STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-196688

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RICHARD BURTON BEEKMAN,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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II. **Appellant's argument that he is entitled to a new trial based on the cumulative error doctrine is not preserved for appellate review. In any event, the cumulative error doctrine is not applicable to Appellant's case where the alleged errors were not, in fact, errors, but even if they were, they were not, independently or collectively, sufficiently prejudicial that they adversely affected Appellant's right to a fair trial.**

STATEMENT OF THE CASE

Appellant was indicted in Pickens County in September 2009 for lewd act upon a minor against Victim 1 (a female child) and criminal sexual conduct (CSC) with a minor in the first degree against Victim 2 (the younger brother of Victim 1). On July 25, 2011, the Honorable G. Edward Welmaker granted the State's motion to consolidate the charges, and Appellant thereafter proceeded to trial. On July 28, 2011, the jury found Appellant guilty of both offenses. Judge Welmaker imposed a sentence of fifteen years for lewd act and thirty years for CSC, with the sentences to run consecutively. A notice of appeal was timely served and filed.

ARGUMENT

Overview of Facts

Appellant met the victims' mother while she was working as a pharmacist at CVS Pharmacy. (R. p. 144-45). She and Appellant began dating after she transferred her employment to Ingle's Pharmacy. (R. p. 145, lines 15-20). The victims' mother, along with the victims, moved in with Appellant around October 2005. (R. p. 146, lines 5-9). She married Appellant on June 3, 2006. (R. p. 146, lines 16-17). The victims' biological father had joint custody of the victims and kept them every other week. (R. p. 146, lines 10-15). In the beginning, Appellant had a good relationship with the victims and spent quality time with them, although the female child (Victim 1) was not at home much since she kept very busy with cheerleading and tumbling activities. (See R. p. 57-59; p. 92-94; p. 146-47). However, on July 7, 2008, Victim 1, who was then twelve years old[1] and "very little" and physically immature for her age, disclosed to her mother that Appellant had sexually abused her earlier that morning. (R. p. 56-76; p. 149-150). The previous night, Victim 1 slept on the couch in the living room. (R. p. 62-63). She slept with blankets and wore underwear, cheerleader bloomers, and pajama pants. (R. p. 65). The television was on the Disney Channel when Victim 1 first tried to go to sleep. (R. p. 65, lines 18-19). Victim 1 had trouble sleeping that night, so her mother gave her half of a melatonin tablet to help her sleep. (R. p. 65-66; p. 173, lines 2-22).

Victim 1 awoke around 4:30 am to find Appellant touching her private area. (R. p. 66-67; p. 90, lines 13-21). The blankets were on the floor and Appellant had pulled her underwear and bloomers down a bit. (See R. p. 67, lines 3-13). Victim 1 recalled that a news program was on the television at the time. (R. p. 68, lines 21-23). When

[1] Victim 1 was fifteen years old at the time of trial. (R. p. 57, lines 3-4).

Appellant realized that Victim 1 was awake, "he jumped up and hesitated and asked where the remote was." (R. p. 68, line 24 – p. 69, line 1). However, the remote was sitting directly in front of Appellant in plain view on the coffee table. (R. p. 69, lines 2-9). Victim 1 grabbed the remote and threw it at Appellant, and Appellant then left the room. (R. p. 69). Victim 1 was "shocked" at what Appellant had done. (R. p. 73, lines 21-23). Later that afternoon, Appellant picked up Victim 1 and her brother from the babysitter's house. (R. p. 70, lines 17-21). As Victim 1 was getting in the truck, Appellant asked Victim 1 if she was "mad at him." (R. p. 70, lines 20-23). Victim 1, still feeling scared of Appellant, did not verbally respond but simply got in the truck. (R. p. 71, lines 2-15). When they arrived at home, Victim 1 stayed in the presence of her brother and waited for their mother to come home. (R. p. 72-74).

Victim 1 told her mother about Appellant's abuse as soon as she "could get her alone." (R. p. 70, lines 1-5). When her mother arrived home from work that evening, Victim 1 immediately pulled her into the bathroom and told her what Appellant had done. (R. p. 75-76). Her mother became "really upset" and decided to take the children to their grandmother's house. (R. p. 76, lines 1-14). Appellant tried to prevent Victim 1 from leaving by stating that she couldn't leave because her room was a mess. (R. p. 76, lines 15-20). Nevertheless, the victims' mother and the children did proceed to the grandmother's house that night, and, in fact, they never returned to live with Appellant. (R. p. 77). Subsequently, Victim 1 told her biological father about the sexual abuse by Appellant and they ultimately reported the incident to the police. (R. p. 77-78). The victim was later placed in counseling as a result of Appellant's abuse. (R. p. 79).

While the victims were living with their grandmother, Victim 1's brother (Victim 2), who was then eight years old and "looked really young," made a disclosure of sexual

abuse by Appellant. (R. p. 57, lines 12-19; p. 72, lines 7-8; p. 79-80; p. 149, line 19). He made this disclosure of abuse immediately after Victim 1 told him, for the first time, what Appellant had done to her. (R. p. 82-83). Prior to making his disclosure, Victim 2 had been "freaking out," in that he had been pulling his hair, hiding in the closet, and crying. (R. p. 80-81; see also p. 131-32). He had also been making drawings of Appellant dying, which Victim 1 found balled up in the trash can. (R. p. 82-83).

Victim 2, who was eleven years old at the time of trial, testified that he and Appellant initially got along "pretty well" and hung out "like buddies." (R. p. 122, lines 10-23). However, their relationship quickly deteriorated after Appellant began sexually abusing him.[2] (See R. p. 122-30). Appellant first touched Victim 2 on his private part (which he referred to as his "worm") underneath his clothes while they were in Appellant's bedroom watching a news program on television. (R. p. 124-25). Appellant told Victim 2 that he shouldn't "tell" because Appellant might get in trouble. (R. p. 125). Appellant touched Victim 2's private part underneath his clothing a second time under similar circumstances, i.e., they were in Appellant's bedroom and the news was on television. (R. p. 125-26). On a third occasion, Appellant forced Victim 2 to touch Appellant's private part underneath Appellant's clothing. (R. p. 126, lines 14-24).

