure to comply with them to his advantage, Appellant was not prejudiced by the admission of Smalls' testimony on direct. Because Appellant actively elicited the allegedly improper testimony in his own defense, any potential error was harmless. Appellant's convictions and sentences should be affirmed.

² This is a far cry from Smalls testifying about the credibility of the Victim and her disclosure as prohibited by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and its progeny.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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February 5, 2018

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APPEAL FROM CHARLESTON COUNTY
The Honorable Roger M Young, Sr., Circuit Court Judge

Appellate Case No. 2017-000214

THE STATE,

Respondent,

v.

CARLOS A. RUIZ,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This fifth day of February, 2018.



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RE: State v. Carlos A. Ruiz
Appellate Case No. 2017-000214

Dear Mr. Dudek:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Please be advised the Initial Brief of Appellant contains personal data identifiers in the form of the victim's month of birth on page 3. Pursuant to the Order of the South Carolina Supreme Court, dated April 15, 2014, entitled RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, this information, along with any other personal data identifiers, must be fully redacted from the Initial Brief of Appellant; the Final Brief of Appellant, and the Record on Appeal in a manner consistent with the order.

Sincerely,

J. Scott Matthews
Assistant Attorney General
Bar # 101464

JSM/ab

Enclosures

cc: ~~H~~onorable Jenny A. Kitchings (original and one enclosed)
Victim Services