

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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ORIGINAL

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

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Appellate Case No. 2017-000873

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THE STATE,

v.

SHANE ISAAC JOHNSON,

Appellant.

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Respondent SC Court of Appeals

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**FINAL BRIEF OF RESPONDENT**

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ALAN WILSON  
Attorney General

V. HENRY GUNTER, JR.  
Assistant Attorney General

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

HEATHER S. WEISS  
Solicitor, Fifth Judicial Circuit

Post Office Box 192  
Columbia, SC 29202  
(803)-576-1800

ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

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- II. The trial judge properly allowed the State to call Dr. Susan Lamb as an expert witness where a miscommunication concerning whether Appellant had Dr. Lamb’s CV and medical report did not result in a Brady violation, and the trial judge cured any inadvertent Rule 5 violation by ensuring the solicitor provided Defense Counsel with a copy of Dr. Lamb’s CV and report and granted a one day continuance as to Dr. Lamb’s testimony so that Defense Counsel would have time review the materials and prepare.
  
- III. The trial judge properly denied Appellant’s motion for a mistrial because Dr. Cartie’s medical testimony, even if admissible hearsay, was not sufficiently prejudicial to warrant the declaration of a mistrial, and the trial judge, out of an abundance of caution, provided the jury with a thorough curative instruction. Further, the solicitor’s question containing the word “punishment” was a reasonable question based on the evidence presented and did not warrant the declaration of a mistrial, and Appellant’s refusal of a curative instruction waived his right to complain about the question on appeal.
  
- IV. The trial judge properly denied Appellant’s motion for a directed verdict because the evidence and testimony presented during trial, when viewed in a light most favorable to the State, could induce a reasonable juror to find Appellant guilty of the charged offenses.

- V. The trial judge did not abuse his broad discretion by admitting a number of photographs showing various angles and areas of severe burns on Victim's body because those photographs were highly probative towards establishing Appellant inflicted great bodily harm upon Victim, which had to be established in order to prove Appellant guilty of the charged offense, the photographs were not cumulative, and the high probative value of the pictures was not substantially outweighed by any potential undue prejudice that could have resulted from their admission.
  
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## STATEMENT OF ISSUES ON APPEAL

### I.

The trial judge did not abuse his discretion in denying Appellant's motion for an independent competency evaluation of Victim where the trial judge conducted *voir dire* of Victim and correctly determined Victim was competent to testify where: (1) Victim had personal knowledge of the matter that he was able to clearly communicate, and (2) Victim was able to differentiate between a truth and a lie and was able to commit to telling the truth.

### II.

The trial judge properly allowed the State to call Dr. Susan Lamb as an expert witness where a miscommunication concerning whether Appellant had Dr. Lamb's CV and medical report did not result in a Brady violation, and the trial judge cured any inadvertent Rule 5 violation by ensuring the solicitor provided Defense Counsel with a copy of Dr. Lamb's CV and report and granted a one day continuance as to Dr. Lamb's testimony so that Defense Counsel would have time review the materials and prepare.

### III.

The trial judge properly denied Appellant's motion for a mistrial because Dr. Cartie's medical testimony, even if admissible hearsay, was not sufficiently prejudicial to warrant the declaration of a mistrial, and the trial judge, out of an abundance of caution, provided the jury with a thorough curative instruction. Further, the solicitor's question containing the word "punishment" was a reasonable question based on the evidence presented and did not warrant the declaration of a mistrial, and Appellant's refusal of a curative instruction waived his right to complain about the question on appeal.

### IV.

The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during trial, when viewed in a light most favorable to the State, could induce a reasonable juror to find Appellant guilty of the charged offenses.

### V.

The trial judge did not abuse his broad discretion by admitting a number of photographs showing various angles and areas of severe burns on Victim's body because those photographs were highly probative towards establishing Appellant inflicted great bodily harm upon Victim, which had to be established in order to

prove Appellant guilty of the charged offense, the photographs were not cumulative, and the high probative value of the pictures was not substantially outweighed by any potential undue prejudice that could have resulted from their admission.

VI.

The trial judge properly charged the jury on the current and correct law of South Carolina, including the correct instruction on criminal intent.

## STATEMENT OF THE CASE

Appellant was indicted during the December 2015 term of the Grand Jury for Richland County for inflicting great bodily injury upon a child (2015-GS-40-6544). Appellant proceeded to a jury trial before the Honorable R. Knox McMahon, from April 3-7, 2017 in Columbia, South Carolina. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge McMahon to imprisonment for a term of twenty years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

## STATEMENT OF FACTS

On October 7, 2015, Officer Don Timmons was dispatched to Palmetto Health Richland Memorial Hospital where Victim was being prepared for transfer to the Joseph M. Still Burn Center in Augusta, Georgia. R. p. 114. Officer's Timmons' dispatcher told him that a child had been burned. R. p. 116. Officer Timmons had a limited view of Victim because Victim's body was wrapped; however, he noticed burns on Victim's face and head. R. pp. 114-15. While at the hospital, Officer Timmons spoke with Appellant, Victim's mother, and several members of the medical staff. R. p. 115. Appellant and Victim's mother were in a romantic relationship and co-habited. R. p. 422. While at the hospital, Officer Timmons spoke to Appellant in Victim's room. R. p. 116. Appellant told Officer Timmons Victim took a shower and got burned while in the shower. R. p. 116. Officer Timmons learned from Victim's mother that she and Appellant waited two hours after Victim was burned to transport him to the hospital. R. p. 115. While Officer Timmons was speaking with Appellant and the victim's mother, they asked several times if they could leave to travel to Augusta to be with Victim. R. p. 117. After they left, Officer Timmons stayed at the hospital for twenty to twenty-five minutes to talk to the medical staff. R. p. 117. As he was leaving the hospital, Officer Timmons spotted Appellant and Victim's mother smoking cigarettes in the parking lot. R. p. 117.

Dr. William Ferrara is employed as an emergency physician at Palmetto Health Richland. R. p. 214. Dr. Ferrara was working on October 7, 2015, when Victim was rushed into the hospital. R. pp. 217-18. While trying to delineate what happened, Dr. Ferrara was told by Victim's family that Victim was found sitting in a tub and crying. R. p. 218. Dr. Ferrara asked whether anyone else was in the room and Victim looked at Appellant and stated, "You did this to me." R. p. 219. Dr. Ferrara was later told by Appellant that Victim was autistic. R. p. 223.

Because Palmetto Health is not a primary burn center, the decision was made to transport Victim to Augusta. R. p. 224. Victim's burns were so severe that his skin was sloughing off of his body. R. p. 227. Dr. Ferrara testified that Appellant had extensive burns all over his body. R. p. 226-27. After treating Victim, Dr. Ferrara had concerns that Victim was abused, so he contacted the relevant authorities. R. p. 233.

Dr. Richard Cartie, the director of pediatric critical care at the Still Burn Center in Augusta, treated Victim. R. pp. 333, 337-38. Victim told Dr. Cartie that, in addition to his burn injuries, he might have been hit in the head. R. pp. 339-40. A detailed examination of Victim revealed burns to forty-two percent of his skin. R. p. 344. Of that forty-two percent of Victim's skin that was burned, twenty-six percent was a third-degree burn that required grafting. R. p. 344. Victim's condition required multiple surgeries and hospitalization for almost a month. R. p. 341. Dr. Cartie characterized Victim's burns as "severe," and noted that the burns "would have been life-threatening without any treatment." R. p. 342. Victim was on a ventilator for almost two weeks after he was admitted to the hospital. R. p. 346. Dr. Cartie explained that Victim will be disfigured for life because of his burns. R. p. 356. Dr. Cartie testified that it was not possible for the burns to be self-inflicted. R. p. 350. Dr. Cartie stated, "I see no way for him to have sprayed himself with hot water to the extent and distribution that his burns were. This would have been done by someone else, or he was put in a situation which he was not able to get away from the hot water. R. p. 351. Dr. Cartie explained that the backs of Victim's hands sustained severe burns, as did his forearms. R. p. 351. Dr. Cartie opined that Victim covered his face with his hands and arms to protect himself from the scalding water to some extent. R. p. 351. Dr. Cartie testified that it was his medical opinion that the burns were the result of child abuse. R. p.

