ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Robert E. Hood, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-001476

THE STATE, ...RESPONDENT,

v.

BRANDON COX, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0368

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467-8282

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III. The trial judge correctly prevented trial counsel from questioning witness Matthew Chapman regarding a conversation he had with Victim's father during the trial because such information was irrelevant to the trial as there was no indication the father's statements were either intended to or actually caused Chapman to change his testimony. Further, such questions would only have confused the issues and served only to cast vague aspersions on father's veracity. To the extent Appellant argues the trial judge's refusal amounts to a violation of the Confrontation Clause, such

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly denied Appellant's request to charge either ABHAN or second-degree assault and battery as a lesser-included offense of first-degree criminal sexual conduct with a minor where second-degree assault and battery was not requested and neither crime is a lesser-included offense of first-degree criminal sexual conduct with a minor under South Carolina law. Further, even if either crime were a lesser-included offense, such a charge was not required because there was no evidence indicating Appellant was guilty of a lesser and not the greater offense.

II. The State's failure to provide Appellant with the audio recording of his conversation with his father was harmless error given the disputed evidence was immaterial to his conviction; it was undisputed Appellant's hands were not tattooed at the time of the offense, the substance of the recording was made known to the defense prior to trial, and the recording itself was not used by the State.

III. The trial judge correctly prevented trial counsel from questioning witness Matthew Chapman regarding a conversation he had with Victim's father during the trial because such information was irrelevant to the trial as there was no indication the father's statements were either intended to or actually caused Chapman to change his testimony. Further, such questions would only have confused the issues and served only to cast vague aspersions on father's veracity. To the extent Appellant argues the trial judge's refusal amounts to a violation of the Confrontation Clause, such argument was not raised to the trial judge and is inapplicable because Chapman was one of Appellant's witnesses and his testimony was not adverse to Appellant's defense.

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

V. Any purported error alleged by Appellant is harmless given the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

On June 14, 2016, the Pickens County Grand Jury indicted Appellant for first-degree criminal sexual conduct (CSC) with a minor. On June 13, 2017, the Pickens County Grand Jury also indicted Appellant for third-degree sexual exploitation of a minor. On June 19–20, 2017 Appellant proceeded to a jury trial before the Honorable Robert Hood. David Cantrell, Esquire, and Melanie Rumfelt, Esquire, represented Appellant; Assistant Solicitors Christopher Jones, Esquire, and Scott Todd, Esquire, represented the State. The jury found Appellant guilty as charged and sentenced him to twenty-five years' incarceration for his first-degree CSC with a minor conviction and a concurrent five years' incarceration for his remaining conviction. Additionally, Appellant was ordered to register on the South Caroline Sex Offender Registry.

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

STATEMENT OF FACTS

Testimony

Victim's father, Daniel Ingram (Father), lived in a home with his partner and three children. Sometime in 2014, Father met Appellant through a mutual friend. Around February of 2015, Appellant's father kicked him out of his house and Father allowed Appellant to move in with his family. After approximately three months, Father began to suspect his partner was having an affair with Appellant. On May 26, 2015, Father took Appellant's phone while the latter was still asleep and began looking through his texts, photographs, and video recordings for evidence of an affair. Instead, Father found videos of Appellant touching Victim's vagina while she slept. Father was able to identify the girl in the videos as his daughter based on her green shorts, yellow underwear, and physical characteristics he could see. Similarly, Father identified Appellant in the video based on the fact that the video was on Appellant's phone and Appellant's bracelet was clearly visible. Distraught, Father called Appellant's father and told him to head to his house and pick up Appellant. Father woke Appellant and asked him about the videos on the phone. Appellant denied any wrongdoing, and Father began beating him. (R.p.175, line 14–R.p.189, line 24; State's Exhibit 1).

Deputy James Bishop, at that time an officer with the Pickens County Sheriff's Office, was dispatched to Father's home after hearing reports of a fight in progress. When he arrived, he heard shouting and profanity from inside the house. Deputy Bishop knocked on the front door of the home and shortly thereafter Father and Appellant exited from a side door. Appellant appeared injured and had blood on his face and some swelling on the side of his face. Father told Deputy Bishop about the events of the morning and showed him the three videos of Appellant assaulting Victim. He noticed Appellant was wearing the same, distinctive bracelet worn by the

man in the video. Deputy Bishop then read Appellant his Miranda[1] rights and questioned him about the recordings. Appellant informed officers he refused to talk without first obtaining a lawyer. Investigator Michael Hendrix arrived around this time and was also shown the video by Father. Appellant's cell phone was placed into evidence and Investigator Hendrix immediately obtained a search warrant for the phone. Other items on the phone included a self-photograph of Appellant and several of his work schedules. Investigator also took numerous photographs of the Victim's home showing furniture, decorations, and clothing found in the cell phone videos. (R.p.78, line 15–R.p.85, line 17; R.p.105, line 24–R.p.125, line 11; R.p.189, line 25–R.p.196, line 20; State's Exhibit 1; State's Exhibits 9–25; State's Exhibit 27).

