STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM NEWBERRY COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000201

THE STATE, ...RESPONDENT

v.

CRAIG CARL BUSSE .....APPELLANT.

FINAL BRIEF OF RESPONDENT

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[1] Section 16-3-659 of the South Carolina Code, which limits the admissibility of evidence concerning a victim's sexual conduct in prosecutions under sections 16-3-615 and 16-3-652 to 16-3-656, is often referred to as the Rape Shield Act or the Rape Shield Statute.

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

State Statutes:

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly overruled Appellant's objection to the solicitor's closing argument where: (1) the comments at issue were cumulative to similar comments made in closing to which no objection was raised and (2) in the context of the entire record, the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Furthermore, whether any possible error in admitting the comments was entirely harmless where they could not reasonably have affected the result of the trial.

2. Whether Appellant's claim that the trial court erred in its application of the Rape Shield Act by refusing his request to introduce evidence of the sexually explicit contents of Victim's cell phone communications is preserved for review where Appellant agreed to the limitations imposed by the trial court without exception or objection prior to cross-examining the relevant witnesses at trial. Even if preserved, whether the trial court properly applied the Rape Shield Act and appropriately limited Appellant's cross-examination of the relevant witnesses by allowing him to explore Victim's alleged motive to fabricate without going into the specific sexually explicit content on her cell phone. Finally, whether any possible error in limiting the cross-examination was entirely harmless where it could not reasonably have affected the result of the trial.

STATEMENT OF THE CASE

Craig Carl Busse (Appellant) was indicted at the September 2017 term of the grand jury for Newberry County for second-degree criminal sexual conduct with a minor (2017-GS-36-00414). He was represented by Anna Browder, Esquire, and the State was represented by Deputy Solicitor Dale Scott, Esquire, and Assistant Solicitor Taylor Daniel, Esquire, of the Eighth Circuit Solicitor's Office. On February 5-7, 2018, Appellant proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable Donald B. Hocker to fifteen (15) years' imprisonment. (Indictment & Sentencing Sheet, R. pp. 364-366). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

After jury qualification and selection, the trial court heard a series of pretrial motions. These included Appellant's motion *in limine* to prevent any State's witnesses from giving any opinion as to the truthfulness of the alleged victim (R.p.29), and the State's motion *in limine* to prohibit Appellant from attempting to cross-examine the victim (Victim) about her prior sexual history pursuant to the South Carolina Rape Shield Act. S.C. Code Ann. § 16-3-659. (R .p.25-p.31). Appellant argued that pursuant to *State v. Finley*,[2] he should be allowed to enter relevant evidence about prior sexual history which tended to establish motive, bias, or prejudice on the part of the victim. He explained his defense was denial, and claimed the allegations of sexual abuse came about after a fight Victim had with Appellant over her cell phone, which she had allegedly been using to send "sexual" pictures to a boy. Appellant argued he should be able to ask questions about the photos because they related to Victim's motive for making the allegations against him. The trial court took the matter under advisement and said it would make a ruling before Victim testified at trial. (R.p.31-p.33). After hearing arguments from both parties and taking in-camera testimony on the issue, the trial court ruled it would allow Appellant to elicit testimony about finding "inappropriate" things on the phone but he would not be able to characterize them as "suggestive" or be able to describe them as involving Victim and a boy. Appellant indicated he understood the ruling and did not object or otherwise argue it would improperly limit his ability to show Victim's alleged motive to fabricate the allegations of sexual abuse. (R.p.40-p.41; p.113-p.126).

The jury was then sworn and the parties proceeded to make opening statements. (R.p.42-p.55). The solicitor first explained the jury would not hear about any physical evidence and instead would have to base its decision on Victim's word that the abuse occurred. He described

[2] *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (1989).

how Victim made the initial disclosure to a friend at school, Jeany Meetze, about being sexually abused by her step-dad, Appellant. The solicitor further explained how Jeany then told her mom, who called the school, and how the school guidance counselor, April Cary, then contacted the school resource officer (SRO), Deanna Wilbanks, who interviewed Victim. He then generally described the relationship between Victim and Appellant, and how the sexual abuse started with touching and groping and progressed to oral sex and attempted intercourse. The solicitor acknowledged Appellant did not confess to the alleged crime and instead denied the abuse; however, he asked the jury to consider why Victim would make up the allegations and put herself through a trial if it was not true, and to judge her credibility accordingly. (R.p.46-p.53). Appellant's counsel responded by arguing the case is not what it seems and asked the jury to focus on Victim's credibility and how her story changed over time so that "things don't add up." She asked the jury to pay particular attention to what happened in the days leading up to the allegations being made. (R.p.53-p.55). The State then presented its case-in-chief.