352. Dr. Cartie noted that, during the two hour delay where Victim was not taken to the hospital, Victim would have been "fairly miserable." R: p. 363

Kristin Campbell, Victim's mother, testified at trial. R. pp. 417-75. Campbell and Appellant began living together after they started a romantic relationship. R. p. 422. Campbell testified that Victim has autism but is highly functioning. R. p. 424. Campbell testified that she typically bathed her son. R. p. 424. Campbell stated that Victim could brush his teeth and wash his face without any assistance from her, but that she would turn the water on for him and Victim would tell her whether the water was too hot or too cold. R. pp. 427-28. Victim was not allowed to shower by himself. R. p. 445. Campbell testified that Appellant would usually only interact with Victim when Appellant's own children were there. R. p. 428. Campbell testified that on the evening Victim was injured, she was too tired to put Victim in the shower, so Appellant offered to bathe him. R. p. 429. Campbell noted she was a little bit hesitant, but let Appellant do it because she was so tired. R. p. 429.

Campbell later heard Victim screaming. Campbell ran down the hallway towards the bathroom where she found Victim curled up in a ball in the shower with Appellant standing over him. R. p. 429. Campbell recalled, "[Appellant] was just standing, looking at my son, in front of the tub." R. p. 431. Campbell turned the water off and ran back to her bedroom to retrieve a towel. R. pp. 429-30. When she began drying Victim, she noticed his skin was peeling off. R. p. 430. Campbell told Appellant that Victim needed to go to the hospital; however, Appellant stated Victim did not need to go and would be fine. R. p. 433. Victim was crying after Campbell retrieved him from the shower and told Campbell, "Appellant did it to him." R. p. 434. After Appellant told her Victim did not need to go to the hospital, Campbell googled burns on her cell phone. R. p. 435. Appellant later walked out of the house and talked on the phone for a while. R.

p. 436. Appellant's brother, Bruce Gibbs, subsequently arrived at Campbell and Appellant's residence. R. p. 437. Gibbs told Appellant that Victim had to go to the hospital, and Appellant acquiesced to allowing Victim to receive medical care. R. p. 438.

At Palmetto Health Richland, Campbell heard Victim tell a nurse that Appellant burned him. R. p. 445. Once DSS and law enforcement officers came to the hospital to speak with Campbell and Appellant, Appellant told Campbell to say that she was the one who burned Victim. R. p. 446. Appellant later advised Campbell that their stories had to match, and they had to provide the same account of Victim getting burned. R. pp. 458-59. Campbell testified she subsequently spoke with police voluntarily and provided an admittedly false statement where she alleged she was the individual who put Victim in the shower. R. p. 452. Campbell subsequently spoke with her aunt and decided to tell the truth about what happened to Victim. R. p. 456. Campbell testified that Appellant was the individual who burned Victim. R. p. 456. Campbell stated she did not call 911 because she was scared of Appellant. R. p. 459. Prior to Appellant's trial, Campbell pled guilty to unlawful conduct and neglect of a child. R. p. 464.

Victim was eight years old at the time of trial. R. p. 270. After being deemed competent to testify by the trial judge, Victim testified he was burned in the shower at his mother's house. R. pp. 271-72. Victim specified that Appellant was the individual who burned him. R. p. 28. Victim stated Appellant burned him with hot water and that it hurt. R. p. 272-73. Victim testified he did not know why Appellant burned him. R. p. 273.

Dr. Susan Lamb is employed as a child abuse pediatrician at the Assessment Resource Center in Columbia, South Carolina. R. p. 382. Victim was referred to the Assessment Resource Center by Richland County DSS. R. p. 390. Dr. Lamb reviewed photographs of Victim's burns and subsequently conducted a physical examination of him. R. p. 391-395. After conducting the

physical examination, Dr. Lamb diagnosed Victim as a victim of child physical abuse. R. p. 394.

In explaining how she reached that conclusion, Dr. Lamb stated:

So, the pattern of burning on him shows that he was in a crouched position. So if you're standing up, the water will run down your back onto your buttocks, onto the backs of your thighs. If you are facing forward, you'll get the same runoff pattern. So, we see commonly runoff patterns, spill patterns, what you would see. So, in order for him to spare most of his chest and his thighs, he had to have been crouched down protecting his lower legs, and then the majority would have been hitting on the top of his head and running down with him forward with his hands up over his face, trying to protect his face. So, there had been - - that's not a pattern that you would associate with an accidental burn, for someone to be crouched down in that position.

R. p. 395.

Sergeant Colin Bailey of the City of Columbia police department became involved in the case on October 12, 2015. R. p. 170. Sergeant Bailey was present for Appellant's initial interview with law enforcement. R. p. 170. Sergeant Bailey described Appellant's demeanor as, "very comfortable." R. p. 178. During a subsequent search warrant of Appellant's residence, Sergeant Bailey was tasked with measuring the temperature of the water at the incident location. R. pp. 191-92. Depending on where the thermometer was placed in the shower, the water temperature ranged from one hundred sixteen degrees and one hundred forty-three degrees. R. pp. 194-95. Sergeant Bailey did not actually touch the water, but, when placing his hand near the water, he could tell the water was, "extremely hot." R. p. 196. During his interview with law enforcement, Appellant told them he only took cold showers and did not know anything about the hot water in the house. R. pp. 197-98. Sergeant Bailey located the home's water heater outside of the home. R. p. 202. With this particular unit, the home's master temperature could be adjusted with a knob. R. p. 203. The knob of Appellant's water heater was pushed to the "very hot" setting. R. p. 203. Investigator Brian Sutton of the City of Columbia Police Department

observed a danger sign on the hot water heater that warned of death or severe burns from water temperatures exceeding one hundred twenty-five degrees. R. p. 282.

Investigator James Charley is employed as a criminal investigator with the City of Columbia Police Department. R. pp. 516-17. Investigator Charley testified that Appellant originally told investigators he had nothing to do with Victim's shower. R. p. 528. Both Appellant and Campbell originally indicated that Victim was allowed to shower by himself and that he caused his own burns. R. p. 528. After looking at Victim's medical report, Investigator Charley decided to re-interview Appellant and Campbell. R. p. 535. Investigator Charley testified that in her second interview, Campbell gave significantly different information than she provided in the first interview. R. p. 537. In Appellant's second interview, he initially blamed Campbell. R. pp. 540-41. However, Appellant changed his story as the interview progressed. R. p. 541. Investigator Charley testified Appellant was very inconsistent in the interviews and explained that, in the first interview, Appellant described Victim as an angel; however, in the second interview Appellant called Victim a liar. R. p. 565. Based on the information from the Victim, Campbell, the medical professionals that treated Victim, and admissions made by Appellant in the interview, Investigator Charley obtained an arrest warrant against Appellant for inflicting great bodily injury upon a child. R. p. 541. After Appellant's bond hearing, Investigator Charley was told Appellant wished to speak with him. R. p. 542. Investigator Charley testified Appellant told him, "it was an accident. I didn't know the water got that hot. And at that point, I tell him to stop talking. He stated - - he kept talking and stated, look, I know I have to pay for what I done." R. p. 543.