After other officers arrived, Deputy Bishop arrested Appellant and took him to the Pickens County Detention Center. While Appellant was being booked, Deputy Bishop noticed Appellant was no longer wearing his bracelet. Appellant claimed he must have lost the bracelet, but Deputy Bishop found the bracelet in the backseat of his vehicle, broken and stuffed in between the cushions of the seat. Additionally, Deputy Bishop observed Appellant's hands and feet, which were photographed during the booking, possessed the same marks and characteristics as the hands in the recordings, including a freckle or scab on his index finger. (R.p.85, line 18–R.p.94, line 24; R.p.97, line 9–R.p.98, line 12; State's Exhibits 2–8; State's Exhibit 26).

After the booking, Deputy Bishop took Appellant to the hospital to verify he had not received any serious injuries during Father's assault. Without any prompting from police, Appellant told hospital staff, "The reason I had those videos on my phone was because I was going to take them to the police for evidence." After the hospital staff cleared Appellant, Deputy Bishop returned him to the detention center. (R.p.95, line 6–R.p.97, line 8).

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Chapman's Proffer and Trial Testimony

After a morning break on the second day of trial, the parties discovered Father had spoken with one of the defense's witnesses, Matthew Chapman. Pursuant to this discovery, the parties questioned Chapman outside the presence of the jury to determine the full extent of Father's actions. Chapman explained he knew both Father and Appellant, and that the former approached him during a break. Father told Chapman "how to answer questions and some of the evidence the [State] [possessed]," but that Father's requests aligned with "the truth of what [Chapman] was already going to say." Chapman, who stayed the night at Victim's home the night following the sexual assault, was told by Father to testify to such and describe what he did that day. Father also told Chapman of DNA evidence in the case which did not match Father or Appellant[2] and warned him the State may use it to "throw [Chapman] under the bus . . . ." Chapman felt a little intimidated by the conversation because of the "type of person" Father is, but noted he and Father were friends, he was never threatened, they had other discussions about the case prior to trial, and their conversation would not impact his trial testimony. Tammy Chapman, Chapman's mother, confirmed his description of the conversation. (R.p.222, line 19–R.p.236, line 1).

The State argued against questioning Chapman about the conversation in front of the jury, arguing it was completely irrelevant to the trial because Father did not threaten Chapman, Father encouraged Chapman to tell the truth, and Chapman asserted the conversation had no impact on his testimony. The State alleged the only purpose of such questions would be to slander Father. In response, trial counsel conceded Father never threatened Chapman but noted

[2] Catherine Leisey, a forensic scientist employed by SLED analyzed DNA obtained from a vaginal swab from Victim. From the swab, Leisey generated a partial DNA profile for an unidentified male individual. The partial profile did not match Father or Appellant. Leisey testified the male DNA found on Victim could have been transferred to her through the use of a towel or other item with a sufficient amount of DNA. (R.p.156, line 19–R.p.174, line 16).

the trial judge had previously admonished the jurors against discussing the case which should have communicated to everyone in the courtroom that no one discusses the case. (R.p.236, line 18–R.p.239, line 12).

The trial judge decided to exclude the questions and testimony regarding Father and Chapman's conversation, finding such information irrelevant to the "issues at hand" because there was no evidence Father threatened or coerced Chapman or that the conversation affected Chapman's testimony in any way. The trial judge also noted such information should be excluded under Rule 403, SCRE because it would confuse the jury regarding the true issues in the case. However, the trial judge did command everyone in the courtroom to abstain from any future contact with each other about the case. (R.p.239, line 13–R.p.242, line 17).

During his trial testimony, Chapman testified he knew both Father and Appellant, and had visited Victim's home on numerous occasions. When visiting, he had seen Father and his family using Appellant's cellular phone, knowing the password to unlock it. Chapman slept at Victim's home the night prior to Appellant's arrest and was woken by the fight between Father and Appellant. (R.p.258, line 8–R.p.264, line 13).