First, the State called Victim's friend Jeany Meetze to the stand to describe her relationship to Victim and the Victim's disclosure of sexual abuse which was made to her on the afternoon of March 8, 2017. She described Victim as upset and crying when she told Jeany it happened in her bedroom and had been going on for a while. Jeany told her mom the same afternoon and Jeany's mom called the school the following morning. (R.p.55-p.61). On cross-examination, Jeany acknowledged she had previously alleged that her uncle sexually abused her. She also acknowledged she told Victim about this allegation but denied telling Victim she lied to her mom about it. (R.p.65-p.73).

Next, the State called the school guidance counselor, April Cary, to the stand. She testified she got a call from Jeany's mom, Barbara Hockett, on March 9, 2017, and as a result she

met with the SRO, Deanna Wilbanks, who then met separately with Jeany and Victim. (R.p.73-p.78). The State then elicited testimony from SRO Wilbanks. She described getting contacted by Cary on March 9, 2017, in regard to the phone call from Hockett, and everything she did as a result, which culminated in talking to Victim. SRO Wilbanks testified Victim disclosed she had been sexually abused from the time she was in eighth grade until two weeks before the disclosure, and that the abuse happened in her home in Newberry County. She said she notified D.S.S. and Victim's mom of the allegations and that as a result, D.S.S. removed Victim from the home and placed her in emergency protective custody. (R. p.79-p.89).

Next, the State called Victim's mom, Meagan Busse (Meagan), to the stand. She gave detailed testimony about her relationship with her husband, Appellant, and her daughter, Victim, including her marriage to Appellant and how they all moved down to South Carolina from Wisconsin in 2015. Meagan then described two instances prior to the disclosure when she discovered text messages on Victim's phone telling her boyfriend that Appellant had tried to rape her, and how in each of those instances when she asked Victim about those messages Victim denied anything happened. She also described how Victim was seeing a therapist at the time she sent the text messages but had never disclosed any abuse to that therapist. Meagan testified she was very surprised to hear the allegations of abuse against Appellant when they were disclosed in March of 2017 and said D.S.S. would not let Victim come home with her that day because there had been allegations she knew the abuse was taking place. She testified Victim's behavior never changed during the time of the alleged abuse and she showed no indicators. Meagan said the first time she saw Victim after she was taken into emergency custody was on March 24, 2017, the day of the forensic interview, and that she did not get custody back until November 29, 2017, eight months later. She testified she only moved away from Appellant so she could get her

daughter back. Meagan testified Appellant suffers from erectile dysfunction (ED) and that as a result their sex life was "very few and far between." She said they never had conversations about the ED with Victim but could not say whether she might have overheard them talking about it. (R.p.91-p.112).

On cross-examination Meagan testified she would have taken Victim and left Appellant if there were ever any concerns or indicators of abuse, but there were not, and they had a typical father-daughter relationship. She said Victim acted normal and continued hugging Appellant and asking to go places with him during the time of the alleged abuse. Meagan then testified about taking Victim's cell phone away from her a few days before the initial disclosure of abuse, and the fight that ensued. She explained she and Appellant took the phone away after finding inappropriate content on the phone. Meagan said Victim was screaming and hollering about having her phone taken away and described her as "very mad." (R.p.126-p.135). On re-direct, Meagan admitted she was still married to Appellant and wanted to get through the trial before considering anything like divorce. She also admitted talking to Appellant during a break in trial and asking him if she "did good." (R.p.144-p.148).

The State then called Lieutenant Garrett Lominack of the Newberry Sheriff's Office to the stand. He received the report from SRO Wilbanks on March 9, 2017, and conducted the follow-up investigation, which included contacting D.S.S. and then interviewing Appellant and Meagan. Lominack said they both voluntarily came to the Sheriff's Office to talk and that Appellant denied the allegations, indicating he believed Victim may have fabricated them because she heard about an allegation of sexual abuse from her half-sister, who was assaulted by an unrelated individual in the past. Lominack testified he did not seek an arrest warrant for Appellant for another month, until after the forensic interview, and he did not refer Victim for a

medical exam due to the length of time after the alleged incidents of abuse. Lominack testified that during his interview, Appellant never suggested a fight over Victim's cell phone as a possible motive for her to fabricate the abuse. (R.p.150-p.163; p.169-p.170).