## ARGUMENT

### I.

**The trial judge did not abuse his discretion in denying Appellant's motion for an independent competency evaluation of Victim where the trial judge conducted *voir dire* of Victim and correctly determined Victim was competent to testify where: (1) Victim had personal knowledge of the matter that he was able to clearly communicate, and (2) Victim was able to differentiate between a truth and a lie and was able to commit to telling the truth.**

#### Relevant Facts

Prior to trial, the trial judge held a hearing on a motion by Appellant asking the court to order an independent competency evaluation of Victim. Pretrial Tr. pp. 4-69. In support of his motion, Appellant offered the testimony of Dr. Jessie Raven, a psychiatrist. Pretrial Tr. p. 5. Dr. Raven did not actually interview Victim, but testified he did review the records in this case of Victim, who has autism spectrum disorder. Pretrial Tr. p. 7. Dr. Raven testified that, although he did not actually evaluate Victim, he still has concerns regarding whether he was competent to testify. Pretrial Tr. p. 8. Dr. Raven clarified he had no opinion as to whether Victim was competent to testify; instead, he expressed concerns regarding Victim's competency because he believes some people with autism seem more competent than they actually are. Pretrial Tr. p. 9. Dr. Raven's assessment is that, generally speaking, a child with autism spectrum disorder always should be evaluated before being determined to be competent to testify. Pretrial Tr. p. 20.

On cross-examination, Dr. Raven agreed with the solicitor that one in sixty-eight children are diagnosed with autism. Pretrial Tr. p. 22. Dr. Raven was aware that Victim suffered extensive burns and specifically identified Appellant as the perpetrator. Pretrial Tr. pp. 23-24. Dr. Raven contended that he could not say whether that identification was reliable. Pretrial Tr. p. 24. When presented with studies showing that typically developing children lie at a much greater rate than

children with autism, and that children with autism are poorer at maintaining lies, Dr. Raven testified he did not disagree with the findings but would have to look at the studies. Pretrial Tr. p. 26. Dr. Raven also testified that the fact that there were no deviances in Victim's testimony throughout the investigation would still not affect his opinion that Victim should be evaluated. Pretrial Tr. p. 28.

In response, the State presented the testimony of Heather Smith. Pretrial Tr. p. 38. Smith is employed by the Department of Social Services and the Assessment Resource Center as a forensic evaluator and human services worker. Pretrial Tr. p. 38. As part of her employment with the Assessment Resource Center, Smith interviewed Victim. Pretrial Tr. p. 41. Smith was aware that Victim suffered from autism. Pretrial Tr. p. 39. Smith testified that the interviews at the Assessment Resource Center are structured to accommodate any developmental delays. Pretrial Tr. p. 39. Smith testified Victim was able to communicate very well, stating:

[Victim] provided exceptional details. He was able to answer questions about where other people were at the time of the incident. He was able to provide information about what was happening, what we call discretionary impressions. That was where he was able to give that first and then something else after that and something else. He was able to give details in sequence which is what you want to see in a forensic interview.

Pretrial Tr. p. 43. Smith stated that in her expert opinion, Victim can understand the difference between a truth and a lie. Pretrial Tr. p. 46.

The trial judge subsequently provided a detailed analysis of the logic going into his ruling, noting that he had read State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976) and was considering the relevant factors. Pretrial Tr. pp. 62-69. The trial judge concluded, "In this case with the child having the autistic syndrome would not mean in my view that he or she should be required to undergo a psychiatric examination, or that the Court should require such an examination." Pretrial Tr. p. 69. The trial judge found, "So at this point, not having heard or seen

the victim, I would find that there is sufficient power in cross-examination if the victim were found competent. This is a pre-trial ruling that there be no psychiatric examination of the victim at this time." Pretrial Tr. p. 69.

At trial, prior to calling Victim as a witness, the solicitor conducted *voir dire* to establish his competency to testify. R. p. 247. During the *voir dire* examination, Victim testified he knew what a lie was. R. p. 249. Victim testified that it was wrong to tell a lie, and that the consequence of telling a lie was that you would get in trouble. R. p. 249. Victim testified he knew what a promise was and that it was bad to break a promise. R. p. 249. Victim stated he knew what it meant to tell the truth, and that he promised to tell the truth during his testimony. R. p. 250. Victim testified he remembered what happened to him when he got burned and he would be able to tell the truth about it. R. p. 250.

Following argument by the solicitor and Defense Counsel, the trial judge stated:

All right, and I would preface my remarks before I get to the psychological examination, that looking at the case law, having the opportunity now to see the witness, observe the witness, listen to the responses of the witness, it does appear that he has a very good concept of the difference between a truth and a lie. That he understands a lie is wrong, and that he would get in trouble. And I believe, as he phrased it, he would get in trouble with his mother, and I think he responded in that regard several times. Also, his testimony was he recalled - - I paraphrase - - that he remembered what had happened to him and would be able to - - he didn't use these words but would be able to relate the event that occurred to him on the - - if he were called to testify. Again I paraphrase what he says. I just draw that inference therefrom. . . .

I don't know if he was correct or incorrect in his answering the questions about Power Rangers. He was correct - - I'll know that by the end of the day, by the way. He was correct in where he went to school, who his teacher was. Also responded, I believe, that he liked his teacher in that regard.

I take this - - and I don't quite know if I'm correct or incorrect in this because I hadn't totally heard or don't recall any prior testimony, that I take it and I believe I did hear part of this without the names of the statements in camera that [Appellant] had two children and Ms. Campbell had one child. And, therefore, in the child's mind, they would be not be his brother and sister. Perhaps they were. Perhaps he embraced them as such when they lived together, but because or he thought that [Appellant] was his daddy, therefore his children would have been

his brother and sister without all the technicalities of marriage or not marriage. So - - and he came back around on that, too. He said, well, they're not my brother and sister now. So, I take it also that was correct. . . .

So, I think he is competent to testify. I think he can - - has the ability to perceive a past event. Whether or not he's moving to Easter Street, California<sup>1</sup>, or not, that's a difference in a child's life between a past event and a future event. When you're talking about a future event, and y'all have heard me say this so many times I get - - I drive myself crazy. I can predict anything but the future. You're told something. I think I remember as a child I thought Christmas would never get here. Now they just fly by. Be that as it may, you know, you are - - you know, nothing wrong with questioning him about a future event. We're talking about whether or not he can relate a past traumatic event that occurred to him in his life.

So, looking again at the factors Under Michael H., 602 S.E.2d 729, I have already reviewed the nature of the examination requested, and the intrusiveness inherent in that examination. Taking into account the victim's age, the resulting physical and/or emotional effects of the examination of the victim, the probative value of the examination, concrete versus non-concrete answers - - that just goes to the form of the answers that are given in cross-examination. And there's no, there's no right or wrong manner in which a witness responds to questions.

There's a whole - - every human being, every witness is different. Just, just like yesterday, for example, with Dr. Ferrara. On the witness stand, questions are asked many times by attorneys, perhaps this will refresh your memory, and they will take a document up there and show them. Will you look at it? Yes. That doctor's response was, well, you can do whatever you want. And so you get different responses from different adult witnesses, and it's the same.

I do not think, in my discretion, considering all those factors outlined in Michael H., that a psychological examination would assist this court. So, I would overrule that motion in that regard.

R. pp. 263-68.

### **Standard of Review**

"The question of the competency of witnesses is to be determined by the trial judge. His determination will not be reversed unless a clear showing of abuse of discretion can be made."

State v. Green, 267 S.C. 599, 603, 130 S.E.2d 618, 619 (1976) (citing Peyton v. Strickland, 262 S.C. 210, 203 S.E.2d 388 (1974); 97 C.J.S. Witnesses §58). Statements from advocates for either party in a judicial proceeding evaluating a witness' competency cannot substitute for a trial

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<sup>1</sup> During cross-examination by Defense Counsel in the competency hearing, Victim stated his father lived on Easter Street in California and that his mother told him he was moving there. R. pp. 255-56.

judge's personal observations of a person's capacity to be a competent witness. State v. Camele, 293 S.C. 302, 305, 360 S.E.2d 307, 308 (1987).

