STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2013-000568

THE STATE,

Respondent,

vs.

BARRY EUGENE LAFAVOR,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

Post Office Drawer 3368
Aiken, SC 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

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II.

Any issue regarding the trial judge's refusal to grant a mistrial in response to remarks made by the solicitor during her closing argument was not properly preserved for appellate review because the trial judge issued a curative instruction at defense counsel's request in order to cure any prejudice that could have resulted from those remarks and no objection was raised to the sufficiency of that curative instruction until after the jury reached a verdict. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged portion of the solicitor's closing argument remarks did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was eliminated through the issuance of a curative instruction to the jury.

STATEMENT OF THE CASE

In October of 2012, Appellant Barry Eugene Lafavor was arrested following an investigation into allegations of sexual abuse involving minor children. In April of 2013, the Aiken County Grand Jury indicted Appellant for one count of second-degree criminal sexual conduct with a minor, three counts of third-degree criminal sexual conduct with a minor, and one count of criminal solicitation of a minor. On June 24, 2013, a jury trial was commenced in the Aiken County Court of General Sessions with the Honorable Michael G. Nettles, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of two counts of third-degree criminal sexual conduct with a minor and acquitted Appellant of all other charges. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for each of the convictions and suspended those sentences to concurrent terms of imprisonment of ten years to be followed by five years of probation. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On May 1, 2012, Investigator Kimberly Sievers of the Aiken County Sheriff's Office responded to an elementary school after an allegation of sexual abuse was raised in regard to a boy at the school. (R. pp. 139-140). Upon arriving at that location, Investigator Sievers spoke with the boy along with his three sisters. (R. p. 140). During her interviews of the children, one of the girls, Victim 1, disclosed she had been sexually abused by Appellant Barry Eugene Lafavor, a fifty-two-year-old man living in the children's home.[1] (R. p. 79; pp. 140-142; p. 147). In response, Investigator Sievers quickly went to the children's residence and spoke with their mother, Allison Whittle ("Mother"), along with her partner, Susan Lukowiak, about the report of the sexual abuse. (R. pp. 89-90; pp. 141-142). At that time, the investigator instructed them Appellant was to have no contact with the children and could not live in the home during the course of the investigation. (R. p. 142). Additionally, Investigator Sievers referred all four children for forensic interviews, and those interviews were conducted on May 11, 2012. (R. p. 142). However, none of the children disclosed any sexual abuse during the forensic interviews, and Investigator Sievers closed her investigation into the matter. (R. pp. 142-143; p. 148).

Thereafter, Investigator Sievers's investigation remained closed until she was contacted by Sherry Pattillo, a clinical social worker at Aiken Barnwell Mental Health Center, on June 20, 2012. (R. p. 144). At that time, Pattillo informed her Victim 1 had made a disclosure of sexual abuse during a counseling session. (R. pp. 133-136; p. 144). In response, Investigator Sievers reopened her investigation into the sexual abuse allegations, contacted both Mother and Appellant, and advised them Appellant was not to

[1] At that time, Victim 1 had recently reached the age of thirteen. (R. pp. 32-33).

have any more contact with the children. (R. p. 144). Additionally, the investigator spoke with the children's aunt, Victoria Whittle ("Aunt"), who indicated Victim 1 stated she lied during the forensic interview in which she recanted her previous disclosure of sexual abuse. (R. p. 100; p. 109; p. 145; p. 165). After that, Investigator Sievers referred all three of Mother's daughters for forensic interviews, and those interviews were conducted on July 30, 2012. (R. p. 145). During the second forensic interviews, Victim 1 disclosed she had been sexually abused, but none of the other children revealed any abuse at that time. (R. p. 46; pp. 148-149; p. 172).

Following Victim 1's disclosure, Investigator Sievers continued her investigation into the reported sexual abuse. (R. pp. 146-147; p. 166). As her investigation continued, Investigator Sievers discovered Appellant was continuing to have contact with the children. (R. pp. 146-147; p. 166). She further learned Appellant sent a rose to one of the girls, Victim 2, while she was at school in October of 2012.[2] (R. pp. 128-130; pp. 146-147). In response, Investigator Sievers obtained arrest warrants for Appellant, and he was taken into custody on October 16, 2012. (R. p. 147). After that, Investigator Sievers again spoke with Victim 2, and, during that conversation, Victim 2 finally disclosed she had been sexually abused by Appellant.[3] (R. p. 147). As a result, Investigator Sievers obtained additional arrest warrants for Appellant, and he was subsequently indicted for numerous charges, including one count of second-degree criminal sexual conduct with a minor, two count of third-degree criminal sexual conduct

[2] During trial, Kaye Hawthorne, the individual who took Appellant's order for the flower, indicated Appellant initially requested for two cards to be included with it when it was delivered to Victim 2. (R. pp. 128-130). She further stated one of those cards was to read, "Happy Birthday, love, Barry," while the other card was to read, "Love, Mom." (R. p. 130). However, she indicated Appellant subsequently elected to change his order and asked her to only include one card reading, "Happy Halloween, love, Mom." (R. p. 130).

[3] At that time, Victim 2 had recently reached the age of twelve. (R. pp. 58-59).

with a minor, and one count of criminal solicitation of minor in regard to Victim 1 along with one count of third-degree criminal sexual conduct with a minor in regard to Victim 2. (R. pp. 18-19; p. 149; pp. 269-278).