Next, forensic interviewer Ariel Gagne of Safe Passage in Rock Hill took the stand. She explained she interviewed the fifteen-year-old Victim on March 27, 2017, during which Victim told her the incidents happened over a span of about two years at her home, in her parents' bedroom. Gagne was then admitted as an expert in the area of child abuse dynamics and reporting and offered general testimony about partial disclosure, piecemeal disclosure, recantation, delayed disclosure, caregiver denial, and fear of disclosure. (R.p.180-p.191).

Victim then testified for the State. She described her family relationships, living arrangements, and about moving to South Carolina from Wisconsin when she was fourteen. Victim said Appellant began touching her sexually when she was in eighth grade by grabbing her boobs and her vagina on top of her clothes. She said this occurred in his bedroom in the afternoons when she would come home from school. Appellant eventually began reaching under her clothes to touch her breasts and vagina, progressing to inserting his fingers into her vagina and getting her to perform oral sex on him. Victim said she tried to make up excuses to leave or avoid the contact but it would not always work. She testified Appellant once made her perform oral sex and ejaculated inside her mouth and that he performed oral sex on her three or four times. Victim said Appellant attempted to have intercourse with her but was unsuccessful because his stomach got in the way. She testified his penis touched her vagina but there was no penetration. Victim said Appellant would only let her hang out with friends if she agreed to pay him back by doing sexual things with him. She explained she did not disclose the abuse for a

long time because she was afraid it would get worse or her privileges would be taken away. (R.p.196-p.238; p.254-p.256).

Finally the State called mental health clinician Betsy Price to the stand. She was admitted as an expert in child mental health assessment. Price completed an assessment of Victim prior to her placement in foster care, and then did therapy sessions with her from April 2017 through August 2017. She testified Victim told her the incidents would occur in her parent's bedroom with the door shut, usually in the afternoons after school, and that they were ongoing after they moved to South Carolina. Price testified she observed symptoms exhibited by Victim that were consistent with post-traumatic stress disorder (PTSD) and diagnosed her with PTSD. (R.p.258-p.265; p.271-p.278). On cross-examination Price acknowledged most of Victim's symptoms predated the alleged abuse; however, on redirect she testified allegations of sexual abuse would exacerbate those symptoms and contributed to her diagnosis. (R.p.278-p.284).

After the State rested, Appellant moved for a directed verdict and that motion was denied. (R.285-p.286). Appellant was then sworn and questioned about his right to testify, and he elected not to testify in his own defense. (R.p.286-p.288). He did however call two witnesses on his behalf. First, Victim's friend Kailey Counts took the stand. She testified she and Victim were best friends during the time of the alleged abuse and often shared secrets with each other, but Victim never told her about the allegations. Kailey said Victim and Appellant seemed to have a regular father-daughter relationship. (R.p.289-p.294). Next, Kailey's mother, Gina Counts, testified for Appellant. She said she was pretty good friends with Appellant and Meagan and thought of Victim and Appellant as having a typical father-daughter relationship. Gina

recounted how, after Victim's testimony about the alleged sexual abuse at a prior D.S.S. proceeding, Victim commented that "she's a good actor." (R.p.295-p.303).

After the defense rested, the parties made closing arguments and the trial court charged the jury on the law. In his closing argument, the solicitor focused in part on the definition of reasonable doubt and the State's burden to ensure the jury was "firmly convinced" Appellant committed the crime. (R.p.306-p.311). He said: "I want to go over *some things that I think are compelling* and I think lead you, as a jury, to be firmly convinced of his guilt. And that's all you must find for him to be guilty. Firmly convinced. I'm fixing to tell you about the credibility of a witness." (R.p.312, lines 1-5) (emphasis added). Appellant did not object to this comment. The solicitor proceeded to talk about the duty of the jurors to determine the credibility of witnesses, asking them to consider what interest Victim could possibly have to fabricate the sexual abuse. (R.p.312-p.318). He argued:

> If she is this masterful liar, why didn't she go for it all and say he had intercourse with me. Because that didn't happen. Because she's telling, well, you can figure out that there is credible testimony. Why just say he had sex with her. If you're going to lie, go all out. But you know, he didn't have intercourse with her. You know why. He can't have intercourse with her, he's impotent, cannot sustain an erection. What I want you to ask yourselves *and what is compelling to me, how does she know that.*

(R.p.318, lines 7-16) (emphasis added). Appellant objected to the comment, arguing that "anything about what he believes and if it's compelling to him or not" was improper. The trial court responded: "Well, you know, I'm pretty liberal with closing arguments. I'll overrule your objection and allow him to argue it. Certainly, afford you the same rights." The solicitor continued: "*I'm going to repeat what was compelling to me and should be to you*, was how did she know that. Is that something parents talk about with their child, step-dad has an erectile disfunction [sic], no." (R.p.318, line 17-p.319, line 1) (emphasis added).

Appellant then made his closing argument and the State made its reply. (R.p.320-p.339). The trial court charged the jury on the law, including the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct and circumstantial evidence, credibility of witnesses, the defendant's right not to testify, and the elements of the offense. (R.p.340-p.350). After deliberating for approximately three hours, the jury found Appellant guilty as indicted. (R.p.350-p.352). Appellant renewed all of his prior motions in addition to requesting a new trial, specifically referencing his pretrial motion in regard to wanting to admit "the content of text messages regarding the phone blowup" and his objection to the solicitor's closing argument indicating which testimony he believed was compelling. (R.p.355, line 23-p.356, line 6). The trial court then sentenced Appellant to fifteen (15) years' imprisonment and ordered that Appellant be placed on the sex offender registry. (R.p.361-p.362).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41,48, 625 S.E.2d. 216, 220 (2006). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. *Wilson,* 345 S.C. at 6, 545 S.E.2d at 829. Indeed, the admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. *See State v. Weaver*, 361 S.C. 73, 89, 602 S.E.2d 786, 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record."). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

ARGUMENT

I.

The trial court properly overruled Appellant's objection to the solicitor's closing argument because: (1) the comments at issue were cumulative to similar comments made in closing to which no objection was raised and (2) in the context of the entire record, the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Furthermore, any possible error in admitting the comments was entirely harmless because they could not reasonably have affected the result of the trial.

Appellant contends the trial court erred in overruling his objection that to the comments in the solicitor's closing argument that he found Victim's testimony to be compelling, on grounds that the comments were improper. The State submits Petitioner's argument should be denied on several grounds. First, any possible error was entirely harmless where the objectionable comments were cumulative to a prior and nearly identical comment by the solicitor to which no objection was raised. Second, even if not deemed cumulative, when taken in the context of the entire record, the comments in question did not so infect the trial with unfairness

as to deny Appellant due process. Finally, and for similar reasons, even if the comments were allowed by the trial court in error, their admission was harmless where they could not have reasonably affected the outcome of trial. Appellant's conviction and sentence should be affirmed.

Relevant Facts

In his closing argument, the solicitor discussed the definition of reasonable doubt and the State's burden to ensure the jury was "firmly convinced" Appellant committed the crime. (R.p.306-p.311). He said: "I want to go over *some things that I think are compelling* and I think lead you, as a jury, to be firmly convinced of his guilt. And that's all you must find for him to be guilty. Firmly convinced. I'm fixing to tell you about the credibility of a witness." (R.p.312, lines 1-5) (emphasis added). Appellant did not object to this comment. The solicitor then proceeded to talk about the duty of the jurors to determine the credibility of witnesses. In response to the defense theory that Victim was lying, he asked the jury to consider what interest Victim could possibly have to fabricate the sexual abuse. (R.p.312-p.318). He argued:

> If she is this masterful liar, why didn't she go for it all and say he had intercourse with me. Because that didn't happen. Because she's telling, well, you can figure out that there is credible testimony. Why just say he had sex with her. If you're going to lie, go all out. But you know, he didn't have intercourse with her. You know why. He can't have intercourse with her, he's impotent, cannot sustain an erection. What I want you to ask yourselves *and what is compelling to me, how does she know that.*

(R.p.318, lines 7-16) (emphasis added). Appellant objected to the comment, arguing that anything the solicitor believed is compelling to him was improper. The trial court responded: "Well, you know, I'm pretty liberal with closing arguments. I'll overrule your objection and allow him to argue it. Certainly, afford you the same rights." The solicitor continued: "*I'm going to repeat what was compelling to me and should be to you*, was how did she know that. Is

that something parents talk about with their child, step-dad has an erectile disfunction [sic], no." (R.p.318, line 17-p.319, line 1) (emphasis added).