### **Discussion**

Appellant contends the trial judge erred in denying his motion for an independent evaluation of Victim because Victim had difficulty recalling certain events and was unable to commit to telling the truth. Appellant's argument seems to imply that Victim's competency was called into question by virtue of the fact that he was a child with autism. Appellant's argument lacks merit. The trial judge conducted a thorough hearing on Victim's competency and was able to conclude that Victim was competent to testify. As was correctly noted by the trial judge, Victim's testimony where he was able to differentiate between a truth and a lie, committed to being truthful, and was able to provide details of Appellant's abuse established that he was competent to testify, and a psychological examination would have been of no further value to the trial judge.

"Every person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(a), SCRE. Courts presume a witness to be competent because bias or other defects in a witness's testimony — revealed primarily through cross examination — affect a witness's credibility and may be weighed by the factfinder. State v. Needs, 333 S.C. 134, 142, 508 S.E.2d 857, 861 (1998). "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. "A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the

proposed witness is incapable of understanding the duty of a witness to tell the truth." Rule 601(b), SCRE.

The South Carolina Supreme Court has stated the applicable rule for establishing competency as: The question of the competency of a witness is a question for the court, and not for the jury, and when a witness is offered in a criminal case, and doubt is raised as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability. State v. Pitts, 256 S.C. 420, 430, 182 S.E.2d 738, 743 (1971) (citing State v. Comstock, 70 S.E.2d 648 (W.Va. 1952).

In In re Michael H., the South Carolina Supreme Court held that a trial judge has the discretion to order the victim to submit to a psychological examination, finding that the trial judge should examine the following factors: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. In re Michael H., 360 S.C. 540, 547, 602 S.E.2d 729, 733 (2004) (citing State v. Delaney, 417 S.E.2d 903 (W.Va. 1992). Critically, a psychological evaluation of a child complainant should only be ordered upon the showing of a compelling need for such an evaluation. Michael H., 360 S.C. at 547-51, 417 S.E.2d at 733-35.

In Appellant's case, the trial judge did not abuse his discretion in finding Victim competent because the extensive hearing into the matter was sufficient to establish Victim's competence and there was thus no compelling need to order an examination of Victim. The trial

judge expressly noted that, after hearing Victim's testimony, a psychological examination would be of no value to him in determining Victim's competency. The *voir dire* of Victim established he understood the difference between a truth and a lie, committed to telling the truth, provided details of the event, and the general questions about Victim's life asked by the solicitor and Defense Counsel were corroborated as true. Victim thus had personal knowledge of the events in the case and was able to communicate that knowledge, and was capable of understanding the duty of a witness to tell the truth. This is all that is required by the South Carolina Rules of Evidence. While Appellant emphasizes the fact that Victim only provided short answers, this is not an uncommon practice in children or adults who are nervous about testifying in court and has no bearing on their overall competency as a witness.

In examining the factors enumerated in Michael H., the trial judge's decision is supported by evidence in the record. First, the examination would be inherently intrusive, as it would force a child to recount painful memories and would make him feel like his veracity is being questioned just by virtue of him having been diagnosed with autism spectrum disorder. As to the second factor, the victim's age, Victim was seven years old at the time of his injury and eight years old at the time of trial. However, "[t]here is no fixed age which an individual must obtain in order to be competent to testify as a witness." State v. Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619. Victim's age did not affect any aspect of the proceeding such that would warrant a psychological evaluation. Oftentimes in a trial, the strongest and most important voices are those of children, and the mere fact that one is a child does not have any bearing on competency. As to the third factor, the resulting physical or emotional effect of the examination on the victim, it is self-evident that a psychiatric evaluation of an autistic child who suffered a horrific injury would take an emotional toll on Victim. As to the fourth factor, the probative value of the examination

to the issue before the court, the examination would have provided no further probative value, as the trial judge emphasized Victim's testimony alone was sufficient for him to find that Victim was competent to testify. An examination would not have assisted the court whatsoever. As to the fifth factor, the remoteness in time of the examination to the criminal act, nearly a year and a half elapsed between the crime and the request for a psychological examination. The lapse in time makes any examination more burdensome on the Victim and less probative for the trial judge. As to the sixth and final factor, the evidence already available for the defendant's use, the Victim was extensively *voir dire*d and subject to cross-examination by Defense Counsel as to his memory and ability to be truthful. The Victim's own testimony provided the best evidence of competency, and the examination would have been of no value. All of the above factors establish there was no compelling need for the trial judge to order a psychological evaluation.

Victim's ability to provide clear details of the crime to medical staff, the trial judge, and jury, as well as a clear account of who burned him, coupled with his ability to tell the truth, firmly established he was competent to testify at trial. Any perceived deficiencies in the Victim's ability to perceive events and communicate what happened were all matters which Defense Counsel could explore through cross-examination in order to try and impeach Victim's credibility. Appellant's argument aims to treat autistic children as a suspect class, and would impose a higher burden for establishing their competency to testify at trial. Simply put, Appellant believes autistic children cannot be taken at their word, and that a trial judge's discretion should not extend to determining whether these witnesses are competent to testify. This argument undermines the discretion of the trial judge and his ability to perceive witnesses. The careful hearing into the matter by the trial judge established that Victim met the threshold for competency to testify. See Green, 267 S.C. at 602-03, 230 S.E.2d at 619 (holding a six year old

eyewitness to shooting was competent to testify where, although he did have difficulty answering questions at times, he was aware of what he had observed and was capable of expressing those observations to the court and the jury); Needs, 333 S.C. at 143-44, 508 S.E.2d at 861 (finding trial judge did not abuse his discretion in finding a witness was competent to testify where, despite the fact that the witness made conflicting statements to police and previously admitted to perjury, the witness swore to tell the truth and had personal knowledge of the matter); State v. Spaniol, 895 N.W.2d 329 (S.D. 2017) (Five-year-old victim was competent to testify at father's rape trial despite the fact that she was autistic, had an imperfect memory, and made contradictory statements, because she possessed the ability to observe, recall facts from her life, and to communicate, and the victim showed a sufficient sense of moral responsibility by distinguishing truth from falsehood several times during her testimony); People v. Armenia, 630 N.Y.S.2d 784 (finding trial judge did not abuse its discretion in allowing a fifteen-year-old autistic, mildly retarded complainant to testify where the preliminary examination conducted by the trial judge adequately demonstrated he understood the nature of testifying under oath and was thus competent to be sworn as a witness) (N.Y. App. 1995). Appellant's conviction and sentence should be affirmed.

## II.

**The trial judge properly allowed the State to call Dr. Susan Lamb as an expert witness where a miscommunication concerning whether Appellant had Dr. Lamb's CV and medical report did not result in a Brady violation, and the trial judge cured any inadvertent Rule 5 violation by ensuring the solicitor provided Defense Counsel with a copy of Dr. Lamb's CV and report and granted a one day continuance as to Dr. Lamb's testimony so that Defense Counsel would have time review the materials and prepare.**

### Relevant Facts

During a break during the State's case-in-chief, Defense Counsel argued:

It's our understanding, Judge, that the state is planning on calling a Dr. Lamb to testify. We were not provided anything on this witness. We've just received a copy of the medical report that was done at the Assessment Resource Center in November of 2015. We've got that just about fifteen minutes ago, twenty minutes ago. So, Your Honor, we would object to, first off, this witness testifying at all because we were not given any sort of notice about what they'd be called to testify to. As far as standing, she is a medical doctor. I can only assume they're going to be trying to qualify her as some sort of expert. We asked for the CVs of all the state's potential experts before the trial started. We've been provided nothing, which is why we have no notice as to what would be testified. Your Honor, we would object to her testifying for, for any purpose for this trial. We believe it would - - it is a Rule 5 Brady violation.

R. pp. 285-86. In response, the solicitor explained that a discovery meeting took place a week before trial where she and Defense Counsel went through the entirety of the discovery materials in the State's possession. R. p. 286. During the meeting, the solicitor went through the ARC report and Defense Counsel indicated they had those materials. R. p. 286. In response, Defense Counsel stated, "I'm unaware of where in the rule it says that we are responsible for asking for every single piece of information that could exist in their file." R. p. 288. Defense Counsel contended that, while they had the ARC report, they were not made aware of the existence of an accompanying medical report. R. p. 288.