Appellant's Testimony

Appellant testified he began living with Victim and her family because his father kicked him out of his home for his drug use. While staying with the family, anyone in the family had access to his cell phone and knew its password. He claimed he was still using drugs around the time of incident, and was suffering from the effects of methamphetamines during his confrontation with Father, his arrest, and while at the hospital. He could not specifically recall his conversations with Father, police, or hospital staff. Appellant admitted the bracelet in

evidence was his own, but that he had a second which he gave to one of Father's young sons. (R.p.267, line 22–Rr.p.292, line 4).

On cross-examination, Appellant admitted he did not have tattoos on his hands at the time of his arrest. He claimed he decided to get the tattoos because he was inspired by seeing someone with a similar tattoo. He claimed he did not get the hand tattoos in an attempt to disguise his hands from jurors. Appellant also admitted the girl in the video recording was Victim. (R.p.292, line 10–R.p.299, line 23).

On redirect examination, Appellant claimed many people in prison have hand tattoos and he did not believe there was "any way in the world" jurors and those involved with the case were unaware he did not have his hand tattoos at the time of his arrest. He alleged hand tattoos helped him fit in with other inmates and chose the tattoos "because [he] believe[s] in God." (R.p.300, line 1–R.p.302, line 13).

On re-cross examination, the State asked Appellant whether he spoke with his father on phone while he was incarcerated, whether he told his father he obtained the tattoos before he was arrested, and whether he also claimed the key to proving his innocence was the hands shown in the videos did not have tattoos. Appellant admitted he made those statements and claimed he did not know why he made them. (R.p.302, line 23–R.p.304, line 21).

Outside the presence of the jurors, the parties debated the propriety of the State's re-cross examination. Trial counsel complained he was aware that the State had a copy of the phone call in its possession and told the subject matter discussed in the call, but a copy of it was never provided to the defense. The State explained it had not intended to use the phone call in its case, but did so when surprised with Appellant's lies about the tattoos. The trial judge overruled the objection, finding the State gave trial counsel notice of the phone call recording and its contents

and the State did not have a copy of it at trial because it had not intended to use it because there was no way of knowing Appellant would take the stand or that he was going to fabricate a story about their origins. The trial judge also noted the State, before resting its case, had asked whether Appellant would be compelled to show his tattoos to the jury, which the judge denied because the State, at that point, had not established enough of a causal link between Appellant's tattoos and the charged offenses. Because Appellant made himself available by taking the witness stand and discussing the motive for getting his tattoos, the phone call became relevant to the case. (R.p.305, line 1–R.p.308, line 21).

In response, trial counsel requested argued he, at the very least, should be able to re-redirect Appellant about the call because the line of questioning had not come up prior to Appellant's re-cross examination.. The trial judge denied the request, noting the phone call was brought up in direct responses to trial counsel's redirect questions about the purpose behind the tattoos and Appellant's claim they were to celebrate his belief in God. (R.p.308, line 24–R.p.309, line 18).

Jury Instructions

During the charge conference, trial counsel requested the jury be charged on assault and battery of a high and aggravated nature (ABHAN), claiming it was a lesser-included offense of first-degree CSC with a minor. The trial judge claimed he had spent time that morning researching the issue and could not find any authority supporting trial counsel's claim. When asked for legal authority supporting his position, trial counsel supplied cases noting common law ABHAN was a lesser-included offense of first degree CSC. Both the State and the trial judge noted such cases predate current South Carolina law in which ABHAN is codified and proscribes different behavior. The trial judge also noted Appellant's cited authorities involved first-degree

CSC and not first-degree CSC with a minor, an entirely separate offense. Further, the State noted even if ABHAN was a lesser-included charge, such a charge would only be appropriate if there was evidence Appellant was guilty of the lesser, and not the greater offense, a claim which was not made by trial counsel and was not supported by the evidence at trial. Accordingly, the trial judge declined the requested charge. (R.p.314, line 14–R.p.318, line 14).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

I.

The trial judge properly denied Appellant's request to charge either ABHAN or second-degree assault and battery as a lesser-included offense of first-degree criminal sexual conduct with a minor where second-degree assault and battery was not requested and neither crime is a lesser-included offense of first-degree criminal sexual conduct with a minor under South Carolina law. Further, even if either crime were a lesser-included offense, such a charge was not required because there was no evidence indicating Appellant was guilty of a lesser and not the greater offense.

