STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2017-001018

THE STATE,

Respondent,

vs.

JUSTIN ADAMS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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I.

The trial judge did not abuse his broad discretion over evidentiary matters by declining to exclude the testimony of a juvenile victim of sexual abuse along with the recordings of two forensic interviews conducted after the abuse was first disclosed because the juvenile victim, who demonstrated an understanding of his duty to tell the truth and an ability to intelligently recount the things he personally experienced, satisfied the requirements to be competent to testify as a witness in South Carolina and because the forensic interview recordings met the statutory requirements for admissibility under the totality of the circumstances.

II.

The trial judge committed no error by declining to include a general jury charge on criminal intent as part of his jury instruction because his instructions as presented correctly conveyed to the jurors all the necessary elements of first-degree criminal sexual conduct with a minor and ensured they understood they could not convict Appellant unless they expressly found he engaged in a sexual battery with a victim who was under the age of eleven and any act of penetration committed was not accomplished for medically-recognized treatment or diagnostic purposes, which was all that was necessary in order for them to convict Appellant of the indicted offense.

III.

The trial judge committed no error by declining to include a special jury charge on unanimity as part of his jury instruction because his instructions as presented contained a proper unanimity charge and were sufficient to ensure the jurors would not reach a verdict in Appellant's case unless all twelve of them were in agreement, which rendered any further instructions on unanimity entirely unnecessary under the circumstances.

IV.

The trial judge did not abuse his broad discretion by declining to grant a new trial based on newly-discovered evidence after it was discovered the minor victim's mother violated a sequestration order at various points during trial by attempting to listen to testimony through the courtroom door because the victim's mother had a constitutional right to be present during the proceedings, her actions were in no way material to Appellant's guilt or innocence for criminal acts committed years before the trial began, and evidence of her actions would not have likely changed the outcome of trial in the event a new trial was granted.

STATEMENT OF THE CASE

In December of 2013, Appellant Justin Adams was arrested following an investigation into allegations he had been sexually abusing a minor child who shared a home with him. In January of 2014, the Beaufort County Grand Jury indicted Appellant for one count of first-degree criminal sexual conduct with a minor. On September 19, 2016, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Brooks P. Goldsmith, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of twenty-five years. Thereafter, on September 30, 2016, defense counsel filed several post-trial motions, including a motion for a new trial based on newly-discovered evidence. On March 30, 2017, the trial judge conducted a hearing on the new trial motion. Subsequently, through a written order filed on April 7, 2017, the trial judge denied that motion. Appellant then timely filed a notice of appeal.

ARGUMENT

I.

The trial judge did not abuse his broad discretion over evidentiary matters by declining to exclude the testimony of a juvenile victim of sexual abuse along with the recordings of two forensic interviews conducted after the abuse was first disclosed because the juvenile victim, who demonstrated an understanding of his duty to tell the truth and an ability to intelligently recount the things he personally experienced, satisfied the requirements to be competent to testify as a witness in South Carolina and because the forensic interview recordings met the statutory requirements for admissibility under the totality of the circumstances.

Appellant contends the trial judge erred by declining to preclude the juvenile victim from testifying about the sexual abuse inflicted upon him and by failing to suppress the out-of-court recordings of the victim's forensic interviews in which he discussed the sexual abuse. In support of that contention, Appellant maintains the entirety of the victim's testimony was "irredeemably tainted" by a purportedly suggestive and biased interview conducted by a law enforcement officer subsequent to the victim's initial—and consistent—disclosure of the abuse. To the contrary, the trial judge committed no error by either permitting the juvenile victim to testify during trial or allowing the admission of the forensic interview recordings. That is true because the victim, who demonstrated an understanding of his duty to tell the truth along with an ability to intelligently discuss the things he personally experienced, met the requirements to be competent to testify as a witness under South Carolina law, and, thus, there were no proper grounds upon which to prevent him from testifying before the jury. Beyond that, the forensic interview recordings met the statutory requirements for admissibility under the totality of the circumstances. As a result, the trial judge did not abuse his broad discretion by declining to take the extreme step of excluding all evidence of the sexual abuse before the evidentiary phase of trial even got underway based solely on arguments defense counsel was fully capable of making

to the jury about his perceived issues with the credibility of that evidence. Appellant's conviction should be affirmed

RELEVANT FACTS

In December of 2013, the then-five-year-old victim ("Victim") was visiting with his grandparents at their home when he informed his grandmother ("Grandmother") he had a secret he was keeping. (Def. Ex. # 4 (Statement)). In response, Grandmother asked Victim about the secret, and Victim reluctantly disclosed Appellant, who was living with Victim and his mother ("Mother") at that time, had been inappropriately touching him.[1] [2] (Trl. Tr. pp. 197-198; pp. 204-205; pp. 272-273; pp. 318-319; Def. Ex. # 4). Concerned, Grandmother quickly called Mother to alert her of the disclosure, and Mother spoke with Victim on the phone to find out what was happening. (Def. Ex. # 4; Def. Ex. # 5 (Statement)). During the conversation, Victim again disclosed Appellant had been inappropriately touching him while indicating Appellant had touched his penis and inserted a finger into his anus. (Trl. Tr. p. 208; Def. Ex. # 5). At that point, Mother rapidly went to her parents' home and spoke with Victim about the abuse in person. (Def. Ex. # 4; Def. Ex. # 5). Once again, Victim recounted the abuse to Mother, and he further reported the abuse also included oral sex. (Trl. Tr. p. 208; Def. Ex. # 4; Def. Ex. # 5). The family then alerted the Bluffton Police Department of what had been revealed, and an investigation into the matter was commenced. (Trl. Tr. pp. 190-191).

During the course of the investigation, Lieutenant Joseph Babkiewicz of the Bluffton Police Department met with Mother and Grandmother and took statements from them about

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[1] As to where on his body he was being inappropriately touched, Victim signaled to his groin. (Def. Ex. # 4).

[2] At the time the sexual abuse was first disclosed, Appellant was Victim's mother's fiancé and was the father of her other son, who was then just an infant. (Trl. Tr. pp. 197-198; pp. 204-205; p. 272).

what Victim had reported. (Trl. Tr. p. 235; p. 249; Def. Ex. # 4; Def. Ex. # 5). Beyond that, Lieutenant Babkiewicz met with Victim and briefly interviewed him in an interview room at the police station.[3] (Trl. Tr. p. 61; p. 236; p. 239; State's Ex. # 1 (Recording)). At the outset of the interview, the officer introduced himself to Victim, discussed their names and birthdates, and asked Victim if he wanted to be a police officer one day. (Trl. Tr. p. 61; State's Ex. # 1). Lieutenant Babkiewicz then gave Victim a "junior police officer" badge sticker, which was placed onto Victim's shirt, and made sure Victim understood the interview was being recorded and his mother was watching. (Trl. Tr. pp. 65-66; p. 236; p. 246; State's Ex. # 1). Thereafter, the officer asked Victim if he understood what it meant to tell the truth, Victim confirmed he did, and Lieutenant Babkiewicz proceeded to playfully tell Victim the interview room was magical and would zap someone who did not tell the truth inside it. (Trl. Tr. p. 61; State's Ex. # 1). However, he *immediately* followed that remark with an explanation he was only joking about the room's purported magical powers.[4] (State's Ex. # 1). After that, Victim and the officer drew pictures for a few minutes before Lieutenant Babkiewicz requested Victim tell him what he had told his grandmother. (State's Ex. # 1). In response, Victim reported Appellant massaged his "whacker," and, when asked if Appellant had touched him anywhere else, Victim stated Appellant also put a finger into his buttocks. (State's Ex. # 1). Victim further reported the abuse occurred around ten times, it happened in the living room and shower, it last occurred a week earlier, and he was told by Appellant to keep it secret. (Trl. Tr. pp. 239-240; State's Ex. # 1). Lieutenant Babkiewicz then offered a stuffed toy dog to Victim, Victim politely declined the

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[3] In total, Victim and Lieutenant Babkiewicz were in the interview room for just over twenty minutes, and only a portion of that time involved a discussion of the abuse. (State's Ex. # 1).

[4] Significantly, based on his smiling face and other body language, Victim did not appear to be negatively influenced by the officer's playful remarks. (State's Ex. # 1).

offer while indicating he wanted the officer to have it, the officer asked Victim if he would like to select a different stuffed animal, and Victim indicated he would, in fact, like to do that. (State's Ex. # 1). The two then left the interview room for roughly five minutes before returning with two stuffed toy birds. (State's Ex. # 1). After that, Lieutenant Babkiewicz briefly resumed the interview and questioned Victim as to whether the abuse hurt, whether Appellant had done anything else to him, and whether Appellant did anything with his "whacker." (State's Ex. # 1). In response to those questions, Victim indicated the abuse hurt and oral sex had also occurred. (State's Ex. # 1). The officer then promised Victim the abuse would not occur again while advising him to call if it did, and the interview was concluded. (State's Ex. # 1).

A few days after that, Mary Beth Hefner, a forensic interviewer and counselor at a child advocacy center located in Beaufort, South Carolina, conducted another forensic interview of Victim following a referral from the Bluffton Police Department. (Trl. Tr. p. 286; p. 289; State's Ex. # 2 (Recording)). During that brief interview, Victim again reported Appellant had been inappropriately touching him.[5] (State's Ex. # 2). Specifically, Victim recounted Appellant "massaged" his "whacker," anally penetrated him with his finger, "nibbled" on his "whacker," and made him reciprocate that act. (State's Ex. # 2). Furthermore, Victim reported the abuse occurred on more than one occasion, it happened in the shower and on a bed, and he saw "pee" come out of Appellant's "whacker" while they were in the shower together.[6] (State's Ex. # 2).