Subsequently, Appellant penetrated Victim 2's "butt" with his penis, which Victim 2 found painful. (R. p. 127-29). This also occurred in Appellant's bedroom while the news was on television. (R. p. 128). During this incident, Victim 2's clothing was pulled down but not removed. (R. p. 128-29). Appellant told Victim 2 not to tell anyone about the incident because Appellant would get in trouble. (R. p. 129, lines 18-25). He

[2] The testimony regarding Appellant's acts of sexual misconduct with Victim 2 prior to the anal penetration were admitted at trial over Appellant's objection. (See R. p. 2-12; p. 37-39; p. 123-24). The admission of these prior bad acts is not being challenged on appeal. See *infra*, p. 17, footnote 5.

also told Victim 2, at some point during these incidents of sexual abuse, that he would hurt Victim 2's family if he told. (R. p. 130, lines 1-6). Victim 2 confessed that, during the time he was being abused by Appellant, he would often sleep in his closet or with his sister so that Appellant would not find him. (R. p. 130-31). Victim 2's mother confirmed this and noted that Appellant "really wanted" Victim 2 to sleep in his own room in his own bed. (R. p. 158, line 18 – p. 159, line 3). She also stated that, prior to Victim 2's disclosure, he had been acting "terrible" and was scratching his skin, banging his head, crying, and saying that he had a "secret." (R. p. 163-64). His mother also saw Victim 2's drawings depicting Appellant dying. (R. p. 164-65).

Following Victim 2's disclosure of Appellant's abuse, his mother immediately called law enforcement and "rape crisis." (R. p. 167, lines 7-16). She testified that both children were subsequently placed in counseling and have remained in counseling to date. (R. p. 169). She also stated that both her children have changed since Appellant's abuse of them. (R. p. 170). She stated that Victim 1 still cries and expresses that she feels "dirty." (R. p. 170, lines 17-18). Meanwhile, Victim 2 is "very paranoid," cries, and sometimes "wishes he could die." (R. p. 170, lines 18-25). He is afraid that Appellant will "come to the house and hurt us." (R. p. 170, lines 24-25). Victim 2 also expressed fear that he was "gay" as a result of the incident. (R. p. 171, lines 4-17; see also p. 190, lines 8-24).

After Victim 2's abuse was reported to law enforcement, he was referred for a forensic interview and for a medical examination. (R. p. 218-314). Victim 2 had a forensic interview with Shauna Galloway-Williams on July 29, 2008. (R. p. 263). Victim 1 also met with Ms. Galloway-Williams. (R. p. 285). At trial, Ms. Galloway-Williams was qualified as an expert in child counseling and forensic interviewing. (See

R. p. 250-52). Ms. Galloway-Williams testified that both victims disclosed sexual abuse to her and both stated that it happened in their home. (R. p. 285-91). The videotape of Victim 2's forensic interview was introduced and published at trial over Appellant's objection. (R. p. 292-93).

Dr. Henderson testified that she conducted a medical examination on Victim 2 on July 31, 2008. (R. p. 221). It was her understanding that the act of sexual abuse involving anal penetration occurred approximately three weeks prior to the exam. (R. p. 235, lines 8-13). Dr. Henderson stated that Victim 2 complained of symptoms including anxiety and sleeping problems. (R. p. 224-25). Dr. Henderson testified that she conducted a rectal examination of Victim 2 which revealed some redness on the outer part of his buttocks area and a little bit of redness on the top part of his penis, but otherwise, the exam was normal. (R. p. 227, lines 8-12). Dr. Henderson stated that in ninety percent of cases where children are abused and there is a history of penile penetration in the rectal area, the rectal examination will be normal. (R. p. 228, lines 3-10). She explained that lacerations, if any, in the rectal area heal "very, very quickly within hours to days;" she also explained that Victim 2 did not experience any bleeding from his rectal area at the time of the abuse, which was not unusual because the area was made to "stretch instead of tear." (R. p. 228-29; see also p. 238). She testified that, assuming the penile penetration occurred on July 6, 2008, it would be very likely that there would have been no evidence of it at the time of the exam on July 31, 2008. (R. p. 229, lines 2-13).

I. **The trial judge did not abuse his discretion in denying Appellant's motion to sever because Appellant's charges were of the same general nature involving connected transactions closely related in kind, place, and character, and the consolidation of the charges did not result in prejudice to Appellant's substantive rights, especially where evidence regarding the other's sibling's abuse would have been admissible in separate trials in any event under Rule 404(b), SCRE and under the res gestae doctrine.**

Standard of Review and Applicable Law

A defendant has "no inalienable right" to be tried separately for each indicted offense when charged with multiple crimes. McCrary v. State, 249 S.C. 14, 38, 152 S.E.2d 235, 247 (1967). A motion for severance or consolidation is addressed to the sound discretion of the trial court. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). The trial judge's ruling on such a motion will not be disturbed on appeal absent an abuse of discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). An abuse of discretion occurs when the trial judge's decision is unsupported by the evidence or controlled by an error of law. State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 395 (Ct. App. 2006). The exercise of the trial court's discretion must be based upon just and proper consideration of the particular circumstances presented in each case. State v. Castineira, 341 S.C. 619, 624, 535 S.E.2d 449, 452 (Ct. App. 2000).