Discussion / Analysis

A party must make a contemporaneous objection to improper arguments made to the jury to preserve any errors for appellate review. *Moore v. Florence Sch. Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994). Here, Appellant failed to make a contemporaneous objection the first time the solicitor argued he was going to review portions of evidence: "I think are compelling." Thus, any complaint about the comment is not preserved for appellate review. As a consequence, even as to Appellant's preserved challenge, the comments are harmless because those comments were merely cumulative. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence).

Even if deemed not cumulative, the comments did not result in a denial of due process. Indeed, they were effectively comments on the evidence, or lack thereof, presented during trial. They did not place the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, and they did not indicate information not presented to the jury supported Victim's testimony. The solicitor's comments directing the jury's attention to evidence and circumstances which would render Victim's testimony more credible were simply comments on the evidence presented during trial in response to Appellant's argument in opening that Victim's story did not add up. Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."). Looking to the

context in which the remarks were made, the solicitor did not make a personal assurance of Victim's veracity, and instead used the first person word "I" as the equivalent of a reasonable person standard. He merely asked the jury to reasonably consider whether, as suggested by Appellant, Victim had a motive to lie. As recognized by the United States Court of Appeals for the Third Circuit, the comment was merely asking the jury to view the evidence in a light most favorable to the State, which is proper argument. *U.S. v. Walker*, 155 F.3d 180, 180 (1998). In *Shuler*, when determining there was no improper vouching, our supreme court noted the comment in question did not use the first person. *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). However, this was not the deciding factor. Rather, the Court's ruling hinged on the finding that the solicitor did not comment that he had personal knowledge the witness was telling the truth. *Id.* The same is true here, despite the solicitor's use of a first person word. Therefore, the result should be the same. Viewed in the proper context, the solicitor's remarks were designed to comment on Appellant's opening statement, the evidence presented at trial, and the jury's exclusive duty to determine credibility, and did not render Appellant's trial fundamentally unfair.

Finally, even if the solicitor's remarks during his closing argument were somehow improper, Petitioner did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. Although the solicitor inartfully used the first person "I" when making the objectionable comment, the overall context of the argument clearly focused on asking the jurors themselves to make a credibility determination based on the evidence in the record. Combined with the trial court's jury charges that: (1) the closing arguments were merely an opportunity for the attorneys to advocate for their respective sides (R.p.305), (2) the jurors must accept and apply the law exactly as charged (R.p.43; p.343), (3) the jury is the sole and exclusive

judge of the facts in a case (R.p.43; p.343), and (4) the jury has the duty to determine the credibility of witnesses (R.p.345); the comments were so insignificant in the context of the case that they could not have reasonably affected the outcome. *See State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). For all of these reasons, Appellant's conviction and sentence should be affirmed.

II.

Appellant's claim that the trial court erred in its application of the Rape Shield Act by refusing his request to introduce evidence of the sexually explicit contents of Victim's cell phone communications is not preserved for review because Appellant agreed to the limitations imposed by the trial court without exception or objection prior to cross-examining the relevant witnesses at trial. Even if preserved, the trial court properly applied the Rape Shield Act and appropriately limited Appellant's cross-examination of the relevant witnesses by allowing him to explore Victim's alleged motive to fabricate without going into the specific sexually explicit content on her cell phone. Finally, any possible error in limiting the cross-examination was entirely harmless because it could not reasonably have affected the result of the trial.

Relying primarily on *State v. Finley*, just as he did at trial, Appellant argues the trial court erred in its application of the Rape Shield Statute when it refused to allow him to use evidence found on Victim's cell phone to show motive. He contends the communications between Victim and a third party were relevant to establish Victim's motive for fabricating the allegations of sexual abuse. Appellant further contends exclusion of the content of the communications was prejudicial because it prevented Appellant from corroborating his theory that discovery of the communications directly led to a dispute between her and Appellant. The State disagrees and submits Appellant's argument should be denied and dismissed for several reasons.