On the following day, Kristin Dalton, a pediatric nurse practitioner, conducted a forensic medical examination of Victim. (Trl. Tr. p. 390; pp. 392-393). During the examination, Dalton

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[5] In total, Victim was in the interview room for the forensic interview for less than thirty minutes. (State's Ex. # 2).

[6] Significantly, Victim also expressly confirmed no one told him what to say during the interview. (State's Ex. # 2).

briefly interviewed Victim about what had occurred, and Victim pointed to his groin and buttocks as the areas where he was inappropriately touched. (Trl. Tr. pp. 397-398). Dalton then conducted the medical examination of Victim's body, but she did not find any signs of injuries. (Trl. Tr. p. 398). However, based on the amount of time between the abuse and the examination coupled with how rapidly injuries to areas like the anus heal, Dalton was not surprised to find no injuries present during the examination as such an outcome was common in her experience even when sexual abuse had occurred. (Trl. Tr. pp. 398-399; p. 408; p. 410).

Ultimately, as a result of the investigation into Victim's disclosures, Appellant was arrested and indicted for first-degree criminal sexual conduct with a minor, and he elected to proceed forward to trial. (Trl. Tr. pp. 10-11; p. 240; Indictment). At the outset of trial, the trial judge conducted an in limine hearing in regard to the admissibility of the recordings of Victim's forensic interviews. (Trl. Tr. p. 56). During the course of the hearing, Lieutenant Babkiewicz testified about his interview of Victim, indicated he asked open-ended questions of Victim, and noted he simplified his questioning based on Victim's age. (Trl. Tr. pp. 61-62). However, he conceded he had minimal training in regard to interviewing children and asserted he was not familiar with many concepts related to forensic interviewing, including the concept of a "minimum fact interview." (Trl. Tr. p. 60; pp. 63-64; p. 75). Furthermore, he admitted to "deputizing" Victim and providing him with stuffed animals, which he explained he did in order to develop a rapport with him. (Trl. Tr. pp. 65-66; pp. 68-69). In addition to that testimony, Hefner testified about her forensic interview of Victim along with her substantial background in forensic interviewing. (Trl. Tr. pp. 84-90). She further indicated it was a better practice not to subject children to multiple interviews to avoid any potential taint, asserted it would be ill-

advised to threaten a child with being "zapped," and noted she had been trained not to reward her interview subjects. (Trl. p. 92; pp. 96-97).

Following the presentation of that testimony, defense counsel moved for the forensic interview recordings to be suppressed, Victim to be prevented from testifying entirely, and the case to be brought to an "end." (Trl. Tr. p. 113; p. 127). In support of those extreme requests, defense counsel—relying on the New Jersey Supreme Court's decision in State v. Michaels, 642 A.2d 1372 (N.J. 1994)—maintained Victim's disclosures were purportedly tainted because he was interviewed multiple times, his statements were inconsistent in some manner, and Lieutenant Babkiewicz allegedly conducted the first of the forensic interviews improperly. (Trl. Tr. pp. 115-127; pp. 134-135). In rebuttal, the solicitor contended the reliability of Victim's testimony was an issue for the jury to resolve while noting defense counsel would be able to make his arguments as to why Victim's testimony should not be believed to the jury. (Trl. Tr. p. 128; p. 133). Furthermore, the solicitor asserted the interview recordings were sufficiently trustworthy under the circumstances and met the statutory requirements for admissibility. (Trl. Tr. pp. 130-131; p. 135). Upon considering the matter and reviewing all the relevant out-of-court statements, the trial judge rejected defense counsel's arguments and found the interview recordings to be admissible. (Trl. Tr. p. 144). In reaching that conclusion, the trial judge found no evidence of interviewer bias in either of the recorded interviews, determined Victim's statements during the interviews were not elicited by leading questions, and agreed with the solicitor the proper way for defense counsel to challenge the reliability of Victim's disclosures would be to make his arguments to the jury.[7] (Trl. Tr. p. 128; pp. 142-144).

[7] In analyzing the matter, the trial judge correctly noted a question asking a juvenile victim whether he was touched anywhere else was not an improper leading question. Cf. State v. Tyner, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979) ("Appellant objected to the following question by

Thereafter, during the course of trial, the interview recordings were admitted over objection and played for the jury. (Trl. Tr. p. 238; pp. 290-291). Additionally, Lieutenant Babkiewicz and Hefner testified about the interviews, and defense counsel thoroughly cross-examined them about the things he believed were improper with the manner in which Victim was interviewed after he disclosed the sexual abuse. (Trl. Tr. pp. 235-236; pp. 286-313). Likewise, Victim, who was eight years old at that time and who demonstrated both an understanding of his obligation to tell the truth and an ability to intelligently recount things he had experienced, testified about the sexual abuse he suffered at Appellant's hands, and defense counsel was fully permitted to cross-examine him about his testimony. (Trl. Tr. pp. 270-282).

Subsequently, at the conclusion of trial, the jury found the State had met its burden of proof and convicted Appellant as indicted. (Trl. Tr. p. 497). The trial judge then sentenced Appellant to a twenty-year term of imprisonment. (Trl. Tr. p. 509).

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). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); 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."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear

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the solicitor as leading: 'Q. Did you ever have any difficulty communicating with Mr. Tyner or he with you?' . . . A leading question is one which suggests to the witness the desired answer. As the question propounded by the solicitor was not suggestive of an answer, it was not leading." (citations omitted)).

prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ANALYSIS

In South Carolina, every person—including a minor child—is generally presumed to be competent to serve as a witness unless otherwise stated by statute or rule. Rule 601(a), SCRE; see State v. Lambert, 276 S.C. 389, 401, 279 S.E.2d 364, 365 (1981) ("[T]here is no fixed age an individual must attain in order to be a competent witness."). In fact, even a convicted perjurer is presumptively qualified to testify as a witness in our state. State v. Needs, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). So long as an individual has the ability to perceive an event with a substantial degree of accuracy, remember it, communicate about it intelligibly, and be mindful of the duty to tell the truth under oath, that individual is considered to be competent to testify during trial regardless of his or her age or past actions. Id.; see State v. Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) ("The mere fact that Tommy was but a six year old boy at the time of trial did not in itself make him incompetent to testify."); see also State v. Karelas, 28 So. 3d 913, 914 (Fla. Dist. Ct. App. 2010) ("Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth. It is a test of intellectual capacity, *not veracity*." (emphasis added)). Critically, if a witness is competent to testify, that witness's testimony can typically be admitted during trial, and it is solely up to the jury to resolve any issues regarding the credibility of the testimony presented. State v. Wright,

269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977); see Needs, 333 S.C. at 144, 508 S.E.2d at 862 ("[T]he resolution of the credibility of the witness is within the province of the jury."); see also United States v. Scheffer, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the *jury* is the lie detector." (internal quotations omitted)).

Beyond the testimony of a competent witness, a recording of an out-of-court statement of a child under twelve years old is also admissible during a criminal trial pursuant to South Carolina law if the statement was made in response to questioning during a forensic interview, the child testifies during trial and is subject to cross-examination, and the trial judge preliminarily finds the circumstances surrounding the making of the statement provide particularized guarantees of trustworthiness. S.C. Code Ann. § 17-23-175. Thus, even though a minor victim's consistent out-of-court statement would ordinarily not be admissible during trial, our legislature has specifically authorized the admission of such a statement when certain conditions are met. State v. Russell, 383 S.C. 447, 451, 679 S.E.2d 542, 544 (Ct. App. 2009); see generally Rule 101, SCRE (stating South Carolina's evidentiary rules govern trial court proceedings in the state "[e]xcept as otherwise provided by rule or by statute").

In the case sub judice, Victim, who first disclosed the sexual abuse before ever speaking with any interviewers, demonstrated he understood his duty to tell the truth by affirming he knew it was wrong to tell a lie during trial. Likewise, Victim demonstrated an ability to perceive, remember, and communicate about events based on his appropriate responses during trial, and his testimony was about acts that were perpetrated directly upon him, which meant it was based on his own personal knowledge. Under those circumstances, Victim met the requisite standard to be competent to testify, and, thus, his testimony about the sexual abuse he suffered at Appellant's hands could properly be admitted and presented to the jury pursuant to South

Carolina law. See Lambert, 276 S.C. at 401, 279 S.E.2d at 365 (holding the trial judge did not abuse his discretion by permitting a thirteen-year-old sexual assault victim to testify where the witness indicated she knew what it meant to tell the truth and understood the questions she was asked); see also Needs, 333 S.C. at 143-144, 508 S.E.2d at 861 ("Ms. Smith swore to tell the truth and had personal knowledge of the matter. The trial judge stated he believed, based upon Ms. Smith's in camera testimony, that she understood her duty to tell the truth. When questioned by the judge, Ms. Smith stated outside the jury's presence that she understood her duty to tell the truth, and that she would face perjury charges if she lied in court. The trial judge did not abuse his discretion in ruling that Ms. Smith was competent to testify under Rule 601(b)(2), SCRE.").

Beyond Victim's testimony itself, both of Victim's forensic interviews were recorded, and Victim was both present to testify during trial and available for cross-examination. Likewise, testimony was presented during the in limine hearing about the circumstances surrounding the forensic interviews, and the trial judge reviewed each of the interview recordings, which contained disclosures consistent with Victim's initial disclosures, along with the other statements taken after the abuse was first disclosed. After hearing the testimony and reviewing the evidence, the trial judge concluded Victim's out-of-court statements sufficiently met the statutory requirements and were admissible. Under those circumstances, the interview recordings could properly be admitted during trial and played for the jury. See S.C. Code Ann. § 17-23-175 (mandating a forensic interview recording of a child under twelve years old is admissible if certain statutory conditions are met); see also State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) ("Section 17-23-175 is a valid legislative enactment.").