When separately-indicted offenses are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order that the indictments be tried together so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Carter, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) ("Joinder is proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and

(3) require the same or similar proof." (citing City of Greenville v. Chapman, 210 S.C. 157, 41 S.E.2d 865 (1947))); see also Tucker, 324 S.C. at 164, 478 S.E.2d at 265 ("Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced."). "When offenses are interconnected they are considered to be of the same general nature." State v. Grace, 350 S.C. 19, 23, 564 S.E.2d 331, 333 (Ct. App. 2002); see also State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App. 1996).

Argument

In Appellant's case, the trial judge did not abuse his discretion in consolidating the charges against Appellant. First, the indicted charges arose from a single chain of circumstances and were of the same general nature involving connected transactions closely related in kind, place, and character. Each offense involved Appellant's sexual abuse of one of his prepubescent stepchildren. (See R. p. 56-142). The victims were biological siblings and each of the offenses occurred in Appellant's home where he lived with the victims. (R. p. 56-70; p. 120-130). The offenses occurred over a relatively short period of time – at most, within eight months of one another, although there is evidence in the record that the offenses occurred within the same month. (See R. p. 6, lines 7-14; p. 235, lines 8-13; p. 312-13). See State v. Clasby, 385 S.C. 148, 158, 682 S.E.2d 892, 897 (2009) (referring to prior incidents of sexual abuse spanning approximately eight months as occurring "over a relatively short period of time"); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) (consolidation was proper in a case involving "allegations of a pattern of sexual abuse involving the two minor victims" where the charges spanned approximately ten months). Finally, the offenses were provable by

primarily the same witnesses, including Victim 1 and Victim 2, the victims' mother, the victims' biological father, Detective Palis, the victims' cousin, and the forensic interviewer.[3] (See R. p. 56-192; p. 198-217; p. 246-317). As the trial judge found, there would be a "great overlap of evidence" had there been two separate trials. (R. p. 37, lines 1-2). See State v. Caldwell, 378 S.C. 268, 278, 662 S.E.2d 474, 479-480 (Ct. App. 2008) ("While the alleged crimes involved pertained to three separate children necessitating some individual evidence as to each of the charges, much of the evidence produced at trial pertained to each of the separate charges. Thus, the separate offenses are proved by the same evidence. We find the fact that some additional evidence from the individual victims may be necessary to prove the individual crimes is not fatal to the joinder of the charges."). In addition, as in State v. Grace, the charge against Victim 1 was "integrally connected" to the charge against Victim 2 because it was "the vehicle through which" the other charge was discovered. Grace, 350 S.C. at 24, 564 S.E.2d at 334.

The trial judge's consolidation of the charges was consistent with principles of judicial economy while also ensuring that the minor victims would not be unnecessarily subjected to repeated appearances in court for multiple trials to testify multiple times about the abuse they suffered at Appellant's hands. See Jones, 325 S.C. at 315-316, 479 S.E.2d at 520 (finding the trial judge did not abuse his discretion in granting the State's motion to have a consolidated trial where "the offenses charged were of the same general nature involving allegations of a pattern of sexual abuse involving the two minor victims"); see also Grace, 350 S.C. at 24, 564 S.E.2d at 333 ("Under the facts of this case

[3] Victims 1 and 2 could have properly testified at one another's trials pursuant to the "time and place" exception and regarding any personal observations of the other sibling as would be relevant to the allegations. (See R. p. 18-19; p. 79-85; p. 131-142). See Rule 801(d)(1)(D), SCRE. Notably, the only witnesses who may not have been necessary in separate trials were Deputy Baker, who took only Victim 1's statement, and Dr. Henderson, who performed a physical examination of only Victim 2. (See R. p. 193-97; p. 218-38).

the circuit court did not abuse its discretion by consolidating the charges for trial. Moreover, judicial economy was fostered by the consolidation.").

"Further, there has been no showing of prejudice resulting from the trial judge's decision" to consolidate the charges. Jones, 325 S.C. at 315, 479 S.E.2d at 520. Indeed, the trial judge ensured Appellant would not be prejudiced as a result of joinder of the charges by instructing the jurors that each charge had to be considered separately and independently without reference to the other charge. (See R. p. 343, lines 10-18; p. 351, line 12 – p. 353, line 7; see also p. 333, lines 15-24). By expressly instructing the jury to consider the charges separately, the trial judge eliminated any prejudice that could have resulted from consolidation of the charges. See State v. Anderson, 318 S.C. 395, 400, 458 S.E.2d 56, 59 (Ct. App. 1995) ("[T]he trial court did not abuse its discretion in denying Anderson's severance motion and Anderson was not prejudiced by the admission into evidence of prior convictions because the trial court gave a sufficient limiting instruction to the jury."); State v. Harry, 321 S.C. 273, 279, 468 S.E.2d 76, 80 (Ct. App. 1996) (finding no abuse of discretion in the trial judge's determination the charges should have been jointly tried where "[t]he trial judge went to great lengths to fully instruct the jury that the state had the burden of proving each element of each crime"); see also Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) ("A jury is presumed to follow instructions."); State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so."); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

In addition, Appellant's substantive rights were not prejudiced by joinder of the charges because the evidence regarding the sexual abuse of the other sibling would have been admissible in each separate trial had the charges not been consolidated.[4] See, e.g., State v. Cutro, 365 S.C. 366, 375, 618 S.E.2d 890, 895 (2005) ("Here, according to the State's case, all three offenses are similar in kind, place, and character—each involves Shaken Baby Syndrome inflicted on an infant in the Cutros' daycare. These offenses clearly fit within the Lyle categories for common scheme or plan and motive. We conclude the charges were properly tried jointly."); State v. Rice, 368 S.C. 610, 615-16, 629 S.E.2d 393, 396 (Ct. App. 2006) (defendant was not prejudiced by joinder of his charges where evidence regarding the other crime would have been admissible in any event in separate trials to show motive). Under Rule 404(b), SCRE, evidence of prior bad acts may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). 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). 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).