First, this argument is not preserved for appellate review because, following arguments on the issue and the presentation of *in camera* testimony at trial, Appellant ultimately agreed to the limitations imposed by the trial court without exception or objection prior to conducting his cross-examination of the relevant witnesses. Second, the trial court properly applied the Act and appropriately limited Appellant's cross-examination of the relevant witnesses by allowing him to explore Victim's alleged motive to fabricate through referencing the "inappropriate content" discovered on Victim's cell phone, but not allowing him to describe or show the sexually explicit content itself. Third, any possible error in the limitation was harmless where Appellant was able to explore the alleged motive to fabricate by eliciting testimony about the argument over Victim's cell phone after he discovered "inappropriate content" and took the phone from Victim a few days before the initial disclosure.

Relevant Facts

The State made a pretrial motion *in limine* to prohibit Appellant from attempting to cross-examine the victim about her prior sexual history. (R.p.25-p.31). The solicitor argued any questions or evidence about Victim's prior sexual history would run counter to the Rape Shield Act. S.C. Code Ann. § 16-3-659. Appellant acknowledged there had been testimony at a prior D.S.S. proceeding regarding Victim's pregnancy, but he assured the court he did not intend to go into the pregnancy evidence unless the State somehow opened the door. He argued however, that pursuant to *State v. Finley*, he should be allowed to enter other relevant evidence about prior sexual history which tended to establish motive, bias, or prejudice on the part of the victim. He explained his defense was denial, and claimed the allegations of sexual abuse came about after a fight Victim had with Appellant over her cell phone, which she had allegedly been using to send sexual pictures to a boy. Appellant argued he should be able to ask questions about the photos

because they related to Victim's motive for making the allegations against him. The trial court took the matter under advisement and said it would make a ruling before Victim testified at trial. (R.p.31-p.33). The trial judge said he would review the issue over a lunch break and would make a ruling at the appropriate time. After lunch, the judge said he would need to take some in-camera testimony before making a final ruling so he would know exactly what Appellant intended to show. Appellant advised the judge he would need to make the ruling before Victim's mother, Megan Busse (Meagan), was subject to cross-examination. (R.p.40-p.41).

Later, after the State completed its direct examination of Meagan, the jury was excused. The trial judge explained his understanding of the RSA and asked the parties to clarify their respective positions on the admissibility of the cell phone evidence. Appellant explained that three or four days before Victim made the initial disclosure of abuse there was an argument between both Megan and Appellant and Victim over some photos they found on her cell phone where she was doing inappropriate things with a boy and sending inappropriate text messages. He said this is what the fight was about, so he should be able to ask about it to establish motive. The solicitor responded that the underlying content on the cell phone was not relevant and argued the disagreement over the cell phone was enough to try to establish motive without going into the actual photos or text messages. The trial judge said his initial thoughts were similar to those of the solicitor and that Appellant could try to show a motive to fabricate the allegations without showing what was on the phone itself. Appellant responded that he would agree with not showing the pictures on the phone but believed explaining the content was necessary to show how big the argument was as opposed to previous fights over Victim's cell phone. (R.p.113-p.116).

The trial court then heard in-camera testimony from Meagan. She described discovering very suggestive pictures of Victim and an unidentified boy on Victim's cell phone three days before Victim's disclosure, how she and Appellant confronted Victim about those photos, and the resulting fight after they took the phone from Victim. (R.p.116-p.124). At the conclusion of the testimony, the solicitor argued it was clear the argument was over the phone with no need to talk about the contents. The trial court disagreed and ruled it would not limit the testimony as strictly as requested by the State, and would instead allow Appellant to elicit testimony about finding "inappropriate" things on the phone but would not allow Appellant to characterize them as "suggestive" or describe them as involving Victim and a boy. After seeking clarification, Appellant indicated he understood the ruling and would proceed accordingly. He did not object or otherwise argue it improperly limited his ability to show the alleged motive for Victim to fabricate the allegations of sexual abuse. (R.p.124-p.126).

The jury then returned to the courtroom and Appellant cross-examined Meagan. She testified about taking Victim's cell phone away a few days before the initial disclosure of abuse, and the fight that ensued. Meagan explained she and Appellant took the phone away after finding inappropriate content on the phone. She said Victim was screaming and hollering about having her phone taken away and described her as "very mad." (R.p.132-p.134).

Issue not Preserved for Review

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Furthermore, "a party cannot acquiesce to an issue at trial and then complain on appeal." *State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010). Finally, where an appellant

obtains the relief he sought there is no issue to decide on appeal. *See State v. Sinclair*, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide.").