Because Victim was qualified to testify as a witness and the recordings of his forensic interviews met the statutory requirements for admissibility, the trial judge correctly allowed that

testimony and evidence to be admitted during trial, and any issues regarding Victim's credibility, including whether it was negatively impacted by the manner in which he was interviewed, were properly left for the jurors to resolve in their exclusive roles as the trial's finders of fact. See State v. Hale, 284 S.C. 348, 356, 326 S.E.2d 418, 423 (Ct. App. 1985) ("It is the function of the jury, not an appellate court, to judge the credibility of witnesses and the weight to be given to their testimony."); cf. Karelas, 28 So. 3d at 915 ("The sum and substance of the trial court finding [excluding a juvenile sexual abuse victim's testimony] was that the witness's reliability was suspect because of the tainted interview. This was not a finding of lack of testimonial competency, but instead, a preemptive determination of the credibility of the testimony, a determination that should have been left for the jury as the trier of fact."). Moreover, nothing about the trial judge's ruling prevented defense counsel from raising the issue of the purported unreliability of Victim's testimony to the jury through cross-examination and argument, and, although his attempts were ultimately not convincing to the jury, defense counsel did, in fact, attempt to challenge the believability of Victim's disclosures throughout the trial. See State v. Scott, 330 S.C. 125, 131, 497 S.E.2d 735, 738 (Ct. App. 1998) ("That the witnesses equivocated goes to their credibility and the weight to be given their testimony, matters solely within the province of the jury."); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); cf. Pendleton v. Commonwealth, 83 S.W.3d 522, 526 (Ky. 2002) ("Appellant had the ability to cross-examine [the juvenile victim] and undermine her credibility with the jury, if he felt her testimony had been coerced by the social worker. No error occurred."). For those reasons, the trial judge did not abuse his broad discretion by declining to take the extreme steps

of precluding a juvenile victim of sexual abuse from testifying before the jury about the abuse he suffered and excluding all evidence of his disclosures based on the speculative possibility his testimony was somehow tainted prior to the trial.[8] See Russell, 383 S.C. at 450, 679 S.E.2d at

[8] In arguing to the contrary on appeal, Appellant—just as defense counsel did during trial—primarily relies upon the New Jersey Supreme Court's decision in State v. Michaels, 642 A.2d 1372 (N.J. 1994). In that non-controlling decision, the New Jersey Supreme Court took the "somewhat extraordinary step" of requiring a pre-trial hearing to make a preliminary determination regarding the reliability of testimony of juvenile victims of sexual abuse in cases in which the defendant can make some showing the victims' statements were the product of suggestive or coercive interview techniques. Id. at 1380-1381. Significantly, the catalyst for that extraordinary step was the highly unusual circumstances of Michaels's case, which involved a disclosure of abuse from one child followed by numerous disclosures from other children that were only made *after* they were repeatedly interviewed about whether they had also been abused. Id. at 1379. Initially, the decision in Michaels is not applicable to Appellant's case as it is simply not consistent with South Carolina law, which leaves determinations of the credibility of testimony to the jury instead of presuming a trial judge is somehow better equipped to resolve such matters preliminarily. See Brown v. Stewart, 348 S.C. 33, 46, 557 S.E.2d 676, 683 (Ct. App. 2001) ("[T]he evaluation of the testimony and the credibility of the witnesses were matters for the jury to determine."); see also State v. Deas, 202 S.C. 9, 14, 23 S.E.2d 820, 822 (1943) ("Of course, under our Constitution and practice the jury are the sole judges of the facts in criminal trials . . . ."); cf. Reece v. State, 103 A.3d 1076, 1088-1089 (Md. Ct. Spec. App. 2014) ("In Maryland, the appellate courts have made clear that the credibility of witnesses is a matter that falls squarely within the province of the jury. Whether improper interviewing techniques were employed in questioning a witness and whether that affected the witness' credibility were issues for the trier of fact to resolve. Due process does not require a pretrial 'taint' hearing to assess whether there was improper interviewing techniques. Rather, any such evidence can be introduced at trial for the trier of fact to evaluate." (citations omitted)). Beyond that, the Michaels decision has been rejected by the majority of courts that have considered it. See, e.g., People v. Montoya, 57 Cal. Rptr. 3d 770, 778 (Cal. Ct. App. 2007) ("Like other states, we reject Michaels in favor of our well-established competency jurisprudence. The relevant determination in California is whether a minor victim is competent to testify." (citations omitted)); Karelas, 28 So. 3d at 915 ("Like the majority of jurisdictions that have considered Michaels, we reject its conclusion. The fact that suggestive questions might have been posited is only one factor that bears on the reliability of the testimony. We conclude that the reliability of the victim's testimony can only be properly assessed after a trial on the merits during which the trier of fact may consider all of the facts and circumstances." (citations omitted)); State v. Ruiz, 150 P.3d 1003, 1008 (N.M. Ct. App. 2006) ("Like many other states, New Mexico rejects Michaels in favor of our well-established competency jurisprudence."); State v. Bumgarner, 184 P.3d 1143, 1151-1152 (Or. Ct. App. 2008) (rejecting the contention a "taint" hearing should have been conducted before the minor victim was permitted to testify and instructing "the trier of fact, rather than the judge, is in the best position to determine the effect, if any, of improper interviewing techniques on a witness's credibility"). However, even assuming the rule from

543 (instructing a decision regarding whether to admit or exclude evidence of a forensic interview recording will not be disturbed on appeal unless the decision constitutes a manifest prejudicial abuse of discretion); cf. Mazzell v. Evatt, 88 F.3d 263, 270-271 (4th Cir. 1996) ("The question of credibility was . . . put before the jury, and our adversary system reposes judgment of the credibility of all witnesses in the jury. We shall uphold its verdict." (citation and internal quotations omitted)). Appellant's conviction should be affirmed.

Michaels was somehow applicable to Appellant's case, it still would not warrant a reversal of the trial judge's decision to admit the evidence as—unlike in Michaels—Victim made a spontaneous initial disclosure before he was ever interviewed about the abuse, and his account of the abuse remained largely consistent after it was initially made, which strongly supported a conclusion it was not the product of the brief interviews that followed the initial disclosure. Cf. Michaels, 642 A.2d at 1379 ("The initial investigation giving rise to [Michaels]'s prosecution was sparked by a child volunteering that his teacher, 'Kelly,' had taken his temperature rectally. However, the overwhelming majority of the interviews and interrogations *did not arise from the spontaneous recollections that are generally considered to be the most reliable*." (emphasis added)).

II.

The trial judge committed no error by declining to include a general jury charge on criminal intent as part of his jury instruction because his instructions as presented correctly conveyed to the jurors all the necessary elements of first-degree criminal sexual conduct with a minor and ensured they understood they could not convict Appellant unless they expressly found he engaged in a sexual battery with a victim who was under the age of eleven and any act of penetration committed was not accomplished for medically-recognized treatment or diagnostic purposes, which was all that was necessary in order for them to convict Appellant of the indicted offense.

Appellant contends the trial judge erred by refusing to instruct the jury on criminal intent as an element of first-degree criminal sexual conduct with a minor. In support of contention, Appellant maintains the indicted offense was not a strict liability offense before asserting his conviction should be reversed based on the purported absence of a jury instruction on intent. To the contrary, the trial judge's jury instructions as presented—when taken together and viewed as a whole—identified all the necessary elements of first-degree criminal sexual conduct with a minor, required the jury to find Appellant engaged in a sexual battery with a minor victim under the age of eleven, and explained the circumstances under which an act of penetration upon a minor victim would not constitute a sexual battery under the law, which meant those instructions conveyed to the jurors all the relevant and applicable law necessary for them to be able to resolve the issues raised by the evidence presented during trial. Accordingly, the trial judge's jury instructions were legally sufficient and proper, and any further instructions on criminal intent in general were unnecessary under the circumstances. Appellant's conviction should be affirmed.

RELEVANT FACTS

During the course of trial, Victim, who was just eight years old, testified about the sexual abuse inflicted upon him by Appellant several years earlier. (Trl. Tr. p. 270; pp. 274-277). Specifically, he indicated Appellant—on more than one occasion—touched his penis and digitally penetrated his anus in the bathroom while they were waiting for bathwater to warm up

and before any washing had begun. (Trl. Tr. pp. 275-276). He further reported Appellant told him to keep the abuse secret. (Trl. Tr. p. 277). However, Victim confirmed he could not—at the time of trial—remember any oral sex having occurred with Appellant. (Trl. Tr. pp. 278-279).

In addition to Victim's testimony, recordings of Victim's forensic interviews were introduced and played for the jury. (Trl. Tr. p. 238; pp. 290-291). During those interviews, Victim disclosed Appellant subjected him to inappropriate touching of his penis, digital penetration of his anus, and acts of oral sex, and he specifically noted the abuse was painful. (Trl. Tr. p. 238; pp. 290-291; State's Ex. # 1; State's Ex. # 2).

Likewise, Mother testified during trial, confirmed Appellant bathed with Victim while they were all living together, and indicated the bathroom door was locked on several occasions when Victim and Appellant were inside. (Trl. Tr. pp. 204-206). Furthermore, on one occasion, Mother stated she knocked on the locked bathroom door while they were inside, Victim subsequently came out of the room with an erect penis, she questioned him about it, Victim turned to Appellant during the questioning, and Appellant quickly signaled for him to be quiet. (Trl. Tr. pp. 206-207). After that, Mother recounted Appellant told her not to worry about it and asserted he quieted Victim to stop him from revealing he had soiled his pants, which Appellant claimed he believed would result in Victim getting in trouble somehow. (Trl. Tr. p. 207).