After determining that the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception

[4] This section addresses what Appellant has labeled "Issue II" in his Brief. (See Brief of Appellant, p. 12-14). Respondent believes that the issues of consolidation and "prior bad acts" relating to the sexual abuse of each other sibling are intertwined and therefore Respondent is addressing them together in its Issue I.

is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Regarding the common scheme or plan exception, the Supreme Court has instructed:

> Such evidence is relevant because proof of one is strong proof of the other. 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 whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b). Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a close degree of similarity in those acts, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. "Requiring a 'connection' between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis." Id. at 434, n. 5, 683 S.E.2d at 278.

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). "The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair

prejudice to the defendant." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result generally hinges on the facts of each specific case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). "Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible." Mathis, 359 S.C. at 463, 597 S.E.2d at 879.

In Appellant's case, the evidence regarding Appellant's sexual abuse of each other sibling would have been admissible in separate trials under the common scheme or plan exception because there was a close degree of similarity between the incidents of abuse and the similarities between the incidents outweighed the dissimilarities.[5] Wallace, 384 S.C. at 433, 683 S.E.2d at 278. First, both victims were prepubescent at the time Appellant abused them. (R. p. 57). Second, the victims were biological siblings. (R. p. 57). Third, the victims were the stepchildren of Appellant. (R. p. 59). Fourth, the abuse of both victims occurred inside the family home where Appellant lived with his stepchildren at a time when the victims' mother was not physically present in the room. (R. p. 63-70; p. 120-142). Fifth, the abuse of both victims began the same way, with Appellant touching the victims' genitalia with his hand.[6] (R. p. 66-70; p. 124-25). Sixth,

[5] Respondent would note that Issue II of Appellant's Brief quotes defense counsel's argument regarding an entirely separate Rule 404(b) issue - prior bad acts relating *only to Victim 2* - when it references defense counsel's statement on page 5, lines 20-22 of the Record. (See Brief of Appellant, p. 13; see R. p. 2-6). This statement by defense counsel was made in reference to his argument that the prior touchings of Victim 2 should not come in under Rule 404(b), SCRE. (See R. p. 2-6). Nevertheless, although at trial Appellant challenged the admission of prior touchings Victim 2, he is not challenging these prior bad acts on appeal; instead, he is only challenging the "prior bad acts" relating to each other sibling which came in as a result of the consolidation of trial. (See Brief of Appellant, p. 12-14). Therefore, it is now the law of the case that the prior touchings of Victim 2 were properly admitted. (See R. p. 37-39). See, e.g., Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (an unappealed ruling, right or wrong, is the law of the case and requires affirmance); State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 809 (Ct. App. 2011) (an unappealed ground becomes the law of the case).

[6] "The fact that [Victim 1's] abuse was interrupted before it could culminate in intercourse does not

Appellant committed the sexual abuse of the victims in the same manner, never totally undressing the victims but instead pulling away their clothing just enough to provide him access to commit the sexual abuse. (R. p. 67; p. 124-29). Seventh, Appellant always had a news program on television when he was committing the sexual abuse against the victims. (R. p. 68-69; p. 137-38). Since there was a close degree of similarity between Appellant's abuse of Victim 1 and Victim 2, and since the similarities outweighed any dissimilarities, the evidence regarding the other victim's abuse would have been admissible in the separate trial of each victim under the common scheme or plan exception.[7] See State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009) (testimony from the victim's sister regarding earlier sexual abuse by the defendant was properly admitted where the similarities outweighed any dissimilarity); State v. Hubner, 384 S.C. 436, 683 S.E.2d 279 (2009) (reversing State v. Hubner, 362 S.C. 572, 608 S.E.2d 463 (Ct. App. 2005), and finding that evidence of prior sexual assaults against a different victim occurring approximately fourteen years earlier was properly admitted pursuant to State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009)); see also State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009).

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diminish the similarity between the progression the abuse took in each case." Wallace, 384 S.C. at 435, 683 S.E.2d at 278. Notably, Appellant did not have as much opportunity to sexually abuse Victim 1 as he did Victim 2 because Victim 1 was constantly busy with cheerleading and tumbling. (See R. p. 57-59; p. 92-94). In fact, the record supports a reasonable inference that Appellant decided to begin sexually abusing Victim 1 at this particular time because he knew that Victim 1's mother had given her a sleeping pill just a few hours before. (See R. p. 65-66; p. 172-73; see also p. 329, lines 13-17).

[7] Appellant argues in his Brief that the facts of his case "mirror" the facts presented in State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Respondent would note that the continued viability of the Tutton case was seriously called into question by the Supreme Court's opinion in State v. Wallace. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 ("The Court of Appeals relied on State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct.App.2003), which appears to require a connection beyond a degree of similarity in the details of the crime charged and the bad act evidence. We find this interpretation to be an overly restrictive view of our case law."); see also Clasby, 385 S.C. at 158, 682 S.E.2d at 897 ("Initially, we note that [Tutton's] holding was called into question by the majority opinion in Wallace on the ground the analysis constituted an overly restrictive view of our case law.").

Additionally, evidence of Victim 2's abuse would have been admissible in a separate trial regarding Victim 1 under the absence of mistake or accident exception of Rule 404(b). Contrary to Appellant's argument on pages 12-13 of his Brief, Appellant *did* place into issue his intent or motive regarding the abuse of Victim 1 by trying to suggest that the touching of Victim 1 was an accident or mistake that occurred while he was searching for the television remote. (See R. p. 19, lines 6-15; p. 68-69). Thus, the State was entitled to introduce evidence to refute accident or mistake and to show Appellant's specific motive and intent. See State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009), *affirmed and adopted by* State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (2011) and State v. Nelson, 331 S.C. 1, 10-12, 501 S.E.2d 716, 721-22 (1998) (unless motive and intent are made material issues in a sexual abuse trial, evidence regarding motive and intent is not admissible because motive and intent are obviously to achieve sexual gratification).

