STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No: 2018-001684

THE STATE, Respondent,

vs.

MICHAEL CLIFF EUBANKS, Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Appellant. Additionally, Appellant opened the door to any testimony presented. Even if the trial judge erred in admitting the testimony, any error was harmless.

III. The trial judge did not abuse his wide discretion when he allowed the State to question Appellant about internet searches he performed as they were relevant to the question of intent, especially as it related to the third degree criminal sexual conduct with a minor charge.

IV. The trial judge properly permitted the State to ask Appellant to demonstrate for jurors how the victim was "wiggling" when she sat on his lap and caused him to ejaculate. Furthermore, Appellant failed to preserve any issue regarding the demonstration.

V. Appellant's argument the solicitor improperly made inflammatory arguments during closing arguments to the jury is not preserved for appeal and does not meet any exception for review without proper preservation.

VI. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance to have a cell phone examined which was in the Appellant's possession until just before trial.

VII. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance.

VIII. The trial court did not abuse its discretion in refusing to dismiss a qualified juror who indicated they could be fair and impartial and did not intentionally conceal any information during voir dire.

IX. The trial court properly denied the motion for a new trial based on the juror's connection to a witness's grandmother and an investigator when no juror bias has been established.

X. The trial court properly refused to charge second degree assault and battery as a lesser included offense of third degree criminal sexual conduct because it is not a lesser included offense and even if it were, there is no evidence indicating Appellant was solely guilty of second degree assault and battery instead of third degree criminal sexual conduct.

XI. Appellant's argument regarding cumulative error is not preserved for review on appeal and he has failed to establish entitlement to a new trial.

XII. This Court should decline the opportunity to issue what is at most an advisory opinion requested by Appellant. Further, the issue was addressed by this Court in ruling on Appellant's motions prior to briefing.

STATEMENT OF THE CASE

On July 21, 2017, the Laurens County Grand Jury indicted Appellant on one count of third-degree criminal sexual conduct with a minor. On August 18, 2017, the Laurens County Grand Jury indicted Appellant on one count of first-degree criminal sexual conduct with a minor. Thereafter, on July 27, 2018, the Laurens County Grand Jury indicted Appellant on one count of second-degree criminal sexual conduct with a minor. (Indictments; R.___).

The case was called for a jury trial on July 31, 2018, before the Honorable Frank R. Addy Jr., and a jury. (Tr. p. 7; R.___). Appellant was subsequently found guilty as indicted by the jury. (Tr. p. 780-782; R.___). Judge Addy sentenced Appellant to twenty-five years imprisonment for first-degree criminal sexual assault with a minor, a concurrent term of fifteen years imprisonment for third-degree criminal sexual assault with a minor, and fifteen years imprisonment, suspended with probation for five year, for second-degree criminal sexual assault with a minor to run consecutive to the twenty-five year sentence on the first-degree criminal sexual assault with a minor. (Tr. p. 793-795; R.___).

On August 13, 2018, Appellant moved for a new trial. (Motion for New Trial; R.___). On September 11, 2018, by written order, Judge Addy denied the new trial motion. (Denial of Motion; R.___) This appeal follows.

STATEMENT OF FACTS

Appellant married Denise "Deanie" Lyons in 2010. (Tr. p. 111, ll. 16-18.) Appellant had two children from a former marriage, and Deanie also had two children from a previous marriage, including the victim. (Tr. pp. 111, l. 21 – 112, l. 16.) Appellant and Deanie had one child during their marriage. (Tr. p. 112, ll. 17-18.) Initially, Appellant and Deanie's children lived in a house on Teague Road. (Tr. p. 423, ll. 4-7.) Appellant's biological children from his first marriage lived with their mother and visited every other weekend. (Tr. p. 164, ll. 3-7.)

In November of 2013, Deanie was involved in an automobile accident that left her with a broken neck. (Tr. pp. 576, l. 22 – 578, l. 21.) Due to the accident, Deanie had to undergo back surgery and was unable to work. (Tr. p. 428, ll. 19-20.) Initially, Deanie did receive disability provided by the State, but that was ultimately cancelled because the accident was not work related. (Tr. p. 578, ll. 4-11.) During this time, Appellant quit his job and did not work for about 6 months which lead to the family losing their home on Teague Road and having to move in with Deanie's parents on Beaver Dam Road. (Tr. p. 428, ll. 16-22.)