Following the presentation of that testimony and evidence, the trial judge discussed his intended jury instructions with the parties. (Trl. Tr. p. 334). During the discussion, defense counsel asked the trial judge if he intended to instruct the jury on intent while alleging no criminal intent was specified in the statute defining first-degree criminal sexual conduct with a minor. (Trl. Tr. p. 347). The trial judge then indicated he had a general jury instruction on criminal intent, which read as follows:

> "In order to accomplish 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, intent, knowledge, 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 certain situation. There is no way to prove intent to a mathematical certainty. There is no way for medical science to dissect a person's brain and determine what the person had in mind.
>
> The law says criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present. It's not necessary to establish intent by direct and positive evidence.
>
> Intent may be established by inference in the same way as other facts are taken into consideration, the acts of the parties and all facts and circumstances of the case.
>
> Criminal intent is a mental state and conscious wrongdoing. It's 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 negligence or recklessness or an indifference to duty or the consequences that is considered by the law to be the equivalent of criminal intent."

(Trl. Tr. pp. 348-349).

After listening to the proposed charge, the solicitor asserted it did not fit the particular facts of Appellant's case, which she noted involved alleged acts of oral sex and anal penetration that were necessarily intentional as opposed to accidental acts.[9] (Trl. Tr. pp. 349-350). In response, defense counsel conceded no argument could be made as to the intent involved in an act of oral sex but asserted "some criminal intent" had to be present for "the touching of the private body parts[.]" (Trl. Tr. p. 350). At that point, the trial judge indicated he did not think

[9] Specifically, in explaining her position, the solicitor argued "if [Appellant] put his finger in the victim's butt[,] then he was acting, and[,] therefore, he had the [requisite] criminal intent." (Trl. Tr. p. 350).

his proposed intent charge was appropriate in Appellant's case, and defense counsel responded he was concerned "the criminal intent element" would not be present anywhere in the jury instructions without some instruction on criminal intent. (Trl. Tr. pp. 350-351). The trial judge then noted the alleged touching was not sufficient to support a conviction based on the charge for which Appellant was indicted, and defense counsel agreed a finding of either penetration or oral sex was necessary for the State to prove the offense. (Trl. Tr. pp. 351-353). Following that discussion, the trial judge took the matter under advisement overnight. (Trl. Tr. p. 357).

Thereafter, the parties and the trial judge resumed the discussion the next morning, and, during the discussion, defense counsel submitted the following proposed jury instruction: "An act is done 'willfully' if done voluntarily, intentionally, and with the specific intent to do something the law forbids. In other words, a criminal act is willful if the actor knows the conduct is unlawful and acts with bad purpose either to disobey or to disregard the law." (Trl. Tr. pp. 376-381; Court's Ex. # 6 (Proposed Jury Charge)). In support of that charge, defense counsel asserted certain acts could be committed in ways that were both criminal and non-criminal before contending he believed the required level of intent for the indicted offense was willfulness. (Trl. Tr. p. 377-379). In rebuttal, the solicitor argued the acts alleged in Appellant's necessarily had to have been willful based on their nature and could not have been accidental. (Trl. Tr. p. 380). Furthermore, she noted defense counsel would be free to argue the alleged penetration occurred mistakenly but maintained a charge on mistake would just not be appropriate, and defense counsel quickly conceded he was not going to be arguing accident to the jury.[10] (Trl. Tr. p. 380). However, defense counsel asserted first-degree criminal sexual

[10] Consistent with his concession, defense counsel did *not* suggest at any point during his closing argument Appellant accidently or mistakenly committed an act of penetration upon Victim and

conduct with a minor was nonetheless not a strict liability crime. (Trl. Tr. p. 381). After considering the matter, the trial judge denied defense counsel's request to give the proposed charge on willfulness. (Trl. Tr. pp. 381-382). Defense counsel then requested the trial judge present the general intent charge he had earlier identified, but the trial judge also denied that request. (Trl. Tr. p. 382).

Subsequently, the trial judge instructed the jury on the applicable law, and, as part of his instructions, the trial judge expressly advised the jury on the State's burden of proof, explained Appellant was presumed innocent until his guilt was proven beyond a reasonable doubt, and thoroughly defined reasonable doubt. (Trl. Tr. pp. 482-490). Furthermore, in regard to the indicted offense of first-degree criminal sexual conduct with a minor, the trial judge instructed the jury in the following manner:

> The State must prove beyond a reasonable doubt that the Defendant engaged in a sexual battery with the victim. A sexual battery is sexual intercourse, fellatio, anal intercourse or any intrusion however slight of any part of a person's body or of any object into the genital or anal openings of another person's body except when the intrusion is accompanied for medically recognized treatment or diagnostic purposes.
>
> The State must then prove beyond a reasonable doubt that the victim was less than 11 years old at the time of the sexual battery. And I tell you that consent, willingness, indifference or ignorance on the part of the minor if any as to what was taking place does not affect the charge of criminal sexual conduct with a minor because the child under the age of 14 cannot legally consent to a sexual battery.

(Trl. Tr. pp. 489).

At the conclusion of the jury charge, defense counsel renewed his objection to the trial judge's failure to present an instruction on criminal intent. (Trl. Tr. pp. 490-491). However,

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did *not* at any point identify any evidence presented that would have supported such a conclusion. (Trl. Tr. pp. 460-482).

once again, the trial judge overruled the objection. (Trl. Tr. p. 491). Thereafter, the jurors began their deliberations and ultimately convicted Appellant as indicted. (Trl. Tr. p. 492; p. 497).

STANDARD OF REVIEW

On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). Significantly, the appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge's decision will not be reversed on appeal. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

ANALYSIS

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only

required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Importantly, so long as the trial judge's jury instructions are substantially correct and adequately cover the applicable law, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

Looking to the offense for which Appellant was indicted in the case at bar, an individual is guilty of first-degree criminal sexual conduct with a minor when the individual engages in a sexual battery with a victim under the age of eleven. See S.C. Code Ann. § 16-3-655(A)(1) (establishing an individual is guilty of first-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age"). For purposes of that offense, a "sexual battery" is statutorily defined to mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, *except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes*." S.C. Code Ann. § 16-3-651(h) (emphasis added).

Accordingly, based on the commonly-understood meaning of the words used by the legislature in defining the offense, a person must involve oneself or take part in a sexual battery in order to be convicted of first-degree criminal sexual conduct with a minor, which suggests an intentional act and means a person cannot be convicted of the offense for unintentional, accidental, or mistaken conduct. See BLACK'S LAW DICTIONARY 608 (9th ed. 2009) (defining "engage" as "[t]o employ or involve oneself; to take part in; to embark on"); NEW OXFORD

AMERICAN DICTIONARY 574 (3rd ed. 2010) (defining "engage" when referring to engaging in some act as "participate or become involved in"); see also NEW OXFORD AMERICAN DICTIONARY 1277 (3rd ed. 2010) (defining "participate" as "take part"); cf. Carter v. United States, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.' " (citation omitted)). However, based on the absence of language indicating the participation or taking part must be knowing, a person's knowledge of the minor victim's actual age is irrelevant. See State v. Kirkland, 282 S.C. 14, 16, 317 S.E.2d 444, 444-445 (1984) (recognizing a statute prohibiting sexual intercourse with any person confined to a mental institution necessitated proof only of "there mere commission of the act of intercourse itself" due to the absence of statutory language requiring something more, such as knowledge); Guinyard v. State, 260 S.C. 220, 228, 195 S.E.2d 392, 395-396 (1973) ("The action of the Legislature in failing to make knowledge of the institutional status of the person molested an element of the present offense is in harmony with the rule adopted by practically all of the courts that, under a charge of statutory rape, the honest belief of the accused that the complainant was of the age of consent when in fact she was not constitutes no defense."); see also McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes." (citation and internal quotations omitted)). Likewise, based on the legislature's express inclusion of an exception in the definition of sexual battery, a person's reason, motive, or purpose for engaging in a penetrative sexual battery is entirely irrelevant *unless* it was accomplished for a limited purpose falling within the exception, which excludes only medically-recognized acts.[11] See S.C. Code Ann. § 16-3-651(h) (excluding *only* "intrusion .

[11] Significantly, based on the language employed in the related subsection defining third-degree

. . accomplished for medically recognized treatment or diagnostic purposes" from the definition of "sexual battery"); see also Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute.").

In instructing the jury on the elements of the indicted offense in Appellant's case, the trial judge presented the jury with the express language of the first-degree criminal sexual conduct with a minor statute along with the applicable statutory definition of "sexual battery." By instructing the jury on the express language of the statutory provision outlining the indicted offense, the trial judge ensured the jury would not and could not convict Appellant without expressly finding he personally engaged, participated, or took part in the sexual battery, which meant the jury could only convict Appellant if it found his act was an intentional one. See United States v. Lewis, 780 F.2d 1140, 1142-1143 (4th Cir. 1986) ("In the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed."); see also BLACK'S LAW DICTIONARY 883 (9th ed. 2009) (defining "intentional" as

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criminal sexual conduct with a minor, the legislature clearly demonstrated it understood what language to employ when it intended to include a higher level of criminal intent or a more specific level of criminal intent as an element of a sexual offense involving a juvenile victim. See S.C. Code Ann. § 16-3-655(C) ("A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor *wilfully and lewdly* commits or attempts to commit a lewd and lascivious act upon or with the body, or its parts, of a child under sixteen years of age, *with the intent of* arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." (emphasis added)); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for it).