Evidence that Appellant previously sexually abused Victim 2 under similar circumstances pursuant to the common scheme or plan discussed above logically tended to refute accident or mistake because it revealed his true intent or motive, i.e., to sexually abuse his prepubescent stepchildren. Accordingly, this prior bad act evidence would have been admissible in a separate trial under the absence of accident or mistake exception. See State v. Smith, 337 S.C. 27, 33, 522 S.E.2d 598, 601 (1999) ("The solicitor properly offered appellant's [prior] criminal domestic violence conviction to establish appellant's intent to kill and the absence of mistake or accident. The prior conviction was logically relevant to appellant's intent and absence of mistake or accident at the time of the shooting. We conclude that the probative value of the prior conviction was not outweighed by unfair prejudice to the accused.") (citation omitted); State v. Key,

277 S.C. 214, 215-16, 284 S.E.2d 781, 782 (1981) ("This evidence of prior misconduct, objected to by defendant, at trial and here, for irrelevancy and lack of similarity to the present charge, was properly admitted to show absence of mistake or accident as well as defendant's intent.").

Finally, evidence regarding Appellant's abuse of the other sibling would have been admissible in separate trials in any event under the res gestae doctrine because such evidence was necessary for a full presentation of the case without fragmentation. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), the South Carolina Supreme Court explained as follows:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.

Id. at 122, 470 S.E.2d at 370-71 (internal quotations omitted).

In this case, the information regarding how, why, and when the siblings disclosed Appellant's abuse was critical evidence in the State's case, especially considering that there was a lack of corroborating physical evidence. (See R. p. 18-21). Victim 1 disclosed the abuse to her mother the same day it occurred, and the children were thereafter removed from Appellant's home because of the abuse of Victim 1. (R. p. 159-61). Subsequently, Victim 2 continued to exhibit strange behaviors consistent with suffering psychological turmoil, but, having been removed from Appellant's custody and

control due to Victim 1's disclosure, was finally was able to confess Appellant's abuse of him after his sister told him about Appellant's abuse of her. (See R. p. 79-85; p. 131-32; p. 158-166). Thus, under the unique circumstances of this case, the evidence regarding Appellant's abuse of his two stepchildren was "inextricably intertwined." State v. Simmons, 352 S.C. 342, 352, 573 S.E.2d 856, 861 (Ct. App. 2002) (citation omitted); see also Grace, 350 S.C. at 24, 564 S.E.2d at 334 (finding that the lewd act charge was "integrally connected" to the prior charges because it was "the vehicle through which the other charges were discovered"). The circumstances surrounding the children's disclosures were highly probative and provided the jury with information they could use to assess the witnesses' credibility. The information regarding each other sibling's abuse was "relevant to show the complete, whole, unfragmented story" regarding Appellant's abuse of his stepchildren. State v. Rice, 368 S.C. 610, 616, 629 S.E.2d 393, 396 (Ct. App. 2006). Accordingly, Appellant was not prejudiced by consolidation of the charges.

Moreover, Rule 403, SCRE, does not preclude admission of this evidence. In fact, contrary to Appellant's argument on pages 11 and 14 of his Brief, the *probative value* of the evidence, not the prejudicial effect, was enhanced because of the lack of corroborating physical evidence.[8] State v. Clasby, 385 S.C. 148, 158-59, 682 S.E.2d 892, 898-99 (2009) ("Finally, we hold the probative value of this evidence substantially outweighed the danger of unfair prejudice to Clasby. Given there was *no physical*

[8] Notably, although Appellant now makes a Rule 403 argument regarding the common scheme or plan evidence on appeal, this argument was not raised below. (See R. p. 14-39). Although Appellant's counsel stated that, "[o]bviously, the Defendant is prejudiced where you're trying two sexual charges against separate victims," this was in the context of the consolidation issue rather than the common scheme or plan issue, and counsel never mentioned Rule 403 or argued that the prejudicial effect of the common scheme or plan evidence substantially outweighed the probative value. (See R. p. 17, lines 17-18; p. 14-39). Accordingly, Appellant's argument on appeal regarding Rule 403 is not preserved for review. (See Brief of Appellant, p. 11; p. 14). See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (where Rule 403 argument was not made below, the issue was not preserved for appellate review).

evidence to corroborate B.C.'s testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was *extremely probative* to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.") (emphasis added); see also State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-79 (2009) (the trial judge properly admitted evidence regarding prior incidents of sexual abuse against the victim's sister where the probative value of this evidence substantially outweighed the danger of unfair prejudice); State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."). Therefore, the trial judge's Rule 403 determination should not be reversed. (See R. p. 37, lines 5-10).

In conclusion, the trial judge did not abuse his discretion by consolidating Appellant's charges because the charges were of the same general nature involving connected transactions closely related in kind, place, and character, and the consolidation of the charges did not result in any prejudice to Appellant's substantive rights. The trial judge's denial of Appellant's motion to sever should be affirmed. (See R. p. 36-37).

II. **Appellant's argument that he is entitled to a new trial based on the cumulative error doctrine is not preserved for appellate review. In any event, the cumulative error doctrine is not applicable to Appellant's case where the alleged errors were not, in fact, errors, but even if they were, they were not, independently or collectively, sufficiently prejudicial that they adversely affected Appellant's right to a fair trial.**

Issue Preservation

Appellant now argues that "the trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a new trial." (Brief of Appellant, p. 15). However, at trial, the only ground asserted for Appellant's new trial motion was that "the evidence does not substantiate the verdict." (R. p. 365, lines 3-12). Thus, contrary to Appellant's suggestion on appeal, the trial judge did not "refuse" to grant a new trial based on the cumulative error doctrine because he was never *asked* to grant a new trial on this basis. Accordingly, this issue is not preserved for appellate review. See State v. Quillien, 263 S.C. 87, 97, 207 S.E.2d 814, 819 (1974) (where defense counsel made no motion for new trial in the lower court based on the ground asserted on appeal, the issue was waived); see, e.g., State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not argue one ground at trial and another ground on appeal); State v. Adams, 332 S.C. 139, 144-145, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise issue was not presented to the trial court).