In May of 2017, one of the children attended a counseling session with Kimberly Little at Gilchrist Consultation and Counseling. (Tr. p. 127, ll. 22-24.) The child suffered from depression due to a series of family losses and bullying that had occurred at school. (Tr. p. 157, ll. 16-23.) During his session, he explained to Little he did not have a relationship with his father nor his stepfather, Appellant, but he wanted a relationship with Appellant. (Tr. p. 158, ll. 4-8.) According to the child, Appellant and Deanie were not getting along in the home, and the Victim was the "peacekeeper" with whom Appellant spent a lot of his time. (Tr. p. 158, ll. 8-13.) After his session with Little, Little decided to ask Deanie if she could meet with Victim "to make sure she was ok." (Tr. p. 158, ll. 14-15.)

On May 16, 2017, the Victim met with Little. Victim was fidgety, anxious and crying. (Tr. p. 158, ll. 22-24.) After Little's session with Victim, Little contacted DSS and law enforcement. (Tr. p. 159, l. 12.) Agents from both agencies arrived and took statements from the Victim and Little. (Tr. pp. 159, l. 21 - 160, l. 3.) Appellant also showed up at Little's office with his mother, but was intercepted by Deputy Ronald Richey (Richey). (Tr. p. 160, ll. 4-11.) Appellant wanted to go inside, but Richey asked Appellant to wait in the parking lot. (Tr. pp. 152, l. 20 – 153, l. 6.) The case was turned over to DSS and Investigator Jared Hunnicutt (Hunnicutt).

On May 17, 2017, Deanie and Victim met with Hunnicutt at the Sheriff's station where statements were provided. (Tr. p. 57, ll. 10-19.) Hunnicutt also met with Appellant on May 17, 2017, to receive his statement of events. (Tr. p. 58, ll. 11-22.) Hunnicutt informed Appellant the Victim made allegations of abuse and the scope of those allegations. (Tr. p. 58, ll. 23-25.) Appellant willfully gave a statement. (State's Exhibit 1; R.___). In the statement Appellant explained:

> As far as I can remember, I have not touched her in any way that I can remember to make her feel this way. She has fell asleep at times with me and my daughter, . . . in the bed, but I have also picked her up and took her to her bed. And I have also fell asleep in my bed watching TV with me waking up with her next to me. I have no clue what goes on when I sleep. And I'm not saying that I did or didn't while I was asleep.

(T.330; State's Exhibit 1; R.___). Hunnicutt further explained that Appellant mentioned catching the Victim masturbating, the Victim was very flirtatious with Appellant and would do things other kids her age would not typically do, but Appellant did not know what to do about the Victims behavior. (Tr. pp. 62, l. 25 – 63, l. 14.) Appellant freely left the Sheriff's office after writing that statement. (Tr. p. 64, ll. 6-16.)

Later on, that same day, May 17, 2017, Hunnicutt asked Appellant if he would be willing to come back to the Sheriff's office to discuss in further detail his first statement and the allegations against him. (Tr. p. 65, ll. 1-10.) Appellant arrived at the Sheriff's office with his parents and gave another statement, freely, detailing an encounter with the Victim at the barn that was not provided in the first statement. (See State's Exhibit #2.) In Appellant's second statement, Appellant averred he was tearing down some pallets with the Victim at their barn and, at some point, the Victim crawled into Appellant's lap and began "wiggling on his leg." (Tr. p. 69, ll. 13-19.) Appellant stated he tried to push the Victim away, but she would not stop. Appellant ejaculated and did not know what to do. (Tr. p. 69, ll. 19-23.) Appellant indicated he knew it was wrong, that he tried to push the Victim away, but it still aroused him, and he ejaculated in his pants. (Tr. p. 70, ll. 18-21.) After providing this statement, Appellant was arrested. (Tr. p. 71, ll. 11-18.)