"[d]one with the aim of carrying out the act"); cf. Carter, 530 U.S. at 269 ("In this case, . . . a general intent requirement suffices to separate wrongful from 'otherwise innocent' conduct. Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring . . . general intent—i.e., proof of knowledge with respect to the actus reus of the crime."). Likewise, by instructing the jury on "sexual battery," the trial judge ensured the jury understood Appellant—assuming he was found to have engaged in a sexual battery—could only be convicted if the battery he committed did *not* involve penetration accomplished for medically-recognized treatment or diagnostic purposes, which must logically include whatever penetration might be necessary to ensure cleanliness and good hygiene for a child in need of assistance with such things.[12] See State v. Jeffries, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994) ("[T]he legislature may declare an act criminal regardless of the mental state of the actor."); see also NEW OXFORD AMERICAN DICTIONARY 855 (3rd ed. 2010) (defining "hygiene" as "conditions or practices conducive to maintaining health and *preventing disease*, esp. through cleanliness" (emphasis added)); NEW OXFORD AMERICAN DICTIONARY

[12] Notably, the only type of penetrative act that would *not* constitute a sexual battery for purposes of first-degree criminal sexual conduct with a minor necessarily must be an act accomplished for purposes of medically-recognized treatment or diagnosis. See S.C. Code Ann. § 16-3-651(h) (excluding only "intrusion . . . accomplished for medically recognized treatment or diagnostic purposes" from the definition of "sexual battery"). Otherwise, the exception would be rendered entirely meaningless as a penetrative act accomplished for purposes of medically-recognized treatment or diagnosis is inherently not accomplished with criminal intent and, thus, would already be excluded from constituting a sexual battery without the need for an express exception if some criminal purpose or intent beyond the general intent to commit the act itself was necessary for it to qualify as a sexual battery. See In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (instructing "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (citations and internal quotations omitted)).

1087 (3rd ed. 2010) (defining "medicine" as "the science or practice of the diagnosis, treatment, and *prevention of disease*" (emphasis added)).

Because the trial judge's jury instructions as presented identified all the necessary elements of first-degree criminal sexual conduct with a minor—including the requisite level of intent—and explained the circumstances under which an act of penetration upon a minor victim would not constitute a sexual battery under the law, those jury instructions taken together as a whole correctly instructed the jury on the relevant and applicable South Carolina law necessary for the jurors to be able to resolve the issues raised by the evidence in Appellant's case. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-473 (2004) ("A jury charge is correct if it contains the correct definition of the law when read as a whole."); see also Burkhart, 350 S.C. at 263, 565 S.E.2d at 304 ("Failure to give requested jury instructions in not prejudicial error where the instructions given afford the proper test for determining the issues."). Under such circumstances, the trial judge's jury instructions were legally sufficient and proper, and defense counsel's requested general jury instruction on criminal intent was unnecessary to ensure the jurors were capable of properly evaluating the evidence and arriving at a correct verdict. See State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); see also State v. Holmes, 277 S.C. 232, 234, 285 S.E.2d 353, 354 (1981) (recognizing a trial judge does not have to use any particular language when instructing the jury on the law so long as the instructions given adequately cover the relevant and applicable law); Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003) ("A circuit court's refusal to give a properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal."). Appellant's conviction should be affirmed.

III.

The trial judge committed no error by declining to include a special jury charge on unanimity as part of his jury instruction because his instructions as presented contained a proper unanimity charge and were sufficient to ensure the jurors would not reach a verdict in Appellant's case unless all twelve of them were in agreement, which rendered any further instructions on unanimity entirely unnecessary under the circumstances.

Appellant contends the trial judge reversibly erred by purportedly failing to instruct the jurors they had to be unanimous in regard to the factual allegations contained within the indictment in order to reach a verdict. In support of that contention, Appellant maintains the indictment was duplicitous because it contained a "to wit" provision that identified two different types of sexual battery and, therefore, "charged two factual counts."[13] Based on the duplicitous nature of the indictment, Appellant alleges he was deprived of his right to a unanimous verdict in

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[13] Although Appellant now contends on appeal the first-degree criminal sexual conduct with a minor indictment was facially duplicitous, defense counsel expressly informed the trial judge he was *not* challenging the validity of that indictment during trial. (Trl. Tr. pp. 50-51). Significantly, because defense counsel did not challenge the propriety of the indictment prior to the jury being sworn, any issue Appellant may have had with it was waived, and he cannot now properly raise any issues with the indictment on appeal. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn *and not afterwards*." (emphasis added)); see also In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."). Likewise, since the issue Appellant is raising on appeal regarding the trial judge's jury instructions is *directly* based on problems alleged to have been caused by the previously-unchallenged indictment, defense counsel's waiver of the indictment issue during trial should also preclude any appellate consideration of Appellant's issue with the jury instructions that stemmed from the indictment. See United States v. Robinson, 855 F.3d 265, 269-270 (4th Cir. 2017) (holding Robinson's contention a duplicitous indictment violated his right to a unanimous verdict was waived because he failed to raise the issue prior to the commencement of trial); United States v. Viserto, 596 F.2d 531, 538 (2nd Cir. 1979) ("Since the alleged duplicitous character of the counts appears on the face of the indictment, appellants could have moved before trial to dismiss the indictment. Failure to make the appropriate motion is a waiver." (citations omitted)); 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.").

the absence of a special unanimity instruction as, without such an instruction, the speculative possibility existed some of the jurors might have only concluded he committed an act of oral sex upon his minor victim while other jurors might have only concluded he committed an act of anal penetration. Contrary to Appellant's contentions, the trial judge's jury instructions as presented did not deprive him of his right to a unanimous verdict because those instructions required the jurors to determine the truth of the evidence as deciders of the facts and be in complete agreement before they could reach a verdict. Under such circumstances, the jury instructions as presented were sufficient to protect Appellant's right to a unanimous verdict, and the trial judge did not err by declining to give an defense counsel's requested special instruction on unanimity to the extent it would have otherwise been warranted. Appellant's conviction should be affirmed.

RELEVANT FACTS

After Appellant was arrested for sexually assaulting his minor victim, the Beaufort County Grand Jury indicted him for a single count of first-degree criminal sexual conduct with a minor, and Appellant's offense was described as follows within the body of the indictment:

> That in Beaufort County, South Carolina, During the year of 2013, the Defendant, Justin Adams, [who was born on a specified date], did commit a sexual battery upon a minor who was less than eleven years of age, to wit: fellatio and digital intrusion of the victim's anal opening upon [Victim, who was born on a specified date], in violation of Section 16-3-655, Code of Laws of South Carolina, 1976, as amended.

(Trl. Tr. pp. 10-11; Indictment). Subsequent to that, Appellant proceeded forward to trial. (Trl. Tr. pp. 10-11).

Towards the beginning of trial, defense counsel—prior to the jury being sworn—indicated he had considered seeking more specificity in regard to the indictment but decided

instead to request a special unanimity jury instruction "for each element" at the end of the case that would inform the jurors "they have to be unanimous as to which act occurred." (Trl. Tr. pp. 48-49; p. 176). At that point, the solicitor indicated she had a response prepared if defense counsel was challenging the indictment, but defense counsel assured the trial judge he was not. (Trl. Tr. p. 50). Instead, defense counsel asserted he was merely giving "fair notice" he believed the indictment could lead to the jurors "speculating as to which acts that they're agreeing on." (Trl. Tr. p. 50). The trial judge then asked defense counsel if he had prepared a motion on the matter he was referencing, and defense counsel indicated he had not while further assuring the trial judge he was "not raising a motion on the indictment at all." (Trl. Tr. pp. 50-51).

Thereafter, during the evidentiary phase of trial, Victim recounted in a general manner Appellant sexually abused him when he was five years old by touching his penis and putting his finger into his anus while they were bathing together. (Trl. Tr. pp. 273-275). In addition to that testimony, recordings of Victim's out-of-court forensic interviews were admitted into evidence and played for the jury, and, during those interviews, Victim recounted Appellant sexually abused him by touching his penis, digitally penetrating his anus, committing acts of oral sex, and forcing him to engage in reciprocal acts of oral sex. (Trl. Tr. p. 238; pp. 290-291; State's Ex. # 1; State's Ex. # 2). Moreover, during the interviews, Victim reported the abuse occurred ten times and on more than one occasion, and he identified the locations where the abuse occurred as the shower, bed, and living room. (State's Ex. #1; State's Ex. # 2).

Following the presentation of that testimony and evidence, the trial judge inquired of the parties if they had any "special concerns" in regard to jury instructions, and defense counsel replied he would be requesting a unanimity instruction "as to the factual allegations" due to the fact multiple incidents were alleged to have occurred. (Trl. Tr. p. 334). In response, the solicitor

asserted defense counsel's request was related to the sufficiency of the indictment and contended defense counsel had missed his opportunity to challenge the indictment by not doing so prior to the swearing of the jury. (Trl. Tr. pp. 336-337). The solicitor further asserted, based on the plain language of the first-degree criminal sexual conduct with a minor statute, the State was only required to prove one type of sexual battery even though two different types had been alleged in the indictment. (Trl. Tr. pp. 337-339).