Appellant argues the trial judge erred in refusing to charge the jury on a second-degree assault and battery, which he claims is a lesser-included offense of first-degree CSC with a minor because South Carolina common law treated the common law version of ABHAN as a lesser-included offense of first-degree CSC. However, the State disagrees with this argument for several reasons. First, this issue is not preserved for appellate review because trial counsel did not request a charge on second-degree assault and battery, the offense championed in his brief. Further, even if this issue were preserved, Appellant's argument is meritless because neither ABHAN or second-degree assault and battery are lesser-included offenses of first-degree CSC with a minor under current South Carolina law; the legislature elected to limit the offenses to be the lesser-included charges of a select few crimes and first-degree CSC with a minor does not include all of the elements of ABHAN or second-degree assault and battery. Finally, even assuming second-degree assault and battery is a lesser-included offense of first-degree CSC with a minor, the trial judge still properly declined to instruct the jury on either charge because the testimony and evidence during trial did not support such charges.

Issue Preservation

The State notes this issue is not preserved for review by this Court. Appellant's argument focuses on the propriety of charging second-degree assault and battery as a lesser-included charge of first-degree CSC with a minor. However, during the jury instruction discussion, trial

counsel requested a charge of ABHAN, not second-degree assault and battery. In his brief, Appellant concedes this point. (Br. of Appellant p.5). Accordingly, this issue is not proper for appellate consideration. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("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.")

Standard of Review

In instructing the jury on the law, "[a] trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). Generally, pursuant to the elements test, an offense is a lesser-included offense of a greater offense if the greater offense includes all of the elements of the lesser-included offense. State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005). However, "[i]f the lesser offense includes an element which is not included in the greater offense, then the lesser offense is **not** included in the greater offense." Id. at 580, 564 S.E.2d at 105 (emphasis added). In determining whether an offense is a lesser-included offense of another, courts in South Carolina typically apply the elements test to make that determination with few exceptions. See id. ("While the Court recognizes the existence of a few anomalies, it generally adheres to the use of the traditional elements test."). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993).

Importantly though, even if an offense is a lesser-included offense of another offense, the trial judge is only required to instruct the jury on the lesser-included offense when the evidence could support an inference the defendant is guilty of **only** the lesser-included offense and not the greater offense. State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983). "It is well settled that a jury instruction on a lesser included offense is required only when the evidence warrants such an instruction." State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 (Omnibus Act) substantially overhauled the state's criminal law in regard to assault and battery offenses. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It codified attempted murder in § 16-3-29 (2015) and four degrees of assault and battery in § 16-3-600 (2015). S.C. Code Ann. §§ 16-3-29, -600 (2015). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery

in the first, second, and third degrees. Middleton, 407 S.C. at 315, 755 S.E.2d at 434. Under the statute, ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3) (2015). Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN. S.C. Code Ann. § 16-3-600(C)(3) (2015). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. S.C. Code Ann. § 16-3-600(D)(3) & (E)(3) (2015). Finally, the Omnibus Act abolished the common law offense of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault. *See* Act No. 273, 2010 S.C. Acts 1947.

In relevant part, S.C. Code Ann. § 16-3-600 provides:

> (A) For purposes of this section:
>
> > (1) "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.
> >
> > (2) "Moderate bodily injury" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.
>
> . . . .
>
> (B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:
>
> > (a) great bodily injury to another person results; or

(b) the act is accomplished by means likely to produce death or great bodily injury.

. . . .

(3) Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29.

. . . .

(D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

. . . .

(3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

. . . .

(emphasis added).

The various degrees of CSC with a minor are proscribed under S.C. Code Ann. section 16-3-655. Under the statute, a person is guilty of first-degree CSC with a minor if that person "engages in sexual battery with a victim who is less than eleven years of age." S.C. Code Ann. §16-3-655(A)(1). A "sexual battery" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is

accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

Analysis

In the current case, the trial judge committed no error in declining to instruct the jury on the offense of ABHAN because that crime was not a lesser-included offense of first-degree CSC with a minor. Recognizing that current statutory law disagrees with his argument, Appellant claims this Court should consider ABHAN a lesser-included offense of first-degree CSC with a minor because common law ABHAN was a lesser-included offense of first-degree CSC prior to its abolition through the passage of the Omnibus Act. However, See Primus, 349 S.C. at 581, 564 S.E.2d at 106 ("[E]mploying the traditional elements test, ABHAN is not a lesser-included offense of first degree CSC. Nevertheless, the Court most recently determined that because it had consistently held ABHAN is a lesser included offense of assault with intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional elements test. In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser included offense of first degree CSC." (citations omitted)).