The Victim testified Appellant began sexually abusing her when she was "young" at around the age of six at the Teague Road home. (Tr. p. 169, ll. 2-3.) Initially, Appellant would touch Victim on her breasts, butt, and vagina with his hands. (Tr. p. 171, ll. 13-16.) Appellant would digitally penetrate Victim's vagina. (Tr. p. 172, ll. 5-11.) Appellant would also perform oral sex on Victim. (Tr. p. 173, ll. 5-9.) Then Appellant would "use his boy part against [her] girl part" and would insert the "tip" into Victim's vagina. (Tr. pp. 174, l. 12 – 175, l. 12.) The Victim testified when she was about eight years old, Appellant would pick her up early in the morning while she was still asleep and take her to the couch in the living room. (Tr. p. 169, ll. 8-25.) Then, Appellant would pull Victim's pants down and pull his pants down and start rubbing his penis against Victim's vagina. (Tr. p. 170, ll. 6-10.) The Victim also testified "[Appellant would] put his boy part on the rag and white stuff would come out." (Tr. p. 179, ll. 11-12.)

The Victim further testified to instances that occurred at the barn where Appellant would put boards up to block the view and would pull her pants down and position her so her "butt was on his boy part." (Tr. p. 204, ll. 4-10.) The Victim testified Appellant would breathe hard and white stuff would go on the chair and floor. (Tr. p. 206, ll. 3-4.) The Victim explained multiple instances that occurred at various locations, including details of when Appellant would put his "boy part" in her "girl part" and behind and expressed the pain that would occur. (Tr. pp. 206, l. 8 – 210, l. 6.)

When the victim explained to her mother the abuse by Appellant, her mother initially did not believe her and thought she was lying. Once the victim explained how Appellant would start kissing her on the neck and ear, and then play with her breasts, and then continue from there, the victim's mother knew it had happened because it was how Appellant started foreplay with her. (Tr. p. 454, ll. 11-23.) Deanie further testified and gave the court a walkthrough of Appellant's signature bedroom foreplay. (Tr. p. 455, ll. 12-21.)

The Victim's brother testified he witnessed Appellant grabbing the Victim's butt and they would cuddle under blankets on the couch and in the bedroom. (Tr. pp. 136, l. 24 – 137, l. 6.) he also testified Appellant would take Victim to school but would not drive him to school, even though Appellant went "right by [his school]," and Appellant gave the Victim money for school but would not give him money for school because Appellant needed it for his own lunch. (Tr. pp. 137, l. 23 – 138, l. 14.) The brother described how Appellant would enter the bathroom with Victim when Victim was not dressed. (Tr. pp. 135, l. 15 – 136, l. 7.)

There was conflicting testimony surrounding Appellant's perceived preferential treatment of Victim compared to the other children in the family. Several family members of Appellant testified they didn't really see any difference in the way Appellant treated the other

children compared to the victim[1]. However, the Victim testified she did receive special attention and Appellant and Deanie would fight about Appellant not treating all the children the same. (Tr. p. 214, ll. 11-19.) Appellant's biological daughter testified to the special attention Appellant would give the Victim compared to how he treated the other children. Appellant's biological daughter even testified about gifts the Victim would receive like clothing, shoes, and perfume. (Tr. p. 400, l. 2.) Deanie testified that after Appellant was arrested, she found clothing, jewelry, perfume, lotions, and a lot of cash that Appellant had given the Victim that she did not know about. (Tr. p. 462, ll. 1-5.)

On June 1, 2017, the Victim was interviewed by Heather Bennett (Bennett) at Beyond Abuse, which is a Children's Advocacy Center. (Tr. pp. 287, l. 7 – 288, l. 7.) The Victim was twelve years old at that time. In her interview, the Victim asserted something happened to her at the Teague Road and Beaver Dam Road homes from when she was six years old until she was twelve years old. (Tr. pp. 288, l. 22 – 289, l. 5.) On June 8, 2017, Dr. Lyle Pritchard performed a sexual assault medical examination on the Victim. (Tr. p. 364, ll. 14-25.) Dr. Pritchard testified that he did not find any signs of trauma and that it was a normal exam. (Tr. p. 366, ll. 22.) Pritchard also testified that 95% of exams in cases where children have been sexually assaulted the exams render a normal finding. (Tr. pp. 366, l. 23 – 368, l. 8.) Specifically, Dr. Pritchard testified it is not definitive of abuse or no abuse. (Tr. p. 372, ll. 7-14.)