Argument

In any event, Appellant is not entitled to a new trial based upon the cumulative error doctrine. The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, have the effect of preventing a party from receiving a fair trial. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)

(citation omitted). The party must demonstrate more than error in order to qualify for reversal under the cumulative error doctrine; he must show that the errors adversely affected his right to a fair trial. Id. This is because "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Id. (citing State v. Mitchell, 330 S.C. 189, 199–200, 498 S.E.2d 642, 647–48 (1998).

Here, as discussed in detail above, the consolidation of Appellant's charges, and the resulting admission of what Appellant labels the "prior bad acts" of each victim, was not error. See, e.g., State v. McEachern, 399 S.C. 125, 149-50, 731 S.E.2d 604, 616-17 (Ct. App. 2012) (because there were no errors in regard to the other issues, defendant's "cumulative error" argument was without merit) (citations omitted). Furthermore, the three additional purported "errors" Appellant sets forth in his argument are not, in fact, errors that deprived Appellant of a fair trial.

First, Appellant asserts that the State asked an "improper and extremely prejudicial" question of a witness where this question called for hearsay exceeding the "time and place" limitations of Rule 801(d)(1)(D), SCRE. (See Brief of Appellant, p. 15-16). It is indeed true that the solicitor asked a question of the victims' mother that would have called for improper hearsay regarding the identity of the perpetrator; however, defense counsel's immediate objection to the question was sustained and the solicitor rephrased her subsequent questions to meet the requirements of Rule 801(d)(1)(D). (See R. p. 149, line 22 – p. 150, line 10). Therefore, *no testimony came in* in response to the improper question. (See R. p. 149-50). Accordingly, there was no error and no resulting prejudice.[9] See State v. Benning, 338 S.C. 59, 63-64, 524 S.E.2d 852, 855 (Ct. App.

[9] Notably, although defense counsel objected to the solicitor's improper question, he did not make a motion for mistrial or argue that Appellant was prejudiced by the question. (See R. p. 149-50). In that vein, there could be no real prejudice from the solicitor asking this question of the victims' mother where Victim 1 had

1999) (the mere asking of an improper question is not prejudicial where no evidence is introduced as a result of it) (citations omitted); State v. Watts, 320 S.C. 377, 384, 465 S.E.2d 359, 364 (Ct. App.1995) (where objectionable questions result in no introduction of evidence, defendant suffers no prejudice); see also Gainey v. Tyner, 259 S.C. 629, 631, 193 S.E.2d 525, 526 (1972) (asking of an improper question did not result in prejudice where the witness's response to the question, after the trial judge overruled counsel's objection, was "I don't know").

Second, Appellant argues that the State improperly bolstered the credibility of Victim 2 by asking the forensic interviewer for her opinion regarding the disclosure of Victim 2. (See Brief of Appellant, p. 16-18). Appellant contends that, in spite of the trial court's ruling "den[ying] the State's request to ask the forensic interviewer about her finding the Minor Child 2's disclosure compelling," the State asked the question anyway and the forensic interviewer responded. (See Brief of Appellant, p. 17). However, critically, Appellant's argument in this regard confuses Appellant's objection to testimony about *Victim 1's* disclosure with the subsequent testimony about *Victim 2's* disclosure.

While the forensic interviewer, Ms. Galloway-Williams, was testifying before the jury, Appellant raised an objection to the solicitor's question asking whether or not she conducted a forensic interview with Victim 1, the female child. (See R. p. 263). Outside the presence of the jury, Appellant explained that he objected to any mention of a forensic interview of Victim 1 because the relevant statute (S.C. Code § 17-23-175, regarding the admission of forensic interviews of children under age twelve) did not allow for admission of forensic interviews of children age twelve and older. (See R. p.

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already testified that she told her mother that Appellant sexually abused her. (See R. p. 70-78).

263-64). Counsel also moved for a mistrial on this ground. (R. p. 264-65). In response, the solicitor pointed out that she was not seeking to admit Victim 1's forensic interview tape and that S.C. Code § 17-23-175 did not preclude general testimony about a forensic interview being conducted. (See R. p. 265, lines 11-23). The solicitor indicated that she was seeking to introduce a prior consistent statement made by Victim 1 to Ms. Galloway-Williams in the forensic interview in order to respond to defense counsel's cross-examination of Victim 1. (See R. p. 265-66; p. 275-76). The solicitor also stated that she would like to introduce Ms. Galloway-Williams' "time and place" testimony and her testimony regarding her opinion of Victim 1's disclosure. (See R. p. 265-70). Defense counsel reiterated his objections pursuant to S.C. Code § 17-23-175. (See R. p. 270-81). He also objected to Ms. Galloway-Williams' testimony regarding whether Victim 1's disclosure was "compelling or not" because her opinion regarding *Victim 1's* credibility "is simply this witness vouching for the credibility of another witness, and that's improper." (R. p. 280-81).

The trial judge denied Appellant's motion for mistrial and concluded that the solicitor could ask Ms. Galloway-Williams about Victim 1's disclosure as to time and place only. (R. p. 278-82). The judge ruled that the solicitor could not ask the witness about any prior consistent statements of Victim 1 and could not ask Ms. Galloway-Williams about whether *Victim 1's* disclosure was compelling. (See R. p. 279-82).

Subsequently, Ms. Galloway-Williams testified regarding "time and place" with respect to the disclosures of both Victim 1 and Victim 2. (See R. p. 285-91). She also testified, **without objection**, that *Victim 2's* disclosure was "compelling" in that he was "able to provide both those core and contextual details about what he was describing."[10]

[10] Notably, on cross-examination, defense counsel established that so-called "compelling disclosures"

(R. p. 291-92). The solicitor then introduced the videotape of Victim 2's forensic interview over defense counsel's objection. (R. p. 292, lines 7-24).