The trial judge subsequently asked Defense Counsel whether she was in possession of Dr. Lamb's medical report, and Defense Counsel indicated that she was in possession of the report. R. p. 291. The trial judge then asked whether Defense Counsel had a copy of Dr. Lamb's CV and Defense Counsel indicated that she did not. R. p. 291. The solicitor apologized and stated that she recently provided Defense Counsel with a copy of Dr. Lamb's CV in another case, so she erroneously thought Defense Counsel had the CV in her possession. R. p. 291. The solicitor then provided Defense Counsel with a copy of Dr. Lamb's CV. R. p. 291. The trial judge stated he was aware of the State's continuing duty to disclose under Rule 5(c), SCRCrimP. The trial judge then ruled that, under Rule 5(d)(2), SCRCrimP:

if this were a failure to comply, and I'm not finding that specifically: The court may order such party to permit discovery or inspection. Discovery has now been permitted. All has been turned over that were not turned over previously to the defense. I'm granting a continuance as to Dr. Lamb's testimony. You may call Dr. Lamb either in the morning or late this afternoon, not now. That will give them the opportunity to review both her CV and the report.

R. pp. 291-92.

Prior to Dr. Lamb's testimony, Defense Counsel again objected to her testimony, arguing that the defense was still unaware of what kind of opinion she would be offering in the case. R. p. 372. Defense Counsel stated, "So, we would object firstly, first off because we have no information on what she'll be talking about. We do think it was a disclosure violation by the State initially." R. p. 373. In response, the solicitor indicated that Dr. Lamb's opinions are in the medical report that was disclosed to Appellant. R. p. 373. In addition, the solicitor noted Defense Counsel spoke to Dr. Lamb the previous day about her findings. R. p. 374. Defense Counsel conceded she approached, Dr. Lamb, stating, "I guess I did, I did stop Dr. Lamb in the hall, and I asked her what she had been qualified as in the past, and I asked her, you know, what are they going to, you know, what are they going to be asking you. She said I'm going to testify off my report." R. p. 375. Nevertheless, Defense Counsel argued that information was insufficient. R. p. 375.

### **Standard of Review**

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

## Discussion

Appellant contends the trial judge erred in allowing the State to call Dr. Lamb as an expert witness because the State withheld her CV and therefore violated Brady v., Maryland, 373 U.S. 83 (1963) and Rule 5, SCRCrimP. Initially, Appellant's Brady argument is not preserved for appellate review where Appellant offered no substantive argument at trial. Further, there was no Brady violation in Appellant's case where Dr. Lamb's CV did not constitute evidence favorable to the accused, and the CV was not material to guilt or punishment. Also, regardless of whether the miscommunication between the parties about Dr. Lamb's medical report constituted a Rule 5 violation, the trial judge remedied the situation by ordering the solicitor to provide Defense Counsel with Dr. Lamb's medical report and CV, and continued Dr. Lamb's testimony until the following day so that Defense Counsel would have time to review the materials and prepare for Dr. Lamb's testimony. The trial judge thus created a just remedy under Rule 5 and there was no resulting prejudice to Appellant.

### Brady

As a threshold matter, Appellant's Brady argument is not preserved for appellate review. The issue of whether a Brady violation occurred was never raised to nor ruled upon by the trial judge. The only mention of Brady by Defense Counsel occurred when he stated that they believed the alleged discovery violation was, "A Rule 5 Brady Violation." R. p. 286. Defense Counsel provided no substantive argument as to Brady, and the trial judge's ruling was based solely on Rule 5. Appellant's Brady argument is thus not preserved for appellate review, because they have been raised for the first time in his Brief to this Court. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial court, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254

S.C. 415, 421, 175 S.E.2d 624, 627 (1970); 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. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal).

Error preservation concerns aside, Appellant’s argument is not meritorious. In Brady, the United States Supreme Court held “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The South Carolina Supreme Court has found: “A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). “Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). See also Strickler v. Green, 527 U.S. 263, 281 (1999) (explaining there is no real Brady violation “unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”).

Initially, there was no Brady violation in Appellant’s case because the evidence was not favorable to the accused. Dr. Lamb’s report and, perhaps by association, her CV, was evidence that was harmful to Appellant because Dr. Lamb examined Victim as well as photographs of his burns and diagnosed him as a victim of child abuse. This evidence was harmful to Appellant rather than favorable. Appellant offers no argument supporting the proposition that Dr. Lamb’s

CV was somehow evidence favorable to him. Dr. Lamb's CV provided no exculpatory or impeachment evidence. Further, Dr. Lamb's CV was not material to guilt or punishment, as its nondisclosure would not have changed the outcome of the proceeding.

#### Rule 5

Similarly, any potential Rule 5 violation stemming from a miscommunication between the parties about Dr. Lamb's medical report did not constitute a Rule 5 violation, as the trial judge remedied the situation by ordering the solicitor to provide Defense Counsel with Dr. Lamb's medical report and CV was remedied by the trial judge. The rules encompassed in Brady and Rule 5 are separate and impose different duties. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219 (Ct. App. 1998). "Therefore, [a] separate analysis must be used to determine if either has been violated." Id. "The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings." Id. at 453, 503 S.E.2d at 220. "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006).

Rule 5(a)(1)(C), SCRCrimP, "Documents and Tangible Objects," states as follows:

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

Critically, Rule 5(d)(2), SCRCrimP, "Failure to Comply with a Request," provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

Irrespective of whether a violation of Rule 5(a)(1)(C) occurred, the trial judge's remedial action, pursuant to Rule 5(d)(2), of granting a continuance and ordering the solicitor to provide Defense Counsel with Dr. Lamb's CV and medical report was sufficient to cure any prejudice to Appellant. Appellant had a full day to review Dr. Lamb's report and CV prior to her testimony. The trial judge's action thus cured any potential prejudice Appellant could have suffered by not having Dr. Lamb's CV. It is critical to note that the remedy for a Rule 5 violation is not always suppression, and the trial judge crafted an appropriate remedy in this case. Because Appellant had access to the information that was previously not disclosed, was able to prepare, and was even able to question Dr. Lamb as to what she would be testifying to, he was not prejudiced in any way by the trial judge's remedy in this case. Appellant's conviction and sentence should be affirmed.

### III.

**The trial judge properly denied Appellant's motion for a mistrial because Dr. Cartie's medical testimony, even if admissible hearsay, was not sufficiently prejudicial to warrant the declaration of a mistrial, and the trial judge, out of an abundance of caution, provided the jury with a thorough curative instruction. Further, the solicitor's question containing the word "punishment" was a reasonable question based on the evidence presented and did not warrant the declaration of a mistrial, and Appellant's refusal of a curative instruction waived his right to complain about the question on appeal.**

#### **Relevant Facts**

During Dr. Cartie's testimony, the solicitor asked what information Victim gave him. R. p. 339. Dr. Cartie testified, "So, the child reported to me that he had been put into the shower and sprayed with hot water as a form of punishment for - -." R. p. 339. Defense Counsel interrupted Dr. Cartie's testimony, objecting on the basis of hearsay. R. p. 339. Dr. Cartie's testimony resumed without any further mention of the objection, although during the following

question, the solicitor did preface her question with, "you can't say because of the rules. Who, who did he tell you who did it to him? You can't say." R. pp. 339-40.