Samantha Black, a therapist employed by the Beckman Mental Health Center, met with the victim on June 14, 2017, and "got her background, history, family abuse allegations, symptoms, and [] assessment measures." (Tr. p. 292, ll. 12-14.) Based on Ms. Black's assessment of the Victim, she thought the Victim should undergo a therapy known as trauma

[1] Tr. pp. 517-21; 523-26; 535-39; 540-43; 548-50; 552-59; 562-64.

focused cognitive behavior therapy. (Tr. p. 292, ll. 15-23.) Dr. Eman Sharawy, the medical director of Beckman Mental Health Center, testified that she reviewed Black's notes and records and then interviewed the Victim. After her interview and review, Dr. Sharawy diagnosed the Victim with posttraumatic stress disorder, PTSD. (Tr. p. 315, ll. 1-19.) Dr. Sharawy testified that the Victim was "very anxious, very avoidant" and further noted the Victim's behaviors and symptoms. (Tr. p. 316, ll. 2-10.) Dr. Sharawy further testified the Victim's therapy was decided from that meeting and she prescribed an anti-depressant for the Victim. (Tr. p. 316, ll. 11-25.)

The trial court qualified Shauna Galloway-Williams, a licensed professional counselor and executive director of the Julie Valentine Center, as a blind expert in the field of child abuse dynamics. (Tr. pp. 377, l. 19 – 378, l. 5.) Ms. Galloway-Williams proffered expert testimony regarding disclosure and the process involved.[2] (Tr. pp. 378, l. 12 – 381, l. 9.) Ms. Galloway-Williams testified that age, frequency of abuse, comfort level with therapist or interviewer, knowledge of anatomy, even who the interviewer is can affect the details of the story a victim will share. (Tr. pp. 378, l. 12 – 381, l. 9.) Ms. Galloway-Williams further testified that children often delay disclosure of sexual abuse because of the relationship with the alleged abuser and or fear of consequences for themselves or for the abuser. (Tr. p. 382, ll. 8-25.) Ms. Galloway-Williams testified that fears are very powerful for children and this can impact their willingness to disclose anything. (Tr. p. 382, ll. 18-23.)

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[2] Contrary to Appellant's assertion, it clearly appears Ms. Galloway-Williams misspoke or the transcript was inaccurate when she testified "So we refer to disclosure as a process, meaning that we would expect that a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time." (Initial Brief of App. p. 18.; Tr. p. 378, ll. 14-17.) In fact, her next sentence stated, "[t]here may be factors that influence when they initially disclose and factors that influence what they tell throughout that entire process." When taken in context to the questions and answers before and after this particular statement, it is undeniable that Ms. Galloway-Williams meant "we would [**not**] expect a child or an adult is going to tell every single detail or every single event that they've experienced related to child abuse at one time."

ARGUMENT

I. The trial court properly admitted the testimony of the State's expert witnesses regarding the victim's diagnosis of PTSD because the testimony was substantive evidence and its probative value significantly outweighed any possible prejudice. (Appellant's Issues I and II).

Appellant contends the trial court erred in admitting testimony from several State's expert witnesses regarding their treatment of the child victim and the victim's diagnosis of PTSD. The testimony was properly admitted under established case law in South Carolina. Further, the testimony was not impermissible bolstering. Additionally, any argument regarding bolstering occurring by any specific testimony is not preserved for review on appeal.