However, in abolishing the common law assault and battery offenses, the South Carolina legislature specifically identified the different offenses to which the new statutory assault and battery offenses could be considered lesser-included offenses. See State v. Elliott, 346 S.C. 603, 607, n. 2, 552 S.E.2d 727, 729 (2001) ("[T]he legislature, in enacting the CSC statutes, is presumed to know the common law **and could have provided that ABHAN not be treated as a lesser offense** of ACSC, as it was of AIR." (emphasis added)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); see also State v. Middleton, 407 S.C. 312,

315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses."). Tellingly, the legislature elected **not** to recognize ABHAN-or any of the other new statutory assault and battery offenses- as a lesser included offense of criminal sexual conduct with a minor in the second degree. See See, e.g., S.C. Code Ann. § 16-3-600(B)(1)(3) ("Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29). Because the legislature specifically chose to identify ABHAN as a lesser-included offense of a certain specified offense while choosing not to identify it as a lesser-included offense of criminal sexual conduct with a minor, the statutory offense of ABHAN is **not** a lesser-included offense of first-degree criminal sexual conduct with a minor, and the trial judge properly declined to instruct the jury on ABHAN in Appellant's case. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); see also State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. **We cannot under our power of construction supply an omission in the statute**." (emphasis added)); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for early release).

Further, looking to the elements of the offenses, first-degree CSC with a minor does **not** include all of the elements of ABHAN or second-degree assault and battery. Compare S.C. Code

Ann. § 16-3-655(A)(1) (stating a person is guilty of criminal sexual conduct with a minor in the first degree if: 1) the actor engages in sexual battery with a victim who is less than eleven years of age) with S.C. Code Ann. § 16-3-600(B)(1) (stating a person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: a) great bodily injury to another person results; or b) the act is accomplished by means likely to produce death or great bodily injury) and S.C. Code Ann. § 16-3-600(D)(1) (stating a person commits second-degree assault and battery if the person unlawfully injures or attempts to injure another person, and: a) moderate bodily results or could have resulted; or b) "the act involves the nonconsensual touching of the private parts of a person, either under or above clothing"). Notably, first-degree CSC with a minor does not require an injury or attempt to injure a victim. As a result, ABHAN and second-degree assault and battery are not lesser-included offenses of first degree criminal sexual conduct with a minor under the elements test. See Knox v. State, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense." (italics in original)), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005).

Finally, even if ABHAN or second-degree assault and battery were lesser-included offenses of first-degree CSC with a minor, the trial judge still committed no error in declining to instruct the jury on that offense because the evidence presented during trial would not have supported a conclusion Appellant was guilty of only the lesser-included offense and not the greater offense. As explained infra, the State presented overwhelming evidence that Appellant committed first-degree CSC with a minor. The evidence presented by the defense, including Appellant's testimony, conceded the crime occurred but posited the abuse was committed by a separate individual. Thus, the only evidence presented at trial indicated Appellant was guilty of

the first-degree CSC with a minor, or completely innocent; neither party presented evidence which indicated Appellant was guilty of ABHAN or second-degree assault and battery, rendering charges on either offense unnecessary. See State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 691 (Ct. App. 2011) ("The mere existence of evidence of ABHAN . . . is not sufficient to require the jury charge. Rather, there must be evidence the defendant committed ABHAN *instead of* CSC." (italics in original)); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("Here the evidence shows appellant committed a sexual battery as defined by § 16-3-651(h) or no battery at all. He was therefore not entitled to a charge of ABHAN."); State v. Fields, 356 S.C. 517, 523-524, 589 S.E.2d 792, 795 (Ct. App. 2003) ("Field's mere assertion that the jury might have disbelieved the State's evidence that the sex was not consensual and on the remaining evidence found him guilty of ABHAN does not entitle him to have the lesser offense submitted to the jury."). Therefore, the trial judge properly declined to instruct the jury on ABHAN, as there was no evidence presented at trial supporting the charge. Appellant's convictions and sentences should be affirmed.

II.

The State's failure to provide Appellant with the audio recording of his conversation with his father was harmless error given the disputed evidence was immaterial to his conviction; it was undisputed Appellant's hands were not tattooed at the time of the offense, the substance of the recording was made known to the defense prior to trial, and the recording itself was not used by the State.