Subsequently, prior to trial, defense counsel filed a subpoena seeking any Department of Social Services records related to the victims, and counsel for D.S.S. moved to quash the subpoena in response. (R. p. 2; p. 4). Thereafter, in May of 2013, a hearing was conducted before the Honorable Doyet A. Early, III, circuit court judge, to address the subpoena matter. (R. p. 2). During the hearing, defense counsel indicated he was seeking any information in the records related to Appellant, Appellant's relationship with the victims, or prior unfounded allegations of sexual abuse while contending such unfounded allegations could be relevant for cross-examination and impeachment purposes during trial. (R. p. 11; p. 14). After considering the matter, the circuit court judge directed counsel for D.S.S. to produce the records for his review and indicated he would make an assessment to determine whether anything in the records was relevant to Appellant's trial. (R. p. 12). The circuit court judge then inquired if his proposed course of action was acceptable to defense counsel, and defense counsel confirmed he agreed with the circuit court judge's proposal. (R. pp. 14-15).

Subsequently, Appellant proceeded to trial in June of 2013. (R. p. 17). At the outset of trial, defense counsel requested a continuance while contending the D.S.S. records he had sought prior to trial were not made available to him until five days before trial and he did not have time to review those records beyond "skimm[ing] the surface of them."[4] (R. pp. 21-23). He further asserted he believed some pages were missing from

[4] During trial, the D.S.S. records were introduced as a sealed exhibit. (R. p. 24). Those records consisted of 491 pages of material. (Court's Exhibit # 2 (D.S.S. Records)). Amongst the 491 pages of material, none of the documents contained any reference whatsoever to Appellant or any of the allegations involved in his

the records while urging the trial judge not to rely on the determination of others as to what was relevant or material. (R. pp. 21-22). In response, the solicitor noted she received the D.S.S. records at the same time as defense counsel, reviewed them in their entirety in just a few hours, and discovered the vast majority of the records were medical documents and were unrelated to Appellant or the victims. (R. pp. 22-24). The trial judge then denied defense counsel's continuance request. (R. p. 24).

Thereafter, as the trial proceeded forward, the victims recounted the details of the sexual abuse inflicted upon them by Appellant. (R. pp. 32-74). Specifically, Victim 1 testified Appellant began inappropriately touching her "private area" at night while her other family members were sleeping after he moved into her home when she was in middle school, and she stated he committed the first act of sexual abuse in his car on July 4, 2011. (R. p. 33; pp. 36-42; p. 46). Additionally, Victim 1 indicated Appellant sometimes digitally penetrated her vagina during the incidents and, on one occasion, asked her to make love to him. (R. pp. 42-43). Furthermore, Victim 1 testified she did not initially reveal the abuse because she was frightened of Appellant and because

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case. (Court's Exhibit # 2). However, the records contained approximately seventeen pages of law enforcement records related to the victims' brother's father, approximately forty-six pages of unrelated incident reports involving various individuals, approximately sixty pages of documents related to records requests, approximately eleven pages of school records, approximately three pages containing no information of any kind, and approximately 211 pages of the medical records of the victims and their siblings from as old as 1999 that had no connection of any kind to sexual abuse. (Court's Exhibit # 2). The remaining pages consisted of various D.S.S. documents related to different neglect investigations conducted between 2005 and 2008. (Court's Exhibit # 2). One such investigation was conducted in response to a report Mother committed physical neglect by allowing the children to have contact with the victims' brother's father despite bond restrictions prohibiting such contact, and that report was determined to be unfounded following an investigation. (Court's Exhibit # 2). Likewise, other investigative notes indicated Victim 1 accidentally burned one of his sisters while playing with a cigarette lighter on one occasion. (Court's Exhibit # 2). Furthermore, other investigative notes indicated Mother brought Victim 1, who was six years old at the time, to the hospital in 2005 after Victim 1 reported her "pee pee" hurt following an incident with Mother's boyfriend. (Court's Exhibit # 2). However, those notes indicated Mother refused to allow any medical examinations to be performed on Victim 1 after being informed law enforcement personnel were going to be notified of the allegation, and a related incident report stated Mother informed an investigating officer she did not believe her six-year-old child's claims while attributing them to a desire for attention. (Court's Exhibit # 2).

Appellant made promises to her to get her to lie about the abuse. (R. pp. 44-46). Likewise, Victim 2 testified Appellant began inappropriately touching her "private areas" at night while her other family members were sleeping when she was a fourth grade elementary school student. (R. pp. 60-62; pp. 65-67). She further stated Appellant was her boyfriend at that time. (R. p. 71).

In addition to the victims' testimony, Lukowiak testified for the State and recounted Appellant moved into the home she shared with Mother, the victims, and Mother's other children after their home was destroyed by a fire. (R. pp. 78-81). During that time, she indicated Appellant helped with the bills and played with the children, and she noted he shared a bed with Victim 2. (R. pp. 81-82). Subsequent to Appellant moving in, Lukowiak stated an investigation was opened and Appellant left their home. (R. pp. 83-85). After that, Lukowiak testified she arranged for Appellant to continue to be able to communicate with the children even though he was not supposed to have any contact with them because he threatened not to help with their bills if she did not do so, and she noted they eventually allowed Appellant to move back into their home because they needed assistance with their bills. (R. pp. pp. 85-86; pp. 91-92). Once Appellant moved back in, Lukowiak noted she caught Appellant in bed with Victim 2 on one occasion with his arm and leg draped over her, but she stated she did not reveal that incident for a number of months because she was frightened. (R. pp. 84-85; pp. 91-94). Furthermore, as her testimony continued, Lukowiak acknowledged she told Investigator Sievers early on in the investigation Victim 1 had lied about the allegations and was simply trying to get Appellant out of their home, but she indicated she subsequently tried to retract that statement. (R. pp. 97-99).