Preservation

First, any argument that the testimony provided by Ms. Black or Dr. Sharawy impermissibly vouched for or bolstered the testimony of the victim is not preserved for review on appeal. During the discussion to exclude the testimony, the trial court ruled he would admit the testimony as long as "these witnesses stay away from any sort of vouching or statement about the veracity of the victim in this case." (T.299; R.___). The trial court continued after hearing more argument particularly about Ms. Black's testimony:

> It is circumstantial evidence that explains some of the behavioral characteristics that we heard the victim testify to earlier. So long as we don't wind up in a vouching situation, and presumably the next witness will be qualified as an expert in this particular field. Again, the Court finds that the probative value of this evidence outweighs any prejudicial effect so long as we stay away from the vouching that was so troublesome in Kromah. That'll be my ruling.

(T.301-302; R.___). Importantly, the trial court ruled it admissible as long as the testimony did not vouch for the child or violate Kromah. Most significantly, immediately after counsel asked that his objection to the admission of the testimony be noted for the record, the trial court stated:

"Now, Mr. Wise, I would ask this. If you feel like they're getting into vouching evidence, like I believe the child, I need to hear from you. Okay?" Counsel immediately responded "I understand." (T.302; R.___). The trial court, therefore, clearly expected counsel to object in the event any testimony bolstered or vouched for the child. Because counsel never raised an objection during any of the testimony of Ms. Black or Dr. Sharawy, any argument that the specific testimony presented impermissibly bolstered or vouched for the child victim is not preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "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.

Merits

On the merits, the testimony regarding the child's therapy, her behaviors, and the diagnosis of PTSD were all properly admitted by the trial court based on clearly established case law in South Carolina. The Courts of this state have examined behavioral testimony in several

cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

In Anderson, the South Carolina Supreme Court specifically stated:

> Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims. See, e.g., State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child).

State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015).

This case is very similar to the case of State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004). In White, the appellant maintained testimony that the victim's symptoms were consistent with those of a recent trauma sufferer was more prejudicial than probative and not allowed pursuant to Schumpert. While White involved an adult victim, the South Carolina Supreme Court explained that Schumpert clearly allowed testimony of the type admitted and further elucidated:

> Expert testimony on rape trauma may be **more crucial** in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. The purpose of rape trauma evidence is to prove the elements of criminal sexual

> conduct since such evidence may make it more or less probable the offense occurred.

White, 361 S.C. at 414–15, 605 S.E.2d at 544 (emphasis added). Additionally, the Court found the evidence not unduly prejudicial and found it probative to dispute the appellant's claims.

In the instant case, the testimony that the child victim suffered PTSD as a result of trauma refutes Appellant's claims that the only touching that occurred was innocent touching and that nothing more happened with the child victim.[3] The fact that after the alleged abuse occurred and was disclosed that the child suffered behaviors consistent with PTSD, including being "very anxious, very avoidant" and "guarded and withdrawn," having "nightmares, bad dreams," and having "depressive symptoms, low mood . . . ." (T.316; R.___). This testimony and diagnosis was not mere repetition of hearsay, but was instead the exact type of behavioral testimony described in Schumpert and White which directly refutes Appellant's claim that nothing traumatic happened to the child and instead supports the existence of sexual abuse.

Additionally, the testimony by Ms. Black and Dr. Sharawy did not impermissibly bolster or vouch for the child victim's allegations of sexual abuse. As noted before, neither tied the symptoms of trauma or PTSD to sexual abuse. Additionally, as the Supreme Court of Virginia noted in a similar case in which testimony of PTSD was admitted: "[the doctor's] testimony merely tended to corroborate the victim's testimony, in the same way that a doctor's testimony describing a rape victim's physical injuries tends to corroborate the victim's testimony." Ward v. Commonwealth, 264 Va. 648, 653, 570 S.E.2d 827, 831 (2002). Accordingly, the trial court did not err in admitting the testimony by Ms. Black and Dr. Sharawy.

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[3] It is significant to note that neither Ms. Black nor Dr. Sharawy testified as to the cause of the trauma suffered by the child victim. Neither indicated they believed it was sexual abuse which resulted in the PTSD or the symptoms of trauma. They merely explained the symptoms and indicated the child victim exhibited those symptoms consistent with a recent traumatic experience.