As the discussion continued, the solicitor asserted she believed one juror could decide one of the alleged types of sexual battery occurred while another juror could decide another of the alleged types of sexual battery occurred and a proper verdict of guilty could still be rendered so long as all twelve jurors were in agreement as to the sexual battery element. (Trl. Tr. p. 356). At that point, defense counsel asserted he *agreed* with the solicitor's contention, stating: "They don't have to be unanimous as to the means. Six can say it was digital penetration. Six can say it was fellatio on the same charged act."[14] (Trl. Tr. p. 356). Nonetheless, defense counsel appeared to suggest the jurors had to agree a sexual battery occurred on a specific date even though "[t]hey don't have to agree on the means[.]"[15] (Trl. Tr. p. 357). The trial judge then took the matter under advisement overnight. (Trl. Tr. p. 357).

On the following morning, the discussion resumed, and defense counsel submitted the following proposed jury instruction:

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[14] Critically, based on defense counsel's trial concession in that regard, Appellant cannot now properly raise an argument to the contrary on appeal. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); see also 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.").

[15] Notably, neither date nor time are elements of first-degree criminal sexual conduct with a minor. See State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct.").

> In this case, you have heard testimony of different acts or conduct taken by the Defendant at different times or on different days. I charge you the jury that you must unanimously agree as to the exact act committed by the Defendant in violation of the statute before you can return a guilty verdict. If you can not agree unanimously as to the prohibited acts or conduct taken by the Defendant then you must return a verdict of not guilty.

(Trl. Tr. p. 360; Court's Ex. # 5 (Proposed Jury Charge)). In support of that proposed charge, defense counsel asserted he had previously been confused about the matter but now believed the relevant issue was one of duplicitousness, which he argued could be cured by an appropriate jury instruction. (Trl. Tr. pp. 360-363). The trial judge then asked the solicitor if she objected to the proposed charge, and she confirmed she did. (Trl. Tr. p. 365). In support of the objection, the solicitor again contended defense counsel's arguments were in essence an attack on the validity of the indictment, which could no longer properly be attacked since the jury had been sworn. (Trl. Tr. pp. 368-369). Moreover, the solicitor noted allegations of sexual abuse occurring over a period of time had been recognized as proper in South Carolina in light of the fact time was not an element of criminal sexual conduct offenses, and she again contended the jury only had to conclude Appellant committed a sexual battery in order to find the sexual battery element of the indicted offense had been proven. (Trl. Tr. pp. 368-369; pp. 371-372). In rebuttal, defense counsel asserted sexual batteries were alleged to have occurred on more than one date and, based on that, contended the jury had to be in agreement as to the specific date, which he indicated led to his proposed charge. (Trl. Tr. pp. 373-376). At the conclusion of that discussion, the trial judge stated he agreed with the solicitor and declined defense counsel's special unanimity charge request. (Trl. Tr. p. 376).

Thereafter, during the course of his jury instructions, the trial judge instructed the jury on the relevant and applicable law, including on the State's burden of proving Appellant's guilt

beyond a reasonable doubt, the presumption of innocence, and the elements of the indicted offense, including the "sexual battery" element. (Trl. Tr. pp. 482-490). Furthermore, he expressly instructed the jurors they were the deciders of the facts and had a duty to determine the truth of the evidence presented, and he directly advised the jurors all twelve of them "must agree" in order to render a verdict. (Trl. Tr. pp. 485-486; p. 490).

At the conclusion of the jury charge, defense counsel renewed his request for a more specific instruction on unanimity. (Trl. Tr. pp. 490-491). However, the trial judge once again rejected that request. (Trl. Tr. p. 491).

Subsequently, the case was submitted the jury, and, after deliberating on the matter, the jury foreman announced on behalf of his fellow jurors they had reached a unanimous verdict of guilty as indicted. (Trl. Tr. p. 492; pp. 496-497). The jurors were then individually polled about the announced verdict, and each of them unwaveringly affirmed it was their individual verdict. (Trl. Tr. pp. 497-500).

STANDARD OF REVIEW

When reviewing a trial judge's jury instructions on appeal, an appellate court must view those instructions collectively as a whole and in light of the evidence and issues from trial. Simmons, 384 S.C. at 178, 682 S.E.2d at 36. Importantly, the appellate court will only reverse a trial judge's jury charging decision when it constituted a prejudicial abuse of discretion. Clark, 339 S.C. at 389, 529 S.E.2d at 539; see Rauch, 284 S.C. at 597, 327 S.E.2d at 378 (recognizing an error regarding jury instructions must be prejudicial in order to warrant reversal). Meanwhile, if the jury instructions presented were substantially correct and adequately covered the law, the trial judge's jury charging decision will not be reversed on appeal. Ezell, 321 S.C. at 425, 468 S.E.2d at 681; see Brandt, 393 S.C. at 550, 713 S.E.2d at 603 ("An appellate court will not

reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." (citation and internal quotations omitted)).

ANALYSIS

When determining what jury instructions to present, the law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). Ordinarily, a trial judge has a duty to present a requested jury instruction if it correctly states the law applicable to the issues and is supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). However, if the jury instructions the trial judge actually presents sufficiently cover the substance of any requested jury instructions, it is not necessary for the trial judge to give any further instructions, and the trial judge's failure to do so is not erroneous. See State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) ("[I]f the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request."); see also State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) ("The substance of the law is what must be instructed to the jury, not any particular verbiage."); State v. Rabon, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980) ("The Constitution of this State requires that the trial judge declare the law, but no particular verbiage is necessary. It is sufficient if the precepts stated to the jury adequately cover that law which is applicable.").

In Appellant's case, the trial judge expressly instructed the jurors they as the deciders of the facts had to determine the truth of the evidence presented and—consistent with South Carolina's constitutional requirement for unanimity—must all twelve agree in order for there to be a verdict. See S.C. Const. art. V, § 22 ("The petit jury of the Circuit Court shall consist of twelve members and the number of jurors of other courts must be determined by law. All jurors

in any trial court *must agree* to a verdict in order to render the same." (emphasis added)). Meanwhile, the trial judge did not present *any* instructions to the jurors that suggested they could reach a verdict without being in complete agreement—factually or otherwise—or that could be construed in a way that might dispel the commonly-understood principle jury verdicts must be unanimous. See State v. Logue, 204 S.C. 171, __, 28 S.E.2d 788, 791 (1944) ("The fact that verdicts of juries must be the unanimous opinion of the twelve men composing the jury is of such common knowledge that all men may be presumed to know it without having to be so informed."). Thus, when viewed as any reasonable juror would have viewed them, the trial judge's jury instructions were adequate and sufficient to ensure the jury would only return a unanimous verdict, which was all that was required under the law.[16] See Sheppard, 357 S.C. at 664, 594 S.E.2d at 474 ("[T]he test is what a reasonable juror would have understood the charge as meaning."); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267, n. 1 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)); 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."); cf. State v. Bradford, 256 S.C. 51, 64, 180 S.E.2d 632, 638 (1971) (holding the trial judge did not err by declining to specifically instruct the jurors their verdict had to be unanimous where the jurors were instructed "in order to render a verdict of guilty, the jurors, 'each and all of you,' must be so convinced beyond a reasonable doubt").

[16] Significantly, the efficacy of the trial judge's unanimity instructions were best demonstrated by the jurors' unwavering affirmations regarding the unanimous nature of the verdict. Cf. Davison v. Commonwealth, 819 S.E.2d 440, 446 (Va. Ct. App. 2018) ("The trial court polled the jury after it returned the verdicts, and each juror confirmed that he or she joined in the verdicts, thus establishing that the verdicts were unanimous.").

Because the trial judge's jury instructions as presented were sufficient to ensure the jurors would not return a verdict in Appellant's case unless all twelve of them were in total agreement, those jury instructions taken together as a whole were sufficient to convey the requisite need for unanimity to the jury, which rendered any additional jury instructions on the matter entirely unnecessary. See State v. Marin, 415 S.C. 475, 482-483, 783 S.E.2d 808, 812 (2016) (explaining the "inquiry on appellate review is concerned only with the question of whether the jury charge, when viewed as a whole, accurately conveys the applicable law"); see also State v. Barwick, 280 S.C. 45, 47, 310 S.E.2d 428, 429 (1983) ("Where a requested charge is fully and fairly covered by the trial judge's general charge, refusal of a requested instruction is not error."); cf. State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) (concluding no reasonable juror would have understood the trial judge's jury instructions to place the burden of proof of Hicks where "[t]he instructions specified the State had the overall burden of proof"). Accordingly, to the extent defense counsel's requested special unanimity instruction constituted a correct statement of law, the trial judge committed no error by declining to present it to the jury.[17] See Rye, 375 S.C. at 123, 651 S.E.2d at 323 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."); see also Richardson v. United States, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the

[17] Moreover, even assuming the trial judge erred by declining to give the requested special unanimity instruction, the outcome of Appellant's trial would have been the same even if that instruction had been given in light of the fact Victim's testimony was largely general in nature and the case hinged solely upon it, and, therefore, any error resulting from the instruction's absence was entirely harmless beyond a reasonable doubt. See Neder v. United States, 527 U.S. 1, 19 (1999) (explaining an error resulting from the omission of a jury instruction can be harmless beyond a reasonable doubt if the result of the trial would have been the same even if the instruction had been given).

crime. Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, that the defendant had threatened force." (citations omitted)); State v. Sheppard, 248 S.C. 464, 467, 150 S.E.2d 916, 917 (1966) ("[I]t is well settled that an indictment is not duplicitous for charging the accused in conjunctive terms with having committed the offense by more than one of the means specified by the statute."); cf. Austin, 299 S.C. at 459, 385 S.E.2d at 832 ("In our view, the jury charge, as given, sufficiently covered the substance of appellant's request. Thus, the trial judge did not err by refusing to give an additional charge."). Appellant's conviction should be affirmed.

IV.