As illustrated above, at no point did Appellant object to any testimony about Ms. Galloway-Williams' opinion regarding *Victim 2's* forensic interview. Therefore, contrary to Appellant's suggestion, the solicitor did not violate the trial judge's previous ruling by asking about Victim 2's disclosure. Regardless, because this ground of alleged error is unpreserved for appellate review, it cannot be bootstrapped to Appellant's "cumulative error" argument. See State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct.App.1997) ("Failure to object when the evidence is offered constitutes *a waiver of the right to object.*") (emphasis added); 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."); State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("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.") (citation omitted); State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 283 (Ct. App. 2005) (where issue is not preserved for appellate review, the appellant must seek redress through the avenue of post-conviction relief); compare State v. McEachern, 399 S.C. 125, 149-50, 731 S.E.2d 604, 616-17 (Ct. App. 2012) (defendant argued that "the cumulative prejudice should be evaluated in light of other improper comments and arguments by the solicitor, *as to which objections were sustained*") (emphasis added); and State v. Peterson, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) (in case where the Supreme Court held that the "combination of numerous errors committed by the trial court in this death penalty case

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could turn out to consist of false allegations and that Ms. Galloway-Williams' determination of whether or not a disclosure was "compelling" was subjective to her. (R. p. 304-305; see also p. 298-314).

compels us to reverse and remand for a new trial," and one of the alleged errors was not preserved for appellate review, the court noted that it would review the record regarding this error only because of the doctrine of *in favorem vitae* review in capital cases which was still in use at that time), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review in capital cases).

Finally, Appellant argues that the State improperly vouched for the credibility of the victims in its closing argument. (See Brief of Appellant, p. 18-19). This issue was also not preserved for appellate review because Appellant interposed no contemporaneous objection when the allegedly improper comments were made. (See R. p. 376-79). See, e.g., State v. Hawkins, 310 S.C. 50, 61, 425 S.E.2d 50, 56 (Ct. App. 1992) (where no contemporaneous objection or mistrial motion was made at the time of the allegedly improper closing argument, the defendant was precluded from raising the issue on appeal); In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) ("Next, appellant argues that the State's closing argument was improper. Appellant interposed no contemporaneous objection to the argument and thus no issue regarding it is preserved for appellate review."). Therefore, as with the previous issue, Appellant cannot bootstrap this unpreserved ground of alleged error to his cumulative error argument. See *supra*, p. 27.

In any event, the solicitor's argument regarding the credibility of the victims was not improper. A solicitor's closing argument must not appeal to the personal biases of the jurors or be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and its reasonable inferences. See, e.g., Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (citation omitted). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."

Id. However, a prosecutor may not vouch for the credibility of a witness based on personal knowledge or other information outside the record. See, e.g., Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citations omitted). "Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration." Id. (citations omitted). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury, but known by the prosecution, which supports the defendant's conviction; it is inappropriate for a prosecutor to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (citation omitted).

Even if improper comments are made, they do not require reversal if they are not prejudicial to the defendant. Randall v. State, 356 S.C. at 642, 591 S.E.2d at 610. The defendant bears the burden of proving he did not receive a fair trial because of the alleged improper comments. Id. On appeal, the appellate court reviews the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured any prejudice from the improper argument. Smith v. State, 375 S.C. at 523, 654 S.E.2d at 532. "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1999). "The relevant question is whether the solicitor's comments so infected the trial

with unfairness as to make the resulting conviction a denial of due process." Randall v. State, 356 S.C. at 642, 591 S.E.2d at 610.

Here, contrary to Appellant's contentions, the solicitor's closing argument did not improperly vouch for the credibility of the victims. The solicitor's comments, as referenced by Appellant in his Brief on page 19, did not in any way place the "government's prestige" behind these witnesses by "making explicit personal assurances" and did not imply that information outside the record supported the witnesses' credibility. (See R. p. 322-25). State v. Shuler, 344 S.C. at 630, 545 S.E.2d at 818. Instead, when the comments are considered in the context of the entire argument, it is clear that the solicitor was properly arguing that the jury should conclude, based upon the evidence in the record and the common-sense reasonable inferences to be drawn therefrom, that the victims' testimony was credible since they had absolutely nothing to gain by lying about their allegations and since that their stories had been consistent all along. (See R. p. 319-325; p. 56-117; p. 120-133; p. 144-192; p. 198-200; p. 210-214; p. 227-238). See State v. Caldwell, 300 S.C. 494, 505-506, 388 S.E.2d 816, 822-23 (1990) (solicitor could properly argue that its witnesses were "credible witnesses who should be admired for their fortitude in telling the truth about their own family member" because such remarks "referred to critical State witnesses in the prosecution of the murder and were directly related to the evidence in the record; the comments were permissible as to the credibility and common sense biases of the witnesses that were apparent from the evidence."); State v. Shuler, 344 S.C. at 629-31, 545 S.E.2d at 818-19 (solicitor did not improperly vouch for witness where he did not imply special knowledge or guarantee the witness's veracity, and where he "made no overt statement of his personal belief as to the truth" of the witness's testimony and "made no insinuation that he knew better than the jury what the

truth was"); State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."); compare Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 767 (2002) (solicitor improperly vouched for witness where she indicated that before putting the witness on the witness stand, she corroborated his testimony and determined that he was credible); compare Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) (finding that the State improperly vouched for a witness's credibility in its opening statement when it personally assured the jurors of the witness's veracity by stating that, "[a]nd I'll say this from the bottom of my heart, that there is one soul, who was at one time unclean and is now clean," and using other "religiously-tinted language" to emphasize that the witness would be given the "opportunity to cleanse his soul" when he testified at trial).