Later during the trial, Defense Counsel asked the trial judge, "Your Honor, would now be the appropriate time to address the motion for mistrial based on this being discipline?" R. p. 380. The trial judge responded, "I don't need to hear now. I won't forget it unless I lose that note." R. pp. 380-81. During a break in Dr. Lamb's testimony, Defense Counsel moved to strike the portion of Dr. Cartie's testimony where he used the word, "discipline," contending that testimony was inadmissible as it went beyond the scope of Dr. Cartie's proffer. R. p. 405. Defense Counsel asserted the damage from that testimony was irreversible and that a mistrial should be granted. R. p. 405. The solicitor responded that she did not believe that the comment was inadmissible, as it went to part of the medical diagnosis, however, even if the testimony was inadmissible, a curative instruction would be adequate to cure the error. R. p. 406. After hearing argument from the solicitor and Defense Counsel, the trial judge ruled:

The five words that were stated by Dr. Cartie was: as a form of discipline. I do not find that incident is so grievous as to prejudice - - the prejudicial effect cannot be removed in any other way, Given the fact that a mistrial should only be granted in cases of manifest necessity and the greatest caution for plain and obvious reasons, inquiry as to fact specific, the doctor did testify as to - - gave his opinion as to this was or amounted to - - injury inflicted amounted to child abuse. Again, that goes back to the medical type of definition that the doctor was using, not in the legal sense, nor would punishment be in the legal sense. Whether or not it was punishment, I would still define what as great bodily injury under the statute. I further find that there would be another method to cure any possible prejudice before aborting this trial. So, I would deny the motion for mistrial. I will give a curative instruction if you would like, [Defense Counsel].

R. pp. 407-08. Defense Counsel indicated that they would accept a curative instruction, but still deemed it to be an insufficient remedy. R. p. 408.

The trial judge subsequently instructed the jury:

Before we take our afternoon recess, ladies and gentlemen, I do want to address one issue that came up during the morning hours as to one witness, Dr. Cartie. If you'll recall, Dr. Cartie was the first witness that testified this morning from the Augusta Burn Center, the Joseph Still Burn Center, and during the course of his testimony, he gave various opinions. In one response, he gave an opinion to the effect that the event, the injury, may have occurred as a form of punishment. Those five words, as a form of punishment, I am striking those from the record. I am advising that during your deliberations, you are not, not to consider those words. They've been stricken from the record, and they should not even be discussed by the jury in any manner. Many times, often in the courtroom you may have the intersection of various professions and crafts, and what may be part of their vocabulary may not be part of the judicial or the legal vocabulary. So as to those words, I'm striking them from the record. I'm advising you you're not to consider them whatsoever during the course of your deliberations. They will be no part of your decision in this matter, and do not even discuss them in your jury room, and I will remind you of this when I instruct you later on during the course of the trial.

R. pp. 477-78.

Thereafter, during the testimony of Investigator Charley when he was recounting Appellant's various interviews with law enforcement, the solicitor asked, "and he was very specific about making [Victim] into the best child ever to make sure it wasn't discipline or that he was mad at him?" R. p. 566. Investigator Charley replied, "Yes." R. p. 566. Following Investigator Charley's testimony, Appellant renewed his motion for a mistrial, arguing that discipline was not part of the trial and that he was prejudiced by the question after the curative instruction was previously given as to Dr. Cartie's testimony containing the phrase, "as a form of punishment." R. p. 568-69. In reply, the solicitor noted Appellant was asked during the interview whether Victim was acting up or misbehaving on the day of the incident. R. p. 569. The solicitor noted Appellant maintained throughout the interview that Victim behaved well on the day he was burned. R. p. 569. The solicitor pointed out that Appellant was trying to remove an inference of an act of discipline or retaliation towards Victim because of misbehavior to try to limit his own culpability and prove it was an accident. R. p. 569. In response, the trial judge asked, "But it

could be - - it would or would not be a reasonable inference from tape one or tape two? Just like the questions you asked about reasonable inferences, that he always denied it was intentional.”

R. p. 571. The trial judge then stated he stood by his original ruling as to the mistrial. R. p. 571.

After analyzing the relevant testimony, the trial judge made a more detailed ruling, finding:

All right, so I, I think that's a reasonable inference to be drawn as far as a question to be asked in the second half of the interview. . . . Throughout the interviews of [Appellant], he talks a great deal about what a good child [Victim] was, how much he loves him. If he ran a daycare, he would like to have all [Victims] basically. I paraphrase those. It was also asked on cross-examination of Detective Charley what a good child he was and such like that in that line of questioning. Again, as far as the mistrial, I do not think it's of manifest necessity. I do not think it's prejudicial in any way, that question, not Detective Charley's response to that question based on the totality of the testimony presented. So I respectfully deny the motion for a mistrial.

R. p. 581. The trial judge noted that he did not think a curative instruction was necessary but that if Defense Counsel requested one, he would be happy to give another curative instruction. R. pp. 581-82. Defense Counsel responded, “I'm not requesting one, but I wouldn't object to one either.” R. p. 582. The trial judge stated he would decline to give a curative instruction since Defense Counsel was not asking for one. R. p. 582.

### **Standard of Review**

“The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and quotation marks omitted). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

## Discussion

Appellant asserts the trial judge erred in declining to grant a mistrial after Dr. Cartie's testimony where he testified Victim told him Appellant burned him as a form of punishment. Appellant further avers the Solicitor's later mention of the word "discipline" was somehow prejudicial to the point that a mistrial should have been granted at that juncture. Appellant contends the curative instruction provided by the trial judge was "meaningless." Br. of Appellant p. 19. On the contrary, Dr. Cartie's medical testimony, even if it was inadmissible hearsay, was not sufficiently prejudicial to warrant the declaration of a mistrial. The trial judge properly exercised his discretion and gave a curative instruction, which cured any potential prejudice to Appellant. Similarly, the solicitor's question containing the word "discipline" was a reasonable question based on the testimony presented and did not warrant the declaration of a mistrial.

The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). A curative instruction is generally deemed to have cured any alleged error. State v. Bantan, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (Ct. App. 2010). See also State v. Howard, 296 S.C. 481, 483-35, 374 S.E.2d 284, 285-86 (1988) (finding curative instruction admonishing jury to disregard co-defendant's inadmissible testimony that murder defendant was involved in an earlier homicide was sufficient to cure error and mistrial was not warranted); State

v. Ferguson, 376 S.C. 615, 619-20, 658 S.E.2d 101, 103-04 (Ct. App. 2008) (trial judge properly exercised his discretion in deciding to give a curative instruction rather than declare a mistrial after witness provided non-responsive testimony from defendant saying she “was next” because the curative instruction cured any potential prejudice).

In Appellant’s case, Dr. Cartie’s testimony was not of the prejudicial character that would necessitate a mistrial. Immediately after Dr. Cartie gave the statement that Victim told him he was sprayed with hot water as a form of punishment, Defense Counsel objected as to hearsay and there was no further mention of the comment. While that particular comment was not in Dr. Cartie’s proffer, it simply recounted a statement Victim made to him as part of his medical treatment. This statement was not of the prejudicial character that would call for the extreme remedy of a mistrial. Instead, the trial judge crafted an appropriate curative instruction that removed any potential prejudice towards Appellant. The trial judge’s instruction ensured that the jury would not put undue emphasis on the single comment by Dr. Cartie and assured the jury that Dr. Cartie was not offering an opinion on the ultimate legal issue before them.

Further, the solicitor’s questioning of Investigator Charley did not warrant the declaration of a mistrial. While he did give a curative instruction pertaining to Dr. Cartie’s testimony, the trial judge never admonished the State not to mention the word “discipline” in any way. Later during trial, during Investigator Charley’s testimony, the solicitor was obtaining information about Appellant’s interviews with him and how he portrayed Victim in those interviews. Investigator Charley emphasized that during the first interview Appellant was careful to say only glowing things about Victim and portraying him as an “angel.” The complained-of question by the solicitor went to explore a potential motive for Appellant to portray Victim as a great child to remove any potential motive for him to have been the culprit. The solicitor’s question was based

on a reasonable inference from the testimony and was not beyond the scope of anything that had been presented during the State's case-in-chief. As was noted by the trial judge, the solicitor's simple mention of the word "discipline" during the interview did not elicit the type of testimony that would warrant the declaration of a mistrial. Critically, despite his belief that the question was permissive, the trial judge offered to give a curative instruction anyway and Defense Counsel declined the opportunity. This forecloses Appellant's ability to complain on appeal of the solicitor's question. See State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (defendant waives objection if curative instruction is refused). The trial judge therefore properly declined Appellant's request for a mistrial. Appellant's conviction and sentence should be affirmed.