The trial judge did not abuse his broad discretion by declining to grant a new trial based on newly-discovered evidence after it was discovered the minor victim's mother violated a sequestration order at various points during trial by attempting to listen to testimony through the courtroom door because the victim's mother had a constitutional right to be present during the proceedings, her actions were in no way material to Appellant's guilt or innocence for criminal acts committed years before the trial began, and evidence of her actions would not have likely changed the outcome of trial in the event a new trial was granted.

Appellant contends the trial judge committed reversible error by declining to grant a new trial after it was discovered Victim's mother listened to testimony through a courtroom door despite being subject to a sequestration order. In support of that contention, Appellant maintains Victim's mother's behavior constituted a flagrant violation of the sequestration order and was contemptuous while further appearing to maintain it would have somehow changed the result of the trial if defense counsel had been able to present the behavior to the jury. Although it is undisputed Victim's mother's behavior was inconsistent with the sequestration order, the trial judge nonetheless did not abuse his broad discretion by refusing to grant a new trial after that behavior was discovered for several different reasons. Initially, just as the trial judge noted, Victim's mother had a constitutional right to be present during the trial proceedings under South Carolina law, and, thus, her efforts to exercise her constitutional right simply did not warrant the grant of a new trial upon being discovered. Furthermore, notwithstanding her constitutional right to be present in the courtroom, Victim's mother's behavior during trial was in no way material to Appellant's guilt or innocence for criminal acts Appellant committed years earlier, and evidence of that behavior was not of a nature that it would probably have changed the result of the proceedings if a new trial had been granted.[18] Under those circumstances, a new trial was not

[18] Significantly, the abuse was first disclosed by the then-five-year-old victim a little less than three years before Appellant's trial took place. (Trl. Tr. pp. 190-191; p. 202; p. 239; p. 290).

warranted based on the newly-discovered evidence of Victim's mother's conduct violating the unconstitutional sequestration order, and the trial judge did not abuse his broad discretion by refusing to grant a new trial, which is a remedy disfavored in the law. Appellant's conviction should be affirmed.

RELEVANT FACTS

Towards the outset of trial, the solicitor asked the trial judge if he wanted the witnesses sequestered as the trial proceeded forward, and defense counsel interjected he did. (Trl. Tr. p. 174). The solicitor then began to speak, but defense counsel interrupted before she could complete a sentence, stated he "didn't mind" sequestration, and indicated he wanted it solely during "the testimony." (Trl. Tr. p. 174). At that point, the trial judge sought clarification on what the parties were seeking and asked directly if the witnesses were going to be sequestered. (Trl. Tr. p. 175). In response, the solicitor replied affirmatively while defense counsel replied: "I would ask during the testimony of the other witnesses they be sequestered." (Trl. Tr. p. 175). The trial judge then asked whether the witnesses would be exiting the courtroom after opening statements, the solicitor indicated her witnesses were already doing so, and defense counsel stated he would ask his witnesses to leave when the testimony began. (Trl. Tr. p. 175). In response to those statements, the trial judge replied: "Okay."[19] (Trl. Tr. p. 175).

Thereafter, the evidentiary phase of trial got underway, and, as part of the State's case, Victim's mother testified as the third witness.[20] (Trl. Tr. pp. 204-233). At the conclusion of her

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[19] Later on during trial, the issue of sequestration was broached once again after the first witness testified, and the parties had an off-the-record discussion with the trial judge on the matter. (Trl. Tr. pp. 196-197).

[20] Prior to Mother's testimony, both Sergeant John Destacio of the Bluffton Police Department and Grandmother testified for the prosecution. (Trl. Tr. pp. 190-203). During the officer's testimony, Sergeant Destacio simply recounted he responded to the initial report of the sexual

testimony, the trial judge advised Mother she was free to the leave the courtroom while reminding her she could not talk to the other witnesses about her testimony. (Trl. Tr. p. 233). The solicitor then noted Mother would need to wait outside of the courtroom due to a subpoena issued by defense counsel, and defense counsel affirmed he believed Mother was still subject to sequestration. (Trl. Tr. p. 234). In response, the trial judge stated: "She would need then to exit the courtroom." (Trl. Tr. p. 234). The trial then continued forward, and several more witnesses testified for the State, including Lieutenant Babkiewicz and Victim. (Trl. Tr. pp. 235-265; pp. 270-282; p. 423).

Subsequently, Appellant was convicted as indicted, and, a few days after the trial concluded, defense counsel filed a motion seeking a new trial based on after-discovered evidence of misconduct committed by Mother. (Trl. Tr. p. 497; New Trial Motion, pp. 1-4). In support of the motion, defense counsel maintained Mother violated the trial judge's sequestration order multiple times by listening to the testimony of other witnesses through the courtroom door after she had completed her testimony. (New Trial Motion, p. 2). Defense counsel further maintained he would have requested "appropriate relief" had he known about the misconduct during trial, which he asserted might have included requests for Mother's testimony to be stricken, for Victim and other witnesses to be barred from testifying, for dismissal of the case, and for the jury to be presented with evidence of the misconduct to demonstrate Mother's "manipulation." (New Trial Motion, p. 3). In rebuttal, the solicitor filed a response contending the evidence of Mother's misconduct did not warrant the grant of a new trial because defense counsel was at least partially

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abuse, took statements from Victim's mother and grandparents, and referred the matter to an investigator. (Trl. Tr. pp. 190-191). During Grandmother's testimony, Grandmother simply provided some brief background information on her family before confirming Victim disclosed sexual abuse to her. (Trl. Tr. pp. 197-203). Notably, as to the specifics of the disclosure, Grandmother limited her testimony solely to time and place. (Trl. Tr. pp. 198-200; p. 202).

aware of it during trial coupled with the fact knowledge of Mother's act of attempting to listen to testimony through the door of the courtroom would not have affected the outcome of trial. (Response to New Trial Motion, pp. 3-5).

Thereafter, the trial judge conducted a hearing on the matter, and, during the hearing, both the solicitor and defense counsel agreed Mother attempted to listen to the testimony through the courtroom door despite the fact a sequestration order was in place.[21] (Post-Trl. Tr. pp. 3-10). Based on that undisputed conduct, defense counsel maintained Appellant was entitled to a new trial as he opined it would have somehow supported his claim of manipulation, coercion, and suggestibility.[22] (Post-Trl. Tr. p. 13). In rebuttal, the solicitor asserted: (1) Mother—as the minor victim's mother—had a constitutional right under South Carolina law to be present during trial; and (2) Mother's act of listening through the courtroom door had nothing to do with her credibility. (Post-Trl. Tr. pp. 16-17).

Following the presentation of the parties' contentions, Mother testified about her actions and admitted she listened through the courtroom door at several points during trial. (Post-Trl. Tr. p. 18). However, she asserted she could not hear much of what was said, and she further confirmed what she did hear did not influence her in any way.[23] (Post-Trl. Tr. pp. 18-19).

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[21] Moreover, defense counsel further alleged Mother committed misconduct by listening in during closing arguments, and he asserted he learned of that purported misconduct through his paralegal immediately after the closing arguments were concluded. (Post-Trl. Tr. pp. 4-5). Notably though, defense counsel had repeatedly indicated during trial he only wanted the witnesses sequestered during the testimony, and there is no indication the witnesses were ever ordered to remain outside the courtroom during the closing arguments. (Trl. Tr. pp. 174-175).

[22] Beyond that, defense counsel contended Mother's conduct constituted "some type of contempt," but he conceded Appellant did not have a "direct interest" in any contempt proceedings. (Post-Trl. Tr. p. 10).

[23] After Mother testified about her actions during trial, defense counsel questioned her on cross-examination about certain trial testimony she had presented that—by defense counsel's own admission—was not related to her attempts to listen through the courtroom door. (Post-Trl. Tr.

At the conclusion of Mother's testimony, the solicitor conceded Mother's behavior during trial had been "cartoonish." (Post-Trl. Tr. p. 32). However, she again reiterated Mother had a right to be present during the trial, and she further asserted any impact Mother's actions during trial could have had on her credibility would have been very minimal if they could have had any impact at all. (Post-Trl. Trl. pp. 30-32). At that point, the trial judge denied the new trial motion while also noting Mother would have been permitted to remain in the courtroom if the solicitor had simply asked for her not to be sequestered. (Post-Trl. Tr. pp. 35-36).

STANDARD OF REVIEW

A decision as to whether to grant or deny a new trial based on after-discovered evidence rests in the sound discretion of the trial judge. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); see State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993) ("It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion."). On appeal, an appellate court will not reverse a trial judge's ruling on a new trial motion absent a clear and manifest abuse of discretion. See State v. Wells, 162 S.C. 509, __, 161 S.E. 177, 187 (1931) ("[T]he granting or refusing of new trials, on the ground of after discovered evidence, is within the discretion of the trial judge, and this court will not interfere with that discretion, unless it manifestly appears that there was an erroneous exercise of it."); see also State v. Corn, 224 S.C. 74, 81, 77 S.E.2d 354, 357 (1953) ("In an appeal from an order denying a motion for a new trial, it is settled by numerous cases that this Court may not nicely weigh the testimony upon which such a motion is based; that power rests in the Circuit Court, for it has at hand the

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pp. 20-25). During that questioning, Mother acknowledged testimony she presented regarding her contact with Appellant after the allegations arose had not been entirely accurate as she "possibly" kissed Appellant at one point and was in a hotel room with him at another point after Victim disclosed the abuse. (Post-Trl. Tr. p. 20; pp. 22-23; p. 25).

instrumentalities with which to exercise the power, and that Court's settled judgment ought not to be impeached except for errors of law, or for an abuse of its discretion.").