Appellant complains the trial judge wrongfully allowed the State to question Appellant on re-cross-examination about a phone call with his father in which he told him he received the tattoos before his arrest, alleging the State's failure to provide the recorded conversation prior to trial was a violation of Rule 5, SCRCrimP and the trial judge should have allowed trial counsel to re-re-direct him to explain the conversation. The State disagrees with this allegation of error. Firstly, the State was not required to provide the phone conversation because it was not intended to be or actually used as "evidence in chief" at the trial. Further, the phone call itself was immaterial to the preparation of Appellant's defense because (1) trial counsel was informed of the existence of the call prior to trial, and the call was only used to the extent it was described to him; (2) Appellant's guilt was conclusively proven by the overwhelming evidence at trial, including the uncontested evidence, including his own testimony, showing he did not have the tattoos at the time of the crime.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of

evidence and his rulings will not be disturbed absent a showing of probable prejudice. State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

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

> Upon request of the defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

(emphasis added). The State's failure to provide the defense with "material" evidence may be the basis for the reversal of a conviction; similar to Brady,[3] "material" evidence is that which, if it had been disclosed to the defense, had a reasonable probability—a probability sufficient to undermine the confidence of the outcome—of changing the result of the legal proceeding. State v. Kennerly, 331 S.C. 442, 452–54, 503 S.E.2d 214, 220 (Ct. App. 1998). "In determining the materiality of nondisclosed evidence, [a] [c]ourt will consider it in the context of the entire record." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). This Court in Kennerly further explained: "In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) ("Evidence is not considered 'material' if the defense discovers the information in time to adequately use it at trial."). Further, "[t]he lack of demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial." 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court's failure to suppress evidence of a defendant's

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

oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them, was upheld where the defendant was permitted to view and copy the prosecution's file and did not request a continuance or recess to review the prosecution's file).

Under Rule 5, SCRCrimP, the trial court has discretion to determine what remedy, if any, is necessary to protect a defendant's rights. Rule 5(d)(2), SCRCrimP, states that if a party fails to comply with Rule 5, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or it may enter such other order as it deems just under the circumstances. Rule 5(d)(2), SCRCrimP; State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996). The remedy, or determination that no remedy is required, will not be reversed absent an abuse of discretion. See State v. Newell, 303 S.C. 471, 476, 401 S.E.2d 420, 423 (Ct. App. 1991) (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 261 at 16 (2d ed. 1982) (adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion)).

Analysis

In the instant case, the State's failure to provide the recorded phone call was harmless error given it was immaterial to the State's case and Appellant's defense. Tellingly, the phone call itself was not prepared for or submitted at trial because neither party disputed Appellant obtained his tattoos when he was incarcerated, after the sexual assault against Victim. The phone call, at best, was evidence that Appellant lied to his father about when he received the tattoos. The recording added nothing to the State's substantive evidence of Appellant's guilt discussed infra. See Kennerly, 331 S.C. at 452–54, 503 S.E.2d at 220 (stating evidence is not

material to guilt if it would not likely have affected the outcome of a defendant's legal proceeding).

Further, use of the recording was also immaterial and harmless because, to the extent it was used at trial, it was presented to the defense. See Moses, 390 S.C. at 517, 702 S.E.2d at 403. Trial counsel admitted he knew the State possessed the recorded phone conversation between Appellant and his father and that Appellant told him he obtained the tattoos before his confinement. When asked about the phone call, Appellant admitted it occurred and explained he lied to his father because Appellant wanted him to firmly believe Appellant could not have committed the crime and so he would not lose his father's love and respect. Appellant also testified he knew officers had photographed his hands after his arrest so getting the tattoos would not impact the trial. Thus, trial counsel and Appellant had enough information to prepare for the State's questioning, a fact supported by the record. Id. Moreover, re-re-direct examination was unnecessary because, as noted by the trial judge, Appellant did not dispute the contents of the call and fully explained the comments he made to his father. See Newell, 303 S.C. at 476, 401 S.E.2d at 423.

Given the immateriality of the recorded phone call, Appellant was not prejudiced by the State's reference to it during his re-cross examination.

III.

The trial judge correctly prevented trial counsel from questioning witness Matthew Chapman regarding a conversation he had with Victim's father during the trial because such information was irrelevant to the trial as there was no indication the father's statements were either intended to or actually caused Chapman to change his testimony. Further, such questions would only have confused the issues and served only to cast vague aspersions on father's veracity. To the extent Appellant argues the trial judge's refusal amounts to a violation of the Confrontation Clause, such argument was not raised to the trial judge and is inapplicable because Chapman was one of Appellant's witnesses and his testimony was not adverse to Appellant's defense.