II. **The trial judge did not abuse his wide discretion when he permitted the State to question the child victim regarding pornography she was exposed to by Appellant. Additionally, Appellant opened the door to any testimony presented. Even if the trial judge erred in admitting the testimony, any error was harmless.**

Appellant maintains the trial court erred in allowing the State to question the child victim about pornography kept by Appellant. Testimony regarding pornography kept by Appellant was relevant when the child victim testified she was exposed to that pornography by Appellant. Further, Appellant opened the door to its admission through his examination of the child on cross-examination. Finally, any argument regarding Rule 404(b), SCRE, and character evidence is not properly preserved for review on appeal.

Preservation

As an initial matter, Appellant's argument regarding Rule 404(b), SCRE, is not preserved for review. Appellant at no point during trial objected to the testimony as "improper character evidence" under Rule 404(b), SCRE, and therefore this issue is not preserved for review on appeal. "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. at 142, 587 S.E.2d at 693. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "Appellant is limited to grounds raised at trial." State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). Therefore, this issue is not preserved for appeal. See State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (A party may not argue one ground at trial and an alternate ground on appeal.).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "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.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

A defendant may open the door to otherwise improper evidence through defendant's own introduction of evidence or witness examination. State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (citations omitted). When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) ("[W]hen a party introduces evidence about a

particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially."). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2009) (citations omitted).

Prior to trial, the State indicated it did not intend to go into the pornography owned by Appellant, including pornography seen on a cell phone. (T.92; R.___). Nevertheless, Appellant in cross-examination of the Victim introduced the subject of pornography by questioning the Victim about videos she saw on Appellant's cell phone. (Tr. pp. 238, l. 14 – 243, l. 3.). Additionally, he specifically opened the door to testimony about the remainder of Appellant's collection of pornography by asking questions designed to make it appear to the jury the only time the child saw pornography or was exposed to pornography was when it was on Appellant's cell phone. (T.238-244; R.___).

The State questioned the child victim about watching pornography and about Appellant's collection of pornography. She indicated he watched it when he would lay on the bed with her, he showed her what was in the tub of pornography that he kept in the barn, and he had her move it in the closet to better conceal the pornography. (T. 266-268; 272-276; R.___). Appellant opened the door to the discussion of the pornography by asking the child about the video and search on the iphone. The State needed to explain to the jury that it was not just an isolated incident in which the child victim was exposed to the pornography by Appellant, but that he

watched it while she was in the room and also that he showed her what he collected and where he kept it.

The information was relevant because the child was knowingly exposed to adult pornography by Appellant as a means of desensitizing her to what was about to happen to her. She explained the first time she saw something was right before the physical touching began occurring and that she told her mom because she thought it was wrong. However, when she watched further videos after the touching started happening she did not tell her mom. (T.239; R.___). The exploration of this grooming was directly relevant to the charges, especially when Appellant placed his intent in regards to the barn incident at issue.

Additionally, the admission of the tub as well as the testimony following the objection was entirely harmless in light of the testimony which was admitted without objection. On re-direct, the State and the child victim engaged in the following colloquy without objection:

> Q And he was asking you about some videos, pornographic videos. Was that something you saw Cliff doing on more than one occasion, looking at dirty videos?
>
> A Yes, sir.
>
> Q And you were talking about in the narrative a Google search or Youtube search that you found.
>
> A Yes, sir.
>
> Q Told your mother about. And then there was another time he was looking up a video. Those were times when he was looking at them by himself or was he asking you to watch them?
>
> A He was looking at them by himself.
>
> Q Were there ever times when he asked you to watch videos or showed you videos?
>
> A He'd lay down beside me and put them on.

Q There's a TV in that barn. Did he ever show you videos in there?

A He showed videos to me on the TV in the house.

Q The TV in the house?

A Yes.

Q Which TV?

A In his bedroom.

. . . .

Q Did you ever know where he kept all his pornographic videos?

A Yes, sir.

Q Where did he keep them?

A In his storage building.

Q Was there a little bit or a lot of them?

A A lot.

(T.266-268; R.___). It was only at this point that counsel interjected an objection. As a result, a significant amount of testimony regarding the existence of Appellant's pornography was admitted before the jury without objection. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless). Additionally, the trial court limited the discussion to solely the existence of the pornographic material and not the contents of any of the materials; thereby greatly reducing any prejudice to Appellant.