Similarly, Aunt and her partner, Tiffany Phillips, testified for the State, and both confirmed they were present when Appellant was caught in bed with Victim 2 with his arm draped over her.[5] (R. pp. 100-103; p. 111; pp. 117-118). However, they acknowledged they did not initially contact the authorities in response to that incident. (R. p. 108; p. 123). On another occasion, they indicated they found Appellant hiding in a closet at the home even though he was not supposed to be there at the time. (R. p. 104; p. 119). Additionally, they both recounted they went to remove Appellant from the home on another occasion, followed him through the home as he collected his belongings, and observed him remove a pair of Victim 2's panties from his duffle bag. (R. pp. 104-105; p. 120). They further indicated they overheard Victim 1 tell Mother she had been inappropriately touched on one occasion, but Aunt indicated Mother did believe Victim 1's claim.[6] (R. pp. 106-107; pp. 120-121).

Following that testimony, Investigator Sievers took the witness stand, recounted the details of her investigation into the allegations involving Appellant, and indicated she obtained arrest warrants for Appellant after Victim 1 and Victim 2 eventually made disclosures of sexual abuse. (R. pp. 139-150). Thereafter, during cross-examination, defense counsel questioned the investigator about prior allegations of abuse related to one of the victims, the solicitor objected, and the trial judge conducted an in camera hearing on the matter. (R. pp. 150-151). During the hearing, Investigator Sievers indicated she was aware an individual named Marie Scott, who was Appellant's cousin, had been accused of molesting Victim 1, and she further indicated she was aware of a case

[5] At that time, Aunt and Phillips indicated all of Mother's children other than Victim 2 had moved into their home because Mother was not healthy enough to be able to take care of them at that time. (R. pp. 101-103; pp. 114-115).

[6] During her testimony, Aunt also admitted she told the authorities at some point during the investigation Victim 1 was known for lying and stealing. (R. p. 109).

involving an individual named Gerald Carlisle, who was the victims' brother's father, but did not remember much about it.[7] (R. p. 94; pp. 151-152; p. 167). The solicitor then noted Carlisle had been convicted of sexual abuse charges unrelated to the victims and had been incarcerated in connection to those charges since 2008. (R. p. 152). Following those remarks, defense counsel indicated he wanted to inquire about the prior allegations because they may have been raised by one of the victims in Appellant's case, and Investigator Sievers indicated she did not believe those allegations were raised by either of the victims. (R. pp. 152-153). Defense counsel then noted one of the D.S.S. records he received prior to trial referred to an incident that occurred when Victim 1 was six years old where Victim 1 indicated her "pee pee" hurt while referencing Mother's boyfriend. (R. p. 153). In response, the parties discussed whether evidence related to the prior allegations was admissible, and the trial judge determined he would let defense counsel question the investigator about those allegations after indicating he believed they were relevant to the empowerment of and emotional damage to the victims that resulted from any prior abuse.[8] (R. pp. 155-156). The parties then agreed defense counsel would

[7] Earlier during trial, defense counsel asked Lukowiak if she was aware allegations had been raised in regard to Scott and Carlisle molesting Victim 1 in the past. (R. p. 94; p. 97). However, Lukowiak did not finish responding to defense counsel's question regarding Scott, and she indicated Carlisle did not molest Victim 1. (R. p. 97). Similarly, defense counsel asked Pattillo if she was aware of prior allegations Victim 1 made against people other than Appellant, and Pattillo responded she believed she heard something about that. (R. p. 137).

[8] Specifically, the trial judge stated: "I think it's very relevant in that at some point in time there's going to be an adverse inference on how emotionally disturbed these young children seem to be, and it very well could be that it's not as a result of this defendant's activity, but having been abused by some other lady and some other man. And it could be that they – it shows the power of what happens when you make an allegation of sexual misconduct. It empowers the child and it happens quite often, if you're ever involved in family court which I doubt that you are. That happens, you know, quite often, where children learn when you bring up bad touching they are the ones who end up being empowered. And why should they not be allowed to do that, I mean, to at least present that issue. Do you think it's relevant? I don't think it disparages the reputation of the children because they're victims of all of it, clearly and clearly have been adversely effected by it and I think that's become eminently clear to the jury and to not allow it would be to put their emotional damage all on him." (R. pp. 155-156).

be allowed to ask about the allegations referenced in the D.S.S. records. (R. pp. 157-160).

After that, defense counsel renewed his motion for a continuance. (R. p. 162). In support of the motion, defense counsel argued he wished to explore the D.S.S. records more thoroughly, noted some of the records involved the issue of "fire starting," and indicated he did not have time to get an expert on that matter. (R. p. 162). Furthermore, he contended he could have more fully explored any references to Carlisle contained in the records and asserted there may have been more records that were not disclosed. (R. pp. 162-163). However, the trial judge again denied defense counsel's motion. (R. p. 163).

Subsequently, Investigator Sievers continued her testimony before the jury, and defense counsel questioned her in regard to the prior allegations of sexual abuse. (R. p. 167). During that questioning, Investigator Sievers acknowledged she was aware an allegation had been raised regarding Scott molesting Victim 1 but indicated she did not know any details regarding the allegation. (R. p. 167). Furthermore, the investigator indicated she was aware Carlisle had been arrested in regard to a sexual abuse case and stated she had heard he was incarcerated in connection to that case. (R. p. 167). However, she stated she was not aware of any allegations involving Victim 1 and Carlisle. (R. pp. 167-168).