#### IV.

**The trial judge properly denied Appellant's motion for a directed verdict because the evidence and testimony presented during trial, when viewed in a light most favorable to the State, could induce a reasonable juror to find Appellant guilty of the charged offenses.**

At the conclusion of the State's case-in-chief, Appellant moved for a directed verdict. R. p. 572. Appellant contended that the construction of the statute for the underlying offense indicated that the offense required proof of specific intent. R. p. 573. Appellant averred that there was no proof that an intentional act was committed against Victim, therefore a directed verdict was required. R. p. 574. In response, the solicitor noted that a requirement that the act be intentional is not part of the statute itself. The solicitor argued that Victim's testimony as well as the testimony of the State's expert medical witnesses established that Appellant was implicated and that it was not possible for Victim to injure himself in the way that occurred. R. pp. 574-75. In response to Appellant's argument that the mens rea requirement was "intentional," the trial

judge noted the statute Appellant was indicted under actually used the word “unlawful.” R. pp. 576-77. The trial judge found:

I think based on the testimony of a number of witnesses, both the victim, Dr. Cartie, Dr. Lamb, my ruling is limited under Commander but that does not limit the ability of the juror as fact finders to make whatever reasonable inferences they may find may be properly drawn from the evidence. So, I think there is clearly direct testimony because there is no valid reason for an adult to put a seven-year-old human being or any other - - even a non-homo sapien - - living creature in a scalding, hot shower, scalding, hot shower. And I think there is substantial circumstantial evidence. So, motion for directed verdict is respectfully denied.

R. pp. 579-80,

### **Standard of Review**

“In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State.” State v. Cope, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge’s ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge’s denial of a directed verdict motion if there is no evidence supporting the trial judge’s ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge’s ruling upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

### **Discussion**

Appellant argues the trial judge erred in denying his motion for directed verdict because the State failed to prove he intended to burn Victim. Appellant avers the State’s evidence merely casted suspicion on Appellant. This argument lacks merit. Looking at the evidence in the light most favorable to the State, the State presented direct and substantial circumstantial evidence that

Appellant burned Victim and that it was impossible that the burns were accidentally inflicted. The trial judge therefore properly denied Appellant's motion for directed verdict.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). The United States Supreme Court has noted:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts.**

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (second emphasis added) *quoted with approval in* State v. Pearson, 415 S.C. 463, 471 n.2, 783 S.E.2d 802, 806 n.2 (2016).

In Bennett, 415 S.C. 232, 781 S.E.2d 352, the South Carolina Supreme Court considered a case where the State contended this Court erred in reversing the trial judge's denial of directed verdict by weighing the evidence and considering alternative hypotheses. In examining the decision of this Court, the Supreme Court concluded this Court erroneously weighed the evidence and reversed Bennett's conviction based on its belief that there was a plausible alternative theory inconsistent with Bennett's guilt. Id. at 236. The Supreme Court clarified that analysis was, "contrary to our jurisprudence and misapprehends the court's role in making this determination." Id. In reversing this Court, the Supreme Court concluded that, in examining the evidence in the light most favorable to the State, the evidence, "could induce a reasonable juror to find Bennett guilty." Id. at 237.

S.C. Code Ann. § 16-3-95(A), the code section Appellant was indicted under, provides, “It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.”

In the current case, the State presented direct and substantial evidence that Appellant inflicted great bodily injury upon Victim. Victim directly implicated Appellant by testifying that Appellant was the individual who burned him. Kristin Campbell, Victim’s mother, testified Appellant volunteered to bathe Victim, as Victim was not allowed to bathe himself. Campbell heard screaming, ran down the hallway, and found Appellant standing next to the shower watching Victim scream in agony while Victim crouched in the corner of the shower in an attempt to avoid the scalding hot water. Campbell, not Appellant, was the one who turned off the water and began tending to Victim. Campbell testified Appellant refused to let Victim go to the hospital for two agonizing hours. Victim also manipulated his account of events to law enforcement in order to protect himself. The State’s medical experts presented compelling evidence establishing Appellant’s culpability. Dr. Cartie testified it was impossible for Victim’s burns to be self-inflicted and that his medical diagnosis was that Victim’s burns were the result of child abuse. Dr. Lamb also diagnosed Victim as a victim of physical abuse.

The above evidence established: (1) Appellant burned Victim, resulting in catastrophic second and third-degree burns to forty-two percent of Victim’s skin (2) Appellant had custody and care of Victim while he was in the shower and watched Victim as he screamed in pain instead of rendering aid, (3) Appellant attempted to keep Victim from obtaining medical care for two hours and ultimately only took him to the hospital at the behest of his brother, (4) the State’s medical witnesses determined the burns could not have been self-inflicted and that Victim was abused, and (5) Appellant gave inconsistent accounts of Victim’s injury to law enforcement,

originally telling investigators Victim showered by himself and caused his own burns, then blaming Campbell for Victim's injuries. Appellant later told investigators that Victim's injuries were an accident because he did not know the water got so hot. This testimony and the natural inferences that followed established that Appellant unlawfully inflicted great bodily injury upon a child. Contrary to Appellant's assertions, infliction or allowing infliction of great bodily injury upon a child is not a specific intent crime because there is no specific intent requirement in the statute, which clearly indicates the legislature intended it to be a general intent crime. The facts and circumstances of the case provided ample evidence from which the jury could infer criminal intent. The trial judge therefore properly denied Appellant's motion for a directed verdict. Appellant's conviction and sentence should be affirmed.

#### V.

**The trial judge did not abuse his broad discretion by admitting a number of photographs showing various angles and areas of severe burns on Victim's body because those photographs were highly probative towards establishing Appellant inflicted great bodily harm upon Victim, which had to be established in order to prove Appellant guilty of the charged offense, the photographs were not cumulative, and the high probative value of the pictures was not substantially outweighed by any potential undue prejudice that could have resulted from their admission.**

#### **Relevant Facts**

Shortly after the trial judge took a recess during Sergeant Bailey's testimony, Defense Counsel noted the State was about to introduce a number of photographs taken while Victim was at Palmetto Health Richland. R. p. 209. Defense Counsel stated he did not object to the majority of the photographs; however, he did have an objection to three of the pictures because he believed they were cumulative. R. p. 209. Defense Counsel specified they believed State's Exhibits 4, 6, and 7 were cumulative. R. p. 210. Defense Counsel alleged State's Exhibits 4, 6, and 7 were the same images as State's Exhibits 3 and 5. R. p. 211. The solicitor responded by

noting the State had the burden of proving great bodily injury and the photographs showed different angles of the wounds and the peeling of the skin that was taking place. R. pp. 210-11.

The trial judge found:

Well, as I look at 3 and 4, there is a different angle; there is a closer angle. The towel or sheet is in a different view on 4 than 3. You see more going on 3 from lower left - - from right towards the shoulder of the victim. Then on 4 you see further down the back, either between or slightly below the shoulder-blades. 5 gives more of a view even further down the lower back. 6 shows much more on the left shoulder of the victim, more top of the left shoulder. So, I would find they are not - - they may be in the same general area obviously of the body of the victim, but they do show differences between 3, 4, and 5, and 6, and 7 shows the difference on what I believe would be the right shoulder and down into the shoulder area. So, I would overrule the objections in this regard. The state does have the burden of proving great bodily injury as defined by the statute.

R. pp. 211-12.

### **Standard of Review**

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). See State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.").

### **Discussion**

Appellant contends the trial judge erred in admitting three of the photographs depicting Victim's burns because the photographs were cumulative, unnecessary, and prejudicial. Appellant asserts the photographs resulted in unfair prejudice because they showed injuries

already before the jury. On the contrary, the State did not present an excessive amount of photographs and the three photographs identified by Appellant as prejudicial were not cumulative to other photographs already in evidence. They showed different angles and areas of the burns on Victim's body. The trial judge analyzed the photographs carefully and correctly concluded they were different than other photographs to be admitted, and noted the photographs had significant probative value as to the State's burden of proving Victim sustained great bodily injury.