Appellant argues the trial judge erred in preventing trial counsel from questioning Chapman, in front of the jury, about his conversation with Father in which Father requested Chapman testify about what he witnessed in days around the discovery of the cell phone videos of Victim. The State disagrees with this allegation of error. First, the State notes any arguments related to the Confrontation Clause and Appellant's assertion trial counsel should have been allowed to recall Father are unpreserved for Appellate review because they were not raised to the trial judge. Additionally, the trial judge did not err in refusing to allow the questioning because the conversation was irrelevant to Appellant's trial; Chapman testified Father only asked him to tell the truth, which Chapman had already planned to do, and that the conversation did not affect his trial testimony. The only purpose for questioning Chapman on this matter in front of the jury would be to cast vague aspersions on Father's veracity. Further, even if Appellant's Confrontation Clause argument were preserved, the trial judge's refusal to allow trial counsel to question Chapman on this issue was not a violation of the Confrontation Clause because Chapman was a defense witness under the control of trial counsel and his testimony was not adverse to Appellant's defense.

Issue Preservation

The State notes both the Confrontation Clause argument and claim that trial counsel should have been permitted to recall Father for further cross-examination are not preserved for review by this Court. At trial, trial counsel failed to argue either point. Because the trial judge was denied the opportunity to rule on these arguments, these issues are not preserved for appellate review. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693–94; also Bakala v. Bakala, 352 S.C. 612, 625 576 S.E.2d 156, 163 (2003) ("A due process claim raised for the first time on appeal is not preserved." (citing Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995)); State v. McWee, 322 S.C. 387, 391, 472 S.E.2d 235, 238 (1996) (finding defendant failed to preserve issues relating violations of due process and his Eighth Amendment rights as they pertained to his parole eligibility because defendant never cited any constitutional basis for his request for such a charge).

Standard of Review

A defendant demonstrates a Confrontation Clause violation when he is prohibited from engaging in otherwise appropriate **cross-examination** designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 884 (2012) (emphasis added). "The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such **cross-examination** based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is

repetitive or only marginally relevant." State v. Aleskey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)) (emphasis added).

"The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence **against the accused**." Crawford v. Washington, 541 U.S. 36, 50 (2004) (emphasis added). Generally speaking, the Confrontation Clause guarantees an opportunity for effective **cross-examination**, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis added).

"Bias, prejudice or any motive to misrepresent may be shown to **impeach** the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE (emphasis added). However, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than a conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), SCRE (emphasis added). In the discretion of the court, **if probative of truthfulness or untruthfulness**, specific instances may be inquired into on **cross-examination** if the specific instances concern "the witness' character for truthfulness or untruthfulness" or "concerning the character for truthfulness or untruthfulness of another witness as to which the character the witness being cross-examined has testified." Id. (emphasis added).

Analysis

The State notes the trial judge prohibition against questioning Chapman on his conversation with Father could not have been a Confrontation Clause violation because the clause concerns an accused's right to meaningful **cross-examination** of **adverse** witnesses. See Van Arsdall, 475 U.S. at 678. Chapman was a defense witness and provided favorable testimony

to the defense. Trial counsel gave no indication he doubted Chapman's veracity, and if he had he could have dealt with the situation by cementing his credibility during direct examination or by simply not calling the witness.

On the merits, the trial judge properly refused to allow trial counsel to question Chapman in front of the jury regarding his conversation with Father because it was irrelevant to the issues at trial; there was no evidence of any bias on the part of Chapman in favor of the State. Chapman was a defense witness who provided testimony favorable to Appellant. Chapman, who reported the conversation with Father to trial counsel, was clear that Appellant did not threaten him and only instructed him to tell the truth, and that he had already planned to testify honestly and in a manner consistent with Father's request. Notably, Chapman did not testify, nor did trial counsel allege, that Father's statements impacted Chapman's truthfulness. Accordingly, because there was no indication of bias, prejudice, a motive to misrepresent, or untruthfulness on the part of Chapman, the trial judge correctly prevented trial counsel from questioning Chapman about his conversation with Father. See Rule 608(b) SCRE (stating specific incidents of conduct may only be inquired into on cross-examination if probative of a witness's character for truthfulness or untruthfulness); Rule 608(c), SCRE (evidence of bias, prejudice, or any motive to misrepresent may be shown to impeach that witness through examination or evidence otherwise adduce); State v. Burgess, 393 S.C. 396, 712 S.E.2d 1 (Ct. App. 2012) (stating that while incidents documented in law enforcement officer's employment records might show the officer was hot-tempered, the trial court properly denied cross-examination about the matters because they did not show bias or otherwise relate to credibility where the incidents occurred after the defendant's arrest and did not relate to the defendant or the manner of the defendant's apprehension).