Following Investigator Siever's testimony, the State rested its case, and Appellant elected to testify in his own defense.[9] (R. p. 173; p. 182). During his testimony, Appellant stated he reluctantly began helping the victims' family following a fire at the

[9] One of Appellant's cousin also testified in his defense and claimed Appellant was with him until 9:00 p.m. on July 4, 2011. (R. pp. 175-176). However, that witness indicated he did not know anything about what occurred at the victims' residence. (R. p. 180).

behest of Scott. (R. pp. 182-183; p. 195). Subsequently, Appellant indicated he moved into their home after being asked to do so and began taking care of the bills, the chores around the home, and the children. (R. pp. 183-185). After that, he stated he lived there for a year before he was accused of the sexual abuse, denied ever touching any of the victims, denied sleeping in the same bed as the victims, and insisted he required women to show him proof they were at least twenty-one years old before he would touch them. (R. p. 185; pp. 190-191; p. 194). Additionally, Appellant claimed Victim 1 became angry at him while he was living at the house after he refused to buy her a phone and threatened to tell people her touched her if he did not buy her one. (R. pp. 186-187). He also acknowledged he sent the flower to Victim 2 but claimed he was asked to do so by Mother. (R. pp. 189-190). Furthermore, he admitted Victim 2's panties were in his duffle bag but insisted she had to have been the one who placed them there. (R. pp. 193-194; pp. 202-204).

Subsequently, at the conclusion of the evidentiary phase of trial, defense counsel presented his closing argument to the jury. (R. pp. 213-222). Specifically, during his closing argument, defense counsel alleged to the jury the sexual abuse of the victims may have started "a long time ago" while noting the victims' brother's father had previously lived with the victims and was serving a prison sentence for criminal sexual conduct with a minor. (R. pp. 214-215). Additionally, he noted Victim 1 previously may have made an allegation against Appellant's cousin, Scott. (R. p. 215). Defense counsel then alleged Victim 1 was "some-what" mentally ill and should not be believed while contending Victim 2 should not be believed based on her failure to disclose the sexual

abuse when initially asked about it.[10] (R. pp. 215-218). As his argument continued, defense counsel insisted the allegations against Appellant were not believable because it would be "passing strange" for the victims' parents to allow Appellant into their home after the sexual abuse was first disclosed while asserting charges should be brought against the victims' parents if the allegations were true. (R. p. 219). Finally, defense counsel argued the testimony indicating Appellant had been caught in bed with Victim 2 was not believable by pointing to the delay in its disclosure and by suggesting most mothers and parents would "be stomping the person's guts out" or immediately reporting such an occurrence. (R. p. 221).

Following defense counsel's remarks, the solicitor presented her closing argument to the jury. (R. pp. 222-233). During her closing argument, the solicitor recounted the evidence and testimony presented during trial that established Appellant sexually abused Victim 1 and Victim 2 while living in their home. (R. pp. 224-228). Additionally, she noted the victims' initial failures to reveal the sexual abuse occurred at a time when Appellant was ignoring directives to avoid contact with the girls and was still communicating with them. (R. pp. 229-230). Furthermore, the solicitor attempted to rebut defense counsel's closing argument contentions regarding the victims' parents' seemingly unusual behavior by noting they only allowed Appellant into the home and initially protected him after the allegations were raised because he paid their bills and acted as their source of income. (R. pp. 232-233). As her argument continued, the solicitor remarked:

> Members of the jury, they let this man have full control over their kids and – they had a stranger living in the house, taking these kids places in the

[10] In alleging Victim 1 was mentally ill, defense counsel referenced her testimony indicating she had seen visions of and had been visited by a friend who had died of leukemia several years earlier. (R. p. 48; pp. 52-55).

> car, being alone with them and they didn't care so long as he was paying the bills. If that makes you mad, it should. No parent does that, but the reason it makes you mad that those parents did nothing when their little girl said that he was touching them is because you know those little girls were telling the truth. If it doesn't make you mad that that's what happened to [Victim 1] and [Victim 2], if that doesn't make you mad, then you should have no problem sending that man home today to move right back into that house with [Victim 1] and [Victim 2]. That shouldn't bother you one bit, but if it makes you made that those girls were abandoned, that those girls –

(R. p. 233). At that point, defense counsel objected to the solicitor's remarks, and the trial judge sustained the objection. (R. p. 233). The solicitor then quickly concluded her closing argument. (R. p. 233).

Thereafter, the jury was excused from the courtroom, and defense counsel moved for a mistrial. (R. p. 234). In support of that motion, defense counsel argued the solicitor's closing argument remarks were improper and designed to inflame the jurors' passions with anger towards Mother in an effort to get them to convict Appellant. (R. p. 234). In response, the solicitor contended her remarks were not designed to inflame the passions of the jury, were responsive to defense counsel's closing argument remarks, and were not directed at Appellant. (R. p. 234). After considering the arguments of counsel, the trial judge declined to grant a mistrial but again indicated he believed the solicitor's remarks were improper. (R. p. 234). Additionally, upon request from defense counsel, the trial judge agreed to give a curative instruction proposed by defense counsel to address his concerns with the solicitor's closing argument remarks. (R. pp. 236-237).

Subsequently, as the trial continued, the trial judge instructed the jury on the applicable law. (R. pp. 237-248). As part of his jury instructions, the trial judge presented the following curative instruction to the jury in regard to the solicitor's closing argument remarks:

> First of all, the defense made an objection in the closing argument and I sustained that objection and I want to give a curative charge in that regard. Ladies and gentlemen of the jury, your deliberation should focus on the evidence or the lack of evidence. Your decision should not be affected by prejudice or appeals to passion or anger. It's about the evidence or the lack thereof.