Furthermore, the solicitor's arguments addressing the victims' credibility were proper responses to defense counsel's attacks on the victims' credibility. See State v. Bennett, 369 S.C. 219, 232-33, 632 S.E.2d 281, 288-89 (2006) (a solicitor's comment in closing argument may properly constitute "an invited response" to the defendant's evidence); State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("The solicitor's comments were invited responses to appellant's argument. Further, reviewing the argument and the entire record, we hold the comments did not deny appellant a fair trial."); State v. Meggett, 398 S.C. 516, 525, 728 S.E.2d 492, 497 (Ct. App. 2012) (a solicitor's comment in closing argument was not improper where it was "made in reply to allegations defense counsel made in his opening and closing arguments"); see also Vaughn v. State, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004) (although it is

ordinarily improper for the solicitor to vouch for its witness, the situation is entirely different when the defendant opens the door to the subject).

Specifically, defense counsel suggested that neither victim had been consistent in their reports of the abuse; that Victim 1 made up her allegations because she was angry with Appellant over an incident that occurred a few days before in Charleston; that Victim 2 made up the allegations to get revenge on Appellant for what he believed Appellant did to his sister; and that Victim 2 made up the allegations because he was seeking attention. (See R. p. 89, line 16 – p. 90, line 12; p. 133-142; p. 195-95; p. 215-17; p. 298-316; see also p. 334-342). The solicitor's argument, considered in its entirety and in the overall context of the trial, was clearly a proper response the defense's attack on the credibility of the victims. (See R. p. 319-331).

Based on the foregoing, Respondent submits that the solicitor's closing argument did not constitute improper vouching as defined by South Carolina case law. The solicitor's remarks about the victims' credibility, and her statements that the victims were telling the truth, were truly just argument. In that vein, no reasonable jury would have believed that the solicitor was, by her comments, personally guaranteeing the veracity of the victims or conveying "inside information" about the victims; therefore, the statements by the solicitor did not contain the harm sought to be avoided by the prohibition on vouching. However, assuming, for argument's sake, that the challenged comments was improper, any possible prejudice was cured because the judge repeatedly instructed the jurors regarding the parameters of closing arguments and regarding their proper duties as jurors. The judge twice told the jurors that the comments made by the attorneys were not evidence (R. p. 55, lines 12-15; p. 318, lines 12-22), and that the jurors were bound by their oath to "consider only the competent evidence that is before you," which included

the testimony from the witness stand and the exhibits that had been offered, and "that alone." (R. p. 55, lines 13-15; p. 56, lines 1-7; p. 345, line 18 – p. 346, line 1). The judge also fully instructed the jurors regarding their duties as the sole judges of witness credibility. (See R. p. 347, line 25 – p. 348, line 22). He told the jurors that "[i]t's your duty as jurors to analyze and evaluate the evidence and determine which evidence convinces you of its truth," explained the various criteria that could be used to determine witness credibility and believability, and advised the jurors that "[i]t's *totally your prerogative and yours alone* to determine the credibility of the witnesses." (R. p. 348, lines 2-22; see also p. 325, lines 10-18) (emphasis added).

Any possible prejudice from the solicitor's closing argument, assuming it was improper, was cured by the judge's instructions. See Smith v. State, 375 S.C. at 524, 654 S.E.2d at 532 (the trial judge's instructions that the jurors must not consider the statements of the attorneys as evidence, and that it was their duty to determine the credibility and believability of the witnesses, were sufficient to cure any possible prejudice caused by the solicitor's comments). Moreover, Appellant's counsel fully responded to the State's arguments regarding the victims' credibility in his own, subsequent closing argument. (See R. p. 331-342). Accordingly, any impropriety in the State's closing argument was not sufficient to warrant a new trial, particularly where nothing in the State's argument was so egregious as to deny Appellant a fundamentally fair trial. See id; State v. Hawkins, 310 S.C. 50, 62, 425 S.E.2d 50, 57 (Ct. App. 1992); State v. Durden, 264 S.C. 86, 91-93, 212 S.E.2d 587, 590-91 (1975); see also Randall v. State, 356 S.C. 639, 642-43, 591 S.E.2d 608, 610-11 (2004) (the challenged comments did not so infect the trial with unfairness so as to make the defendant's conviction a

denial of due process where the objectionable comments consisted of "only 10 lines in the transcript").

In sum, Appellant's contention that he is entitled to a new trial based on the cumulative error doctrine is not preserved for appellate review, but, in any event, the cumulative error doctrine is not applicable to Appellant's case where the alleged errors were not, in fact, errors, but even if they were, they were not, independently or collectively, sufficiently prejudicial that they adversely affected Appellant's right to a fair trial. Therefore, this Court should reject Appellant's arguments on this ground.

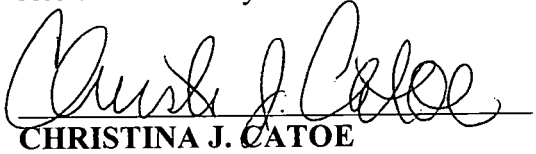
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



CHRISTINA J. CATOE
SC Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

January 8, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-196688

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

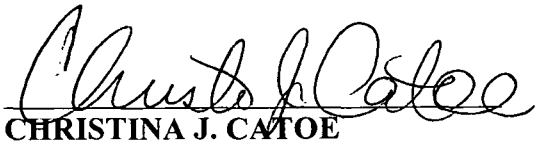
v.

RICHARD BURTON BEEKMAN,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.**



CHRISTINA J. CATOE

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

January 8, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-196688

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RICHARD BURTON BEEKMAN,

APPELLANT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **DAYNE C. PHILLIPS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **8th day of January, 2013.**

CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 8th day of January, 2013.

Notary Public for South Carolina.
My Commission Expires: 7/18/2017