Moreover, no prejudice is shown and any error in the exclusion of the evidence is harmless. See Van Arsdall, 475 U. S. at 684 (finding the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless-error analysis); see also State v. Whatley, 407 S.C. 460, 468–69, 756 S.E.2d 393, 397 (Ct. App. 2014) (stating a violation of the Confrontation Clause is subject to a harmless error analysis and whether error is harmless depends on a number of factors, including the importance of the witnesses' testimony in the State's case, whether the testimony is cumulative, the presence of corroborating or contradictory testimony of the witness on significant points, the extent of cross-examination conducted by the defendant, and the strength of the State's case.). Chapman's testimony was ultimately irrelevant to Appellant's conviction. As discussed infra, the State had overwhelming evidence of Appellant's guilt, including the video of Appellant's hands while he was abusing Victim and the undisputed fact that the video was found on Appellant's phone.

Accordingly, the trial judge did not err in preventing trial counsel from questioning Chapman about his conversation with Father.

IV.

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

Appellant argues the cumulative effect of the errors argued above create reversible error in his case. The State disagrees with this allegation. This ground was neither raised at trial nor in a motion for new trial and is therefore not preserved for review. Further, the trial judge's decisions were not error and do not justify the grant of a new trial.

Standard of Review

The exact name of the legal doctrine employed does not need to be used to preserve an argument, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground. Id.; see also State v. McEachern, 399 S.C. 125, 150, 731 S.E. 2d 604, 617 (Ct. App. 2012) (stating, "even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial"). The Constitution entitles a

criminal defendant to a fair trial, not a perfect one. State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

Analysis

Despite the numerous issues presented on appeal, the record reflects the trial court exercised its discretion soundly at each instance. The trial judge did not charge the jury on ABHAN because, under current law, it is not a lesser-included offense of first-degree CSC with a minor. Moreover, the trial judge properly excluded questions regarding questions regarding Father's contact with Chapman because it was irrelevant to the determination of Appellant's guilt. Similarly, the trial judge did not penalize the State for failing to provide the defense with a copy of the recording of Appellant's call with his father because it was immaterial to Appellant's guilt.

Appellant's attempt to stack the deck does not change the equation: the sum of all zeros is still zero. Moreover, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. This case does not warrant reversal on grounds of cumulative error. "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Mitchell, 330 S.C. at 199-200, 498 S.E.2d at 647-48 (finding reversal on cumulative error doctrine not warranted). In the case at hand, Appellant received a fair trial.

V.

Any purported error alleged by Appellant is harmless given the overwhelming evidence of Appellant's guilt.

Even if this Court determines the trial judge erred in one or more of issues argued by Appellant, such error is harmless given the overwhelming evidence of Appellant's guilt.

Standard of Review

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." Heller at 171, 731 S.E.2d at 320.

Analysis

In the instant case, should this Court find the trial judge erred in the ways argued by Appellant, any such error is harmless due to the overwhelming evidence of Appellant's guilt. Videos of Appellant abusing Victim were found on Appellant's phone. Notably, Appellant does not dispute the videos showed Victim being abused in her home. Further, in those videos, Appellant's hands are easily identified by his bracelet and the presence of unique markings on his skin, and those identifying characteristics were also found in the pictures of Appellant's hands taken after his arrest. At the hospital, Appellant admitted to staff he knew the videos were

on his phone. Accordingly, the overwhelming evidence demonstrated Appellant was guilty of both charged offenses, rendering any alleged error harmless.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: _____
William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

September 10, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001476

THE STATE, ...RESPONDENT,

v.

BRANDON COX, ...APPELLANT.

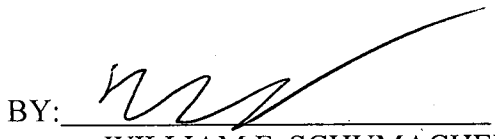
CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: 

WILLIAM F. SCHUMACHER, IV
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 9, 2018