(R. p. 238). The trial judge then instructed the jury on the relevant law, including on the presumption of innocence, the State's burden of proving Appellant's guilt beyond a reasonable doubt, the credibility of witnesses, and the consideration of prior inconsistent statements. (R. pp. 239-242).

Following the presentation of those instructions, both the solicitor and defense counsel expressly indicated they had no objections to the trial judge's jury instructions, and the jurors began their deliberations. (R. pp. 250-252). Thereafter, approximately three hours later, the jury convicted Appellant of one count of third-degree criminal sexual conduct involving Victim 1 and one count of third-degree criminal sexual conduct involving Victim 2 while acquitting Appellant of all other charges. (R. pp. 253-254). The trial judge then sentenced Appellant to an aggregate fifteen-year term of imprisonment and suspended it to a ten-year term of imprisonment to be followed by five years of probation. (R. pp. 258-259).

After the sentence was imposed, defense counsel made a motion for a new trial while contending the solicitor's closing argument remarks were improper and could not be cured by any curative instruction. (R. pp. 259-260). However, the trial judge denied that motion after noting the jury deliberated for a long period of time and acquitted Appellant of a number of charges. (R. p. 260). Defense counsel then argued for a new trial based on the trial judge's denial of his continuance motion. (R. p. 261). Specifically, defense counsel reaffirmed his belief some pages were missing from the

D.S.S. records while reasserting his claim he did not have enough time to fully go through all those records.[11] (R. pp. 261-262). Defense counsel further asserted the records could have warranted the presentation of testimony from an expert witness or a D.S.S. employee while noting the records suggested Victim 1 burned one of her sisters with a lighter, which he contended could have been evidence of sexual abuse and allegedly would have been exculpatory because it occurred before Appellant had any contact with the victims. (R. pp. 262-263). In response, the trial judge indicated he offered to make any D.S.S. employees available for trial if desired while further noting the solicitor was able to review all the D.S.S. records in just a few hours. (R. pp. 263-264). Defense counsel then asserted he might not have gotten all the records due to the fact Appellant was not referenced in any of them, and the solicitor responded all of the records had been produced while confirming Appellant was not mentioned in the records because he was not the subject of the D.S.S. investigations to which those records related. (R. pp. 264-265). Finally, defense counsel contended expert testimony could have been presented in regard to the effects of the prior unrelated sexual abuse of Victim 1 while asserting the denial of his continuance motion hampered his ability to build a defense and be fully prepared for trial. (R. pp. 267-268). Once again, the trial judge declined to grant a new trial. (R. p. 268). Appellant then filed his appeal.

[11] In making that assertion, defense counsel admitted he received the records on the preceding Thursday but waited until Sunday night to begin reviewing them before the trial, which began on the following Monday. (R. p. 262).

ARGUMENT

I.

The trial judge did not abuse his broad discretion by declining to grant a continuance in Appellant's case because the parties had sufficient time to adequately review the Department of Social Services records that were disclosed to them several days before the trial began, the disclosed records had no connection or relevance to Appellant or the charges for which he was being tried, and nothing was presented suggesting the grant of any additional time would have enabled Appellant to produce additional admissible evidence or raise additional points beneficial to his defense during his trial.

Appellant contends the trial judge abused his discretion by refusing to grant a continuance prior to trial. In support of that contention, Appellant maintains the grant of a continuance would have permitted defense counsel to more thoroughly review the D.S.S. records released to him four days before the trial began, to more fully explore allegations Victim 1 made against Carlisle nearly eight years before Appellant's trial, to show a possible source of Victim 1's knowledge of sexual activity, and to potentially obtain an expert to offer testimony in regard to the effects prior sexual abuse or allegations of sexual abuse might have on a juvenile victim. Contrary to Appellant's contentions, the trial judge committed no error in refusing to grant a continuance prior to trial because defense counsel was provided with sufficient time to review the D.S.S. records, which were entirely unrelated to any matter involving Appellant and contained no information pertinent to Appellant's trial, and because Appellant failed to establish the grant of any additional time would have enabled him to produce admissible evidence or raise additional points beneficial to his defense during trial. Accordingly, the trial judge did not abuse his broad discretion in refusing to grant a continuance in Appellant's case. Appellant's convictions should be affirmed.

In South Carolina, trial judges are vested with broad discretion when faced with a decision as to whether to grant or deny a motion for a continuance, and such decisions are ordinarily left solely to the trial judge's discretion. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005); see State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966) ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a clear and conclusive abuse of discretion."). On appeal, appellate courts typically show great deference to a trial judge in regard to such a decision. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). As a result, the denial of a continuance motion will not be disturbed on appeal absent a clear, prejudicial abuse of discretion. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010); see State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) ("The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant."). Significantly, "reversals of refusal of continuance **are about as rare as the proverbial hens' teeth**." Lytchfield, 230 S.C. at 409, 95 S.E.2d at 859 (emphasis added).