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on

appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, “[a] trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Id. at 358, 543 S.E.2d at 594.

In the current case, the trial judge correctly determined the photographs at issue were not cumulative such that their probative value was substantially outweighed by the risk of unfair prejudice. State’s Exhibits 4, 6, and 7 showed distinctly different images than the other photographs, as they showed different angles and different parts of the burns. The photographs were a necessary part of the presentation of the State’s evidence, as Victim suffered extensive burns to forty-two percent of his body, and the State needed to show those injuries in order to prove Victim suffered great bodily injury as was required by the statute. This gave the evidence an exceptionally high probative value, and that probative value was not substantially outweighed by the risk of unfair prejudice. The trial judge thus properly concluded State’s Exhibits 4, 6, and 7 were admissible, as they were not cumulative to other photographs and they had significant relevance and probative value in the case. Appellant’s conviction and sentence should be affirmed.

## VI.

**The trial judge properly charged the jury on the current and correct law of South Carolina, including the correct instruction on criminal intent.**

### Relevant Facts

During the charge conference, Defense Counsel requested a charge on the defense of accident, contending there was evidence in the record that would support the charge. R. p. 600. The trial judge indicated he would provide the jury with a defense of accident charge at the end of his charge on the statute representing the charge in the indictment. R. pp. 606-07. Defense Counsel then asked the trial judge to consider charging the jury on a different *mens rea* requirement, alleging the statutory term of "unlawful" created a strict liability situation for Appellant on the charge. R. p. 607. Defense Counsel conceded that S.C. Code Ann. § 16-3-95(A) did not have a specific intent requirement, but S.C. Code Ann. § 16-3-95(B) contained the *mens rea* requirement of "knowingly," and that requirement should be imputed to S.C. Code Ann. § 16-3-95(A) as well. R. pp. 607-11. In response, the trial judge noted, "I'm not telling them it's a strict liability offense." R. p. 611. The solicitor also noted the State was required to prove criminal intent in every case, which was the purpose of the criminal intent charge. R. pp. 611-12. The trial judge then read his criminal intent charge to the parties and stated:

So, if you take, you take the charge as a whole, they have to determine the element of intent and the state has to prove it beyond a reasonable doubt. And then the defense for that is accident: either A, I didn't do it, Ms. Campbell did; or B, if I did, it was an accident. It, it's not diminishing the state's burden of proof in that regard, but I - - you know, as far as the statute, it says unlawful. Unlawful is not necessarily strict liability, in my mind. It is not authorized by law to put a seven year old in a scalding shower. I mean, that - - we ain't got to write a statute for that. I mean, that would be assault and battery of a high and aggravated nature under the common law, in my opinion. But that's how the statute is written. It is unlawful to do what he did, what he allegedly did. It's up to the jury to determine whether or not, based on this record and the facts as they find them to be, whether he's guilty or not guilty.

R. pp. 612-13. Defense Counsel reiterated, "I object to the general intent because I - - we asked for specific intent. R. p. 616.

During his charge to the jury, the trial judge instructed:

Intent. In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the state for a particular crime might be purpose, purposely, intent, intentionally, knowledge, knowingly, recklessness, or criminal negligence. Criminal intent must be proven by the state beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There is no way to prove intent to a mathematical certainty. There's no way medical science can dissect a person's brain and determine what the person had in their mind. So, the law says criminal intent may be inferred from circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present. It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact: by taking into consideration the acts of the parties and all the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from action or a failure to act. It may arise from consequences that is considered by the law to be the equivalent of criminal intent.

R. pp. 630-31. The trial judge subsequently instructed the jury on the defense of accident. R. p. 632.

After the jury began deliberating, the trial judge received a note from one of the jurors asking, "What is criminal negligence under the criminal intent statute? Same question for recklessness." R. p. 637. In response to the question, the trial judge re-read the intent portion of his charge to the jury, R. pp. 648-50.

### **Standard of Review**

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial court's

decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

### **Discussion**

Appellant asserts the trial judge’s instruction to the jury was erroneous on two grounds. First, Appellant contends the trial judge erred in refusing to charge the jury on the defense of accident. Second, Appellant argues the trial judge charged the jury on the incorrect *mens rea* requirement under the infliction of great bodily injury upon a child statute. Appellant asseverates, “the requested jury charge on accident was intertwined with the proposed charge on *mens rea*. Both represent the idea that Appellant did not intentionally injure the minor child and allow the jury to indicate accordingly with a verdict.” Br. of Appellant p. 25. Both of Appellant’s allegations of error are incorrect. The trial judge did not erroneously refuse to charge the jury on the defense of accident, because the trial judge did in fact provide the jury with an accident instruction. Furthermore, the trial judge did not err in refusing to change the *mens rea* requirement in the statute and incorrectly charging the jury that infliction of great bodily injury upon a child was a specific intent crime, where the statute only requires general intent

In general, the trial judge is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462 472. A jury charge is correct if it contains the correct definition of the law when read as a whole. Id., 594 S.E.2d at 472-73.

Section 16-3-95 of the South Carolina Code provides, in relevant part:

- (A) It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction must be imprisoned.
- (B) It is unlawful for a child’s parent or guardian, person with whom the child’s parent or guardian is cohabitating, or any other person responsible for a child’s welfare as defined in Section 63-7-20 knowingly to allow another person to inflict great bodily injury upon a child. A person who violates this subsection is

guilty of a felony and, upon conviction, must be imprisoned not more than five years.

S.C. Code Ann. § 16-3-95(A)–(B).

As to Appellant's first allegation of error, the trial judge did not err in refusing to instruct the jury on the defense of accident because the trial judge did in fact give the instruction at the request of Defense Counsel. See R. p. 632. As to Appellant's second argument, the trial judge correctly refused to charge the jury that inflicting bodily injury upon a child required proof of specific intent. At trial, Appellant contended that inflicting great bodily injury upon a child was a specific intent crime because of the use of the term "knowingly" as the *mens rea* requirement in 16-3-95(B). This argument overlooked the fact that Appellant was indicted under 16-3-95(A), and sections (A) and (B) encompass entirely different courses of conduct. Section (A) is silent on any specific intent requirement, therefore making it a general intent crime. The trial judge properly gave the jury the criminal intent jury charge, which was the applicable intent in Appellant's case. See State v. Ferguson, 302 S.C. 269, 273, 395 S.E.2d 182, 184 (1990) (finding that, where cocaine distribution statute was silent as to a particular mental state, the State must show the defendant was at least criminally negligent); State v. Morris, 376 S.C. 189, 201, 656 S.E.2d 359, 366 (2008) (where a statute does not specify that criminal liability is to be imposed based upon graduated levels of intent, appellate courts are extremely reluctant to draw such distinctions). The trial judge thus correctly instructed the jury on the current and correct applicable law of the State of South Carolina. Appellant's conviction and sentence 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

V. HENRY GUNTER, JR.  
Assistant Attorney General

HEATHER S. WEISS  
Solicitor, Fifth Judicial Circuit

BY: 

V. Henry Gunter, Jr.  
Bar # 102259

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

ATTORNEYS FOR RESPONDENT

December 7, 2018

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

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Appellate Case No. 2017-000873

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**RECEIVED**  
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SC Court of Appeals

THE STATE,

Respondent,

v.

SHANE ISAAC JOHNSON,

Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b),  
SCACR.

ALAN WILSON  
Attorney General

V. HENRY GUNTER, JR.  
Assistant Attorney General

HEATHER S. WEISS  
Solicitor, Fifth Judicial Circuit

BY:   
V. HENRY GUNTER, JR.

S.C. Bar No. 102259

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211-1549  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 7, 2018