ANALYSIS

After-discovered evidence is "evidence of facts existing at time of trial of which [the] aggrieved party was excusably ignorant." State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973). In order to obtain a new trial based on after-discovered evidence, a party must demonstrate the evidence: (1) would probably change the result of the proceedings if a new trial is granted; (2) was discovered after the trial ended; (3) could not have been discovered prior to trial; (4) was material to the issue of guilt or innocence; and (5) was not merely cumulative or impeaching. State v. Taylor, 333 S.C. 159, 176, 508 S.E.2d 870, 879 (1998). When deciding whether to grant a new trial based on after-discovered evidence, the trial judge alone is tasked with weighing the evidence and determining whether a new trial is warranted under the circumstances presented. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Importantly though, the granting of a new trial based on after-discovered evidence is disfavored in South Carolina, and, thus, a party seeking a new trial based on such evidence must satisfy a heavy burden in order to be entitled to one. Needs, 333 S.C. at 158, 508 S.E.2d at 869; see State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197-198 (1978) ("The granting of a new trial because of after-discovered is not favored, and this Court will sustain the lower court's denial of such a motion unless there appears an abuse of discretion."); see also United States v. Wilson, 624 F.3d 641, 660 (4th Cir. 2010) (explaining new trials based on after-discovered evidence should only be granted sparingly and in the rare circumstance the evidence weighs heavily against the jury's verdict).

In the case at bar, Mother unquestionably engaged in "cartoonish" behavior through her attempts to listen to the testimony from outside the courtroom, but that behavior nonetheless did not warrant the grant of a new trial upon being discovered for several different reasons. Initially, Mother's behavior did not warrant a grant of a new trial because Mother had a constitutional right to be present during the trial proceedings and, thus, should have been allowed into the courtroom during the testimony of *all* the witnesses, which would continue to be true in any subsequent trial proceedings. See S.C. Const. art. I, § 24(A) (mandating a crime victim—which includes a parent of a minor victim—has a constitutional right to "be informed of and *present at* any criminal proceedings which are dispositive of the charges where the defendant has the right to be present" (emphasis added)). Therefore, just as the trial judge found, Mother's efforts to exercise her constitutional right to be present for the trial would not and did not warrant a grant of a new trial for Appellant. See S.C. Const. art. I, § 24(C)(1) ("A victim's exercise of any right granted by this section is not grounds for dismissing any criminal proceeding or setting aside any conviction or sentence."). Moreover, even if Mother had not had a constitutional right to be present, her behavior still would not and did not warrant the grant of a new trial because her attempts during trial to hear what was going on were simply not material in any conceivable or logical way to Appellant's guilt or innocence for criminal acts he committed nearly three years earlier. See Irvin, 270 S.C. at 545-546, 243 S.E.2d at 198 (concluding a new trial based on after-discovered evidence was properly denied where "[t]he only potential use of this prior inconsistent testimony would be to impeach Investigator Lewis' trial testimony, and it is improbable this inconsistency would change the result if a new trial is had"); cf. United States v. Robinson, 627 F.3d 941, 949 (4th Cir. 2010) ("If Robinson is instead contending that the misconduct evidence serves some purpose other than impeachment, we are at a loss as to what

that purpose could be. Unlike the evidence in those few cases in which we have ordered or allowed a retrial, the misconduct evidence does not directly support some alternate theory of the crimes, nor does it provide any legal justification for Robinson's actions. Instead, the evidence is offered to cast doubt on the testimony of the dismissed officers and the evidence they helped to collect, about as textbook an example of impeachment evidence as there could be." (citation omitted)). Likewise, since Mother's actions were immaterial to Appellant's guilt or innocence for sexually-abusing Victim, evidence of those actions could not have had a realistic possibility of altering the outcome of the proceedings had a new trial been granted. See State v. Wells, 249 S.C. 249, 264, 153 S.E.2d 904, 912 (1967) (" 'It cannot be said . . . that the affidavits must necessarily lead any reasonable mind to the inference that the newly-discovered evidence would probably change the result. *Nothing short of this* would justify the conclusion that the Circuit Court abused its discretion in refusing the motion. ' " (emphasis added and citation omitted)); cf. Guidry v. State, 121 S.W.3d 849, 851 (Tex. App. 2003) (finding the trial court did not abuse its discretion by declining to grant a new trial based on newly-discovered evidence establishing several witnesses violated a sequestration order during the course of trial because the evidence of the witnesses' misconduct "was not material other than perhaps for impeachment" and "was not of a nature likely to cause a different result").

Accordingly, under the circumstances of Appellant's case, Appellant wholly failed to meet his burden of establishing a new trial based on after-discovered evidence was warranted, and the trial judge did not abuse his broad discretion by declining to award a new trial to Appellant based solely on the fact an unconstitutionally-sequestered witness heard some portions of the trial testimony from outside the courtroom. See Corn, 224 S.C. at 88, 77 S.E.2d at 360 ("The hearing Judge is the determiner of the facts in such matters and unless his findings are

influenced or controlled by error of law or unless his conclusions are so illogical and unreasonable to amount to an abuse of discretion[,] his findings are binding upon this Court[.]"); cf. Needs, 333 S.C. at 158, 508 S.E.2d at 869 ("We conclude appellant has not met his burden. It is true the State's case against appellant was not overwhelming, especially since the State's key witness had offered so many contradictory statements. But we do not believe the evidence appellant would present at a new trial would change the outcome of the trial."). Appellant's conviction 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,

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ATTORNEYS FOR RESPONDENT

June 14, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2017-001018

THE STATE,

Respondent,

vs.

JUSTIN ADAMS,

Appellant.

PROOF OF SERVICE

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

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of June, 2019.

MARK R. FARTHING
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ALAN WILSON
ATTORNEY GENERAL

June 14, 2019

David Alexander, Esquire
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RE: State v. Justin Adams – Appellate Case No. 2017-001018

Dear Mr. Alexander:

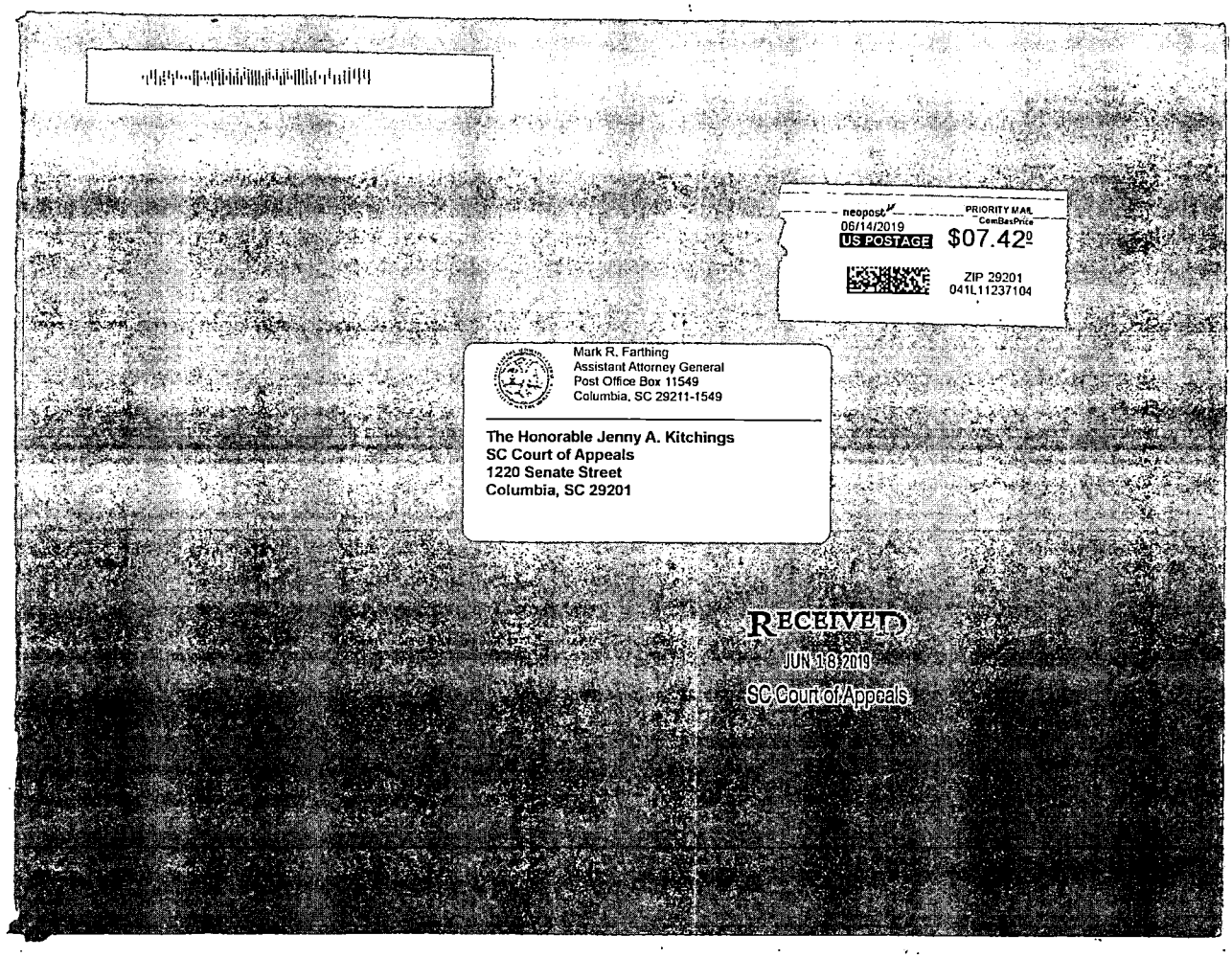
I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one copy enclosed)
Victim Advocacy Division



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