In the case sub judice, defense counsel sought a continuance prior to trial based on the fact the parties obtained a number of D.S.S. records related to the victims and their family members several days before trial. However, a continuance was not warranted under those circumstances because the disclosure of the records four days before trial provided the parties with adequate and sufficient time to review the D.S.S. records in light of the fact many of the records were entirely unrelated to the victims and were wholly unrelated to Appellant. Cf. State v. Harvey, 253 S.C. 328, 332, 170 S.E.2d 657,

659 (1969) (affirming the denial of a request for a continuance where counsel had been appointed to represented Harvey and his co-defendant just four days prior to trial and counsel asserted they did not have sufficient time to investigate the case, search for witnesses, confer with the defendants, question co-defendants, study jurors, and research the law related to the charged offenses). Furthermore, a continuance was not warranted based on the late disclosure of the D.S.S. records because those records were **not** related in any way to Appellant or the allegations involved in his case and, thus, were not pertinent to his defense. See State v. Geer, 391 S.C. 179, 192, 705 S.E.2d 441, 448 (Ct. App. 2010) (holding the trial judge did not abuse his discretion in denying Geer's continuance request where "the State's late disclosure of the evidence did not impair Geer's ability to present a defense regarding whether she possessed crack cocaine"). Under those circumstances, the trial judge did not abuse his broad discretion by refusing to grant a continuance and delay the trial. See State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) ("The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice."); see also Morris v. Slappy, 461 U.S. 1, 11-12 (1983) ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon

expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." (citation omitted)).

In arguing the trial judge abused his discretion by refusing to grant a continuance, Appellant first contends the grant of a continuance would have permitted defense counsel to more fully explore the allegation of sexual abuse referenced in the D.S.S. records involving Carlisle and Victim 1 and to use evidence regarding that nearly eight-year-old allegation to explain the source of Victim 1's knowledge of sexual activity. Importantly though, neither the source of Victim 1's sexual knowledge nor any other permissible subject related to prior sexual abuse was at issue in Appellant's case as the allegations raised against Appellant involved inappropriate touching, which was not a subject that would be expected to be beyond the ordinary knowledge of a thirteen-year-old child, while the prior allegation involving Carlisle could have had no relevance whatsoever to Victim 2's source of knowledge regarding the abuse she alleged occurred.[12] See State v. Grovenstein, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000) ("[W]e hold that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct. **Our decision, however, does not mean that this type of evidence is always admissible.**" (emphasis added)); see also S.C. Code Ann. § 16-3-659.1 ("Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not

[12] Moreover, defense counsel did **not** argue to the trial judge in support of his continuance request more time would have potentially permitted him to obtain evidence in regard to the source of the victims' sexual knowledge, and, thus, Appellant cannot properly raise such an argument for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); see also State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."). Thus, under the circumstances of Appellant's case, no explanation was necessary in regard to the potential source of Victim 1's knowledge as to what inappropriate touching was, and testimony related to the remote prior allegation involving Carlisle was irrelevant to the issues in dispute in Appellant's case. Compare Grovenstein, 340 S.C. at 220-221, 530 S.E.2d at 412 (finding evidence indicating the victims, who were as young as nine years old at the time of trial, previously had been accused of inserting objects into a young girl's vagina and rectum prior to meeting Grovenstein was admissible in a case in which Grovenstein was accused of inserting his penis and other objects into the victims' rectums); with State v. Williams, 409 S.C. 455, 466-467, 761 S.E.2d 770, 776-777 (Ct. App. 2014) (finding evidence of a prior allegation indicating one of the victims was forced to engage in oral sex with her stepbrother on previous occasions was properly excluded during a trial where Williams was charged with inappropriately touching and digitally penetrating the two victims because the evidence of the prior allegation did not provide an alternative explanation as to the source of the victims' sexual knowledge in light of the fact it involved a different type of sexual activity from what was alleged in Williams' case, it was related to only a single victim, and it had the potential to be confusing under the circumstances). As a result, the grant of a continuance would **not** have allowed defense counsel to properly

present additional evidence regarding the prior allegation involving Carlisle, and the trial judge did not abuse his discretion by refusing to grant a continuance on that basis. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.").

In further arguing the trial judge erred by refusing to grant a continuance, Appellant maintains the grant of a continuance would have permitted him to obtain the services of an expert witness to testify in regard to the effects prior sexual abuse may have on a juvenile victim and in regard to the effects the act of making a disclosure of sexual abuse may have on a child. However, while expert testimony in regard to the behavioral characteristics exhibited by juvenile victims of sexual abuse is unquestionably admissible in sexual abuse prosecutions, it is unclear how such testimony would have been relevant or beneficial to Appellant's defense. See State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) (recognizing expert testimony is admissible in regard to the behavioral characteristics commonly exhibiting by victims of sexual abuse); see also State v. Weaverling, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible."). Significantly, testimony regarding behaviors such as delayed disclosure or recantation would have **damaged** Appellant's defense as opposed to have helped it in light of the fact defense counsel urged the jury during his closing argument to disbelieve the evidence presented during trial due to the fact the victims had either delayed or recanted their disclosures in Appellant's case. See State v. Brown, 411 S.C. 332, 342, 768 S.E.2d 246, 251 (Ct. App. 2015) (finding expert testimony regarding delayed disclosures was

admissible in a juvenile sexual abuse prosecution); see also John E. B. Myers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children. Frequently when children finally disclose, they give slightly different versions of the abuse to different interviewers. Finally, although there is debate about how many sexually abused children recant, it is undisputed that some children recant and some recant their recantation. Thus, from a psychological point of view, expert testimony about delay, inconsistency, and recantation is not controversial. From the legal perspective, such testimony is not worrisome." (footnotes omitted)). Furthermore, testimony establishing the victims' behavior was indicative of them being victims of sexual abuse at the hands of Appellant would certainly not have aided Appellant's case while testimony suggesting the victims' behavior was indicative of them being victims of sexual abuse at the hands of others would similarly have been unhelpful to Appellant because it would have in no way rebutted the evidence establishing Appellant **also** abused the victims. See State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred."); State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) (recognizing "both expert testimony and behavioral evidence are admissible as rape trauma evidence **to prove a sexual offense**" (emphasis added)). Finally, to the extent Appellant contends expert testimony could have been presented in regard to the effects the act of making a disclosure might have on a child, Appellant has failed to identify any authority of any kind demonstrating what such testimony would entail or how it would have been beneficial to his defense, and, therefore, he has failed to