The State submits Appellant's argument is not preserved for review because Appellant ultimately agreed to the limitations imposed by the trial court without exception or objection, prior to cross-examining the relevant witnesses at trial. He obtained the only relief he sought—the ability to introduce evidence about a fight Victim and Appellant had about her cell phone in an attempt to prove Victim had a motive to fabricate. By acquiescing in the trial court's proposed solution, which did not prohibit questions about the "inappropriate content" on the cell phone and the ensuing argument between Victim and Appellant, Appellant may not now complain about the trial court's ruling on appeal. *Rios*, *supra*. Additionally, by effectively obtaining the relief he sought, Appellant has left this Court with no issue to decide. *Sinclair*, *supra*.

Discussion / Analysis

Even if preserved, the trial court properly applied the Rape Shield Act and appropriately limited Appellant's cross-examination of the relevant witnesses by allowing him to explore Victim's alleged motive to fabricate, but by still prohibiting him from going into the specific sexually explicit content on her cell phone. This ruling not only complied with the Rape Shield Act itself, which only allows the trial court to admit such evidence, even for a proper purpose, where "its inflammatory or prejudicial nature does not outweigh its probative value," but it also exemplifies a proper Rule 403 ruling which requires the trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice. S.C. Code Ann. § 16-3-659; Rule 403, SCRE. As explained by Appellant at trial, the fight over the

cell phone is what established the motive to fabricate. Thus, the sexually explicit nature of the "inappropriate content" on that cell phone did little or nothing to enhance the probative value of the evidence Appellant was permitted to introduce. The only purpose would have been to attack Victim's reputation or character. This would have been improper and is exactly the kind of attack the Rape Shield Act was intended to prevent. *See State v. McCoy*, 274 S.C. 70, 72-73, 261 S.E.2d 159, 160 (1979) ("In recent years there has been a great tendency by counsel for persons accused of rape or criminal sexual misconduct to try the prosecutrix instead of the defendant. No doubt the legislature has concluded that such tactics have a chilling effect on prosecutions, to the detriment of society, while providing minimal benefit to the accused person in his defense.").

Appellant's reliance on *Finley* is misplaced. In *Finley*, in a trial for first-degree criminal sexual conduct, trial counsel moved to introduce evidence of the specific instance of the complainant's sexual conduct on the night in question. *Finley*, 300 S.C. at 200, 387 S.E.2d at 90. Our supreme court held the exclusion of the proffered evidence was prejudicial error, noting Finley's defense was that he did not commit the assault and that the charges were fabricated to silence him about the complainant's sexual conduct with her neighbor, and to extort money from him. *Id.* The Court found: "The *unique facts of this controversy*, coupled with the appellant's right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." *Id.* (emphasis added). Thus, in *Finley*, the motive to fabricate arose from the sexual conduct itself. Here, the motive to fabricate came not from a claim that Victim was trying to silence Appellant about Victim's sexual conduct or trying to extort money from him, but from Victim's anger when Appellant took away her cell phone. The content that led to taking away the cell phone does not enhance proof of that motive, particularly where Appellant

was allowed to describe the phone's contents as inappropriate. The trial court's decision should be affirmed.

Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. *State v. Adams*, (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). Here, even if this Court determines the trial court erred in not allowing testimony about the specific content on Victim's phone, Appellant was not prejudiced by the error where the description of those contents as being "inappropriate" was sufficiently descriptive to inform the jury of the material forming the genesis of the fight. Furthermore, neither Victim's nor her mother's testimony suggested the fight over the cell phone prior to Victim's disclosure was any more intense than similar fights in the past, which consequently lent little support for Appellant's theory of defense. Thus, any possible error in limiting the cross-examination was entirely harmless because it could not reasonably have affected the result of the trial. *See State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). For all of these reasons, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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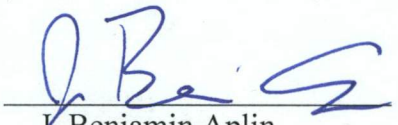
BY: 
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Columbia, South Carolina
April 25, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000201

THE STATE,.....RESPONDENT

v.

CRAIG CARL BUSSE, ...APPELLANT.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Final Brief of Respondent*, dated April 25, 2019, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 25th day of April, 2019.

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