demonstrate he was entitled to a continuance on that basis. See Yarborough, 363 S.C. at 266, 609 S.E.2d at 595 ("The party asking for the continuance must show due diligence was used in trying to procure the testimony of an absent witness as well as **set forth what the party believes the absent witness will testify to and the grounds for that belief.**" (emphasis added)).

Accordingly, for all the foregoing reasons, Appellant failed to meet his burden of establishing the trial judge's refusal to grant a continuance constituted a prejudicial abuse discretion. See Squires, 248 S.C. at 244, 149 S.E.2d at 603 ("It is well settled in this jurisdiction, as well as in most others, that the trial court's refusal of a motion for continuance in a criminal case will not be disturbed in the absence of a **clear and conclusive** abuse of discretion." (emphasis added)). As a result, there is no basis to disturb the trial judge's decision on appeal. See State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by **the trial court has rarely been disturbed on appeal.**" (emphasis added)); see also Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)). Appellant's convictions should be affirmed.

II.

Any issue regarding the trial judge's refusal to grant a mistrial in response to remarks made by the solicitor during her closing argument was not properly preserved for appellate review because the trial judge issued a curative instruction at defense counsel's request in order to cure any prejudice that could have resulted from those remarks and no objection was raised to the sufficiency of that curative instruction until after the jury reached a verdict. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his discretion by declining to grant a mistrial under the circumstances of Appellant's case because the challenged portion of the solicitor's closing argument remarks did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was eliminated through the issuance of a curative instruction to the jury.

Appellant contends the trial judge erred by declining to grant a mistrial in response to remarks made by the solicitor during her closing argument. In support of that contention, Appellant maintains the solicitor's closing argument remarks were inflammatory and invited the jury to convict him on an improper basis. Initially, any issue in regard to the trial judge's response to the solicitor's closing argument remarks was not properly preserved for appellate review because no objection was raised after the trial judge presented a curative instruction to the jury at defense counsel's behest in an effort to cure any prejudice that could have resulted from the undesirable remarks until after the jury reached a verdict in Appellant's case. However, even if the issue was somehow preserved for appellate review, the trial judge committed no error by declining to take the extreme step of granting a mistrial because the challenged portion of the solicitor's closing argument remarks did not render Appellant's trial fundamentally unfair when considered in the context of the record as a whole, and any prejudice that could have resulted from those remarks was cured by the trial judge's pointed curative instruction to the jury. Accordingly, under the circumstances, a mistrial was not warranted in Appellant's case. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Regarding the requirement a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came

too late."). Significantly, "[i]t is axiomatic that an issue cannot be raised for the first time **in a post-trial motion**." Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) (emphasis added).

Moreover, the requirement a contemporaneous objection must be raised is applicable to situations in which a trial judge issues a curative instruction in response to a sustained objection as such instructions are ordinarily presumed to have cured any prejudice resulting from a trial error. State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010); see State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) ("Generally, a curative instruction is deemed to have cured any alleged error."). Thus, when a trial judge take steps to cure an error during trial, a defendant must object to the sufficiency of the trial judge's curative measures in order to preserve any issue with the error for appeal. State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 524 (Ct. App. 1996); see State v. Craig, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976) ("Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error."). Critically, if a defendant does not raise an objection to the sufficiency of a curative instruction during trial, no issue is preserved for appellate review. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.").

In the case at bar, defense counsel initially moved for a mistrial after the trial judge sustained his objection to remarks made by the solicitor during her closing argument, and the trial judge ultimately determined a mistrial was not warranted under the circumstances even though he believed the solicitor's remarks to be improper.

Following the trial judge's ruling, defense counsel asked the trial judge to give a curative instruction to eliminate any possible prejudice that could have resulted from the improper argument remarks, and the trial judge agreed to do so after defense counsel proposed such an instruction. The trial judge then presented a curative instruction to the jury in regard to the solicitor's closing argument remarks as part of his jury instructions, and, after he concluded those instructions, defense counsel expressly confirmed he had **no** objections to them. Subsequently, defense counsel refrained from making any further arguments or objections regarding the solicitor's closing argument remarks or the sufficiency of the trial judge's curative measure until **after** the jury convicted Appellant of several of the indicted offenses. At that point, defense counsel argued Appellant was entitled to a new trial because no curative instruction – presumably including the one he personally proposed – could have cured the prejudice that resulted from the solicitor's closing argument remarks.

Now, on appeal, Appellant contends the trial judge erred by refusing to grant a mistrial in response to the solicitor's closing argument remarks, which he contends likely led the jury to convict Appellant on an improper basis. However, any issue regarding the trial judge's response to the solicitor's improper closing argument was not properly preserved for appellate review because defense counsel sought and obtained a curative instruction to eliminate any prejudice that resulted from the improper argument and did not contemporaneously object to the sufficiency of that instruction after it was given. See Jones, 325 S.C. at 316, 479 S.E.2d at 524 ("[T]his issue is not preserved for review since Appellants did not object to the adequacy of the trial judge's curative instruction."); see also George, 323 S.C. at 510, 476 S.E.2d at 912 ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously

make an additional objection to the sufficiency of the curative charge or move for a mistrial."). Instead, defense counsel specifically indicated he had no objections after the curative instruction was presented to the jury and then waited until after the verdict to raise a challenge to the sufficiency of that curative measure. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."). Under those circumstances, any issue regarding the trial judge's response to the solicitor's closing argument remarks was not preserved for appellate review and cannot now be properly raised or addressed on appeal. Cf. Brown, 389 S.C. at 95, 697 S.E.2d at 628 ("If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review. In the present case, the trial court issued a curative instruction and defense counsel failed to challenge the sufficiency of the curative instruction, making this issue [regarding the denial of a mistrial motion] unpreserved for review." (citation omitted)). Appellant's convictions should be affirmed.

B. Propriety of the Trial Judge's Denial of the Mistrial Motion

Closing arguments are a basic element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 858 (1975). Such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and provide both the prosecution and the defense with an opportunity to advocate for their respective positions, to argue for certain inferences to be drawn from the evidence and testimony presented, and to identify the weaknesses in their opponents' positions. Id. at 862. As a result, closing arguments are crucial towards achieving the ultimate objective of the adversarial system of justice in the United States, which is for the correct verdict to be reached in each case. Id.; see also Gardner v. Florida, 403 U.S. 349, 360 (1977) ("[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]").

In presenting a closing argument to the jury, a solicitor – and any other party – must confine the argument to the evidence in the record and the inferences to be drawn from that evidence. State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight to given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)). Importantly, the solicitor is also permitted to use a closing argument to call into question the credibility of the defenses that were identified

or raised by the opposing side during trial. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999).

In considering the propriety of a closing argument, "[i]t is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). "However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." Id. As a result, trial judges have broad discretion in regard to both the range and scope of closing arguments. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument.").

When a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). On appeal, appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 ("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."). In making that determination, " 'it is not enough that the [challenged] remarks were undesirable or even universally condemned.' " Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation omitted). Critically, absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court's

ruling in regard to a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("Ordinarily, a trial court's rulings on closing arguments will not be disturbed.").

In Appellant's case, the trial judge sustained an objection to remarks made by the solicitor during her closing argument that suggested the jurors should be angry at the victims' parents based on their actions that enabled Appellant to commit the sexual abuse, but the trial judge declined to take the drastic action of granting a mistrial in response to the remarks. Critically, the trial judge committed no error by refusing to grant a mistrial under the circumstances because the solicitor's closing argument remarks – although perhaps undesirable – did not render Appellant's trial fundamentally unfair. See Darden, 477 U.S. at 181 ("[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (citations omitted)).

That is true because the challenged portion of the solicitor's remarks only consisted of a small portion of a closing argument that was otherwise properly focused on the testimony and evidence establishing Appellant's guilt, was quickly interrupted by a sustained objection, was never repeated or referenced again during trial, and was rapidly followed by a pointed curative instruction from the trial judge.[13] See Brown, 389 S.C. at 95, 697 S.E.2d at 628 ("A curative instruction is usually deemed to cure an alleged

[13] Notably, a majority of the challenged portion of the solicitor's closing argument remarks was directly responsive to defense counsel's closing argument remarks suggesting the victims' parents' actions were not actions that would be expected of ordinary parents and should not be believed for that reason. See State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant."); see also Darden, 477 U.S. at 179 ("The prosecutors' comments must be evaluated in light of the defense argument that preceded it[.]"); cf. Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding the solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair).

error."); see also State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[A]ppellants complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one."); cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."). Under those circumstances, the potential prejudice that could have resulted from the remarks was not sufficient to render Appellant's trial fundamentally unfair and was promptly eliminated through the trial judge's curative instruction, which instructed the jurors **not** to allow their decision in Appellant's case to be affected by anger, passion, or prejudice.[14] See Brown, 389 S.C. at 95, 697 S.E.2d at 628 ("[W]e believe the trial court's instruction to the jury cured any error."); see also 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."); 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."). Accordingly, the drastic sanction of a mistrial was not warranted in Appellant's case, and the trial judge committed no error by refusing to abandon Appellant's trial in response to isolated closing argument remarks that were quickly and adequately addressed by a sustained

[14] Significantly, the fact the jury ultimately acquitted Appellant of the majority of the indicted offenses, including of the most serious of those offenses, strongly supports a conclusion the jury was in no way improperly influenced by the solicitor's undesirable closing argument remarks. (R. pp. 253-254).

objection and a curative instruction. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial."); State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."); see also State v. Greene, 255 S.C. 548, 558, 180 S.E.2d 178, 184 (1971) ("[The appellant] was not entitled to a perfect trial, only a fair one."). Appellant's convictions should be affirmed.

CONCLUSION

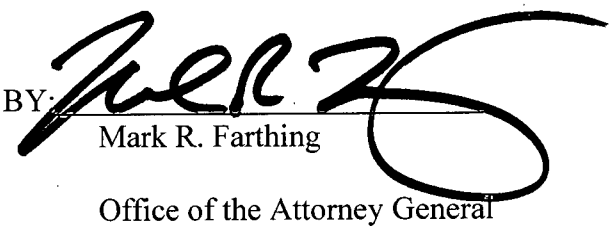
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 20, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2013-000568

THE STATE,

Respondent,

vs.

BARRY EUGENE LAFAVOR,

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

MARK R. FARTHING
Assistant Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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