Accordingly, the trial court did not err in admitting the testimony and if it was error, it was entirely harmless.

III. The trial judge did not abuse his wide discretion when he allowed the State to question Appellant about internet searches he performed as they were relevant to the question of intent, especially as it related to the third degree criminal sexual conduct with a minor charge.

Appellant maintains the trial court erred in allowing the State to question Appellant about internet searches he performed. He alleges they were improper prior bad act testimony and also unduly prejudicial. The testimony was directly relevant based on the allegations in this case and Appellant's defense that he did not intend certain things to happen with the child victim. Further, the evidence was highly probative and, therefore, the trial court properly did not exclude the testimony.

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); 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."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Merits

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451,

453 (2003). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See Saltz, at 127, 551 S.E.2d at 247 ("The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion.").

Additionally: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165.

Generally, evidence of a defendant's character is inadmissible to show a propensity to commit the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

In the instant case, the Appellant maintained he had low testosterone, erectile dysfunction, and general difficulties obtaining and maintaining an erection. The State questioned Appellant regarding his use of pornography to become aroused and assist in obtaining an erection. After a sidebar which was not put on the record,[4] the State asked: "I'm going to ask the million dollar question. Are you attracted to young girls?" (T.644; R.___). Appellant maintained he was only interested in girls over 18 but when asked again indicated: "I mean, you need to describe how - - what you mean by young." The State then sought to question Appellant about specific websites he searched. The Court allowed the solicitor to ask generally about his prior internet searches: "Had you done internet searches where you looked for young looking girls?" Appellant responded: "I have done searches." The State clarified: "Have you done searches where you looked for younger looking girls?" and Appellant responded: "Yes, sir." (T.652-653; R.___).

[4] As a result, any objection to the immediately following testimony would not be properly preserved for review on appeal.

The question was directly relevant to the question of intent and whether Appellant "**wilfully and lewdly** commits or attempts to commit a lewd or 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." S. C. Code Ann. § 16-3-655(C) (Supp. 2018). Appellant cites to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) to allege the testimony was improperly admitted on intent. Nelson is clearly distinguishable. In Nelson, the trial court permitted children's toys, videos, photographs of young girls, and other evidence tending to depict the defendant as a pedophile into evidence. There the trial court stated the evidence was probative of a "personality characteristic," specifically, that the defendant was a pedophile. Our Supreme Court reversed the trial court because "[s]uch evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged." Id. at 7, 501 S.E.2d at 719. Further, the Court found that "the State's argument [that] th[e] evidence was relevant to show motive or intent [wa]s merely a cleverly disguised way of asserting Petitioner committed the crimes because he has a propensity to commit sexual offenses." Id. at 12, 501 S.E.2d at 722.

In the instant case, the central question regarding the incident where the child victim was in Appellant's lap and he ejaculated was whether this was a lewd or lascivious act in which he intended the arousal he obtained or if it was an incident in which the girl was behaving and he attempted to prevent what occurred. The testimony about the prior internet searches for young looking girls was probative of his intent since he acknowledged the pornography he viewed was for purposes of arousal; meaning he became aroused looking at younger girls engaged in sexual situations. The fact he became aroused looking at younger looking girls engaged in sex made it

more likely that the incident in the barn was a willful act done by Appellant with the intent to create arousal and not the innocent accident he alleged.

Finally, the evidence was not unduly prejudicial. Its high probative value, assisting the jury in determining the likelihood of Appellant's ejaculation being a mere accident as opposed to a result of a willful and intentional lewd or lascivious act, is not outweighed by the prejudice. The State is required to prove the elements of third degree criminal sexual conduct with a minor including that Appellant acted with the requisite intent. The prior searches assisted the State is establishing that intent and directly refuting Appellant's claim it was an accident or unintentional act. Accordingly, the trial court properly admitted the testimony regarding the internet searches for "younger looking girls."

IV. The trial judge properly permitted the State to ask Appellant to demonstrate for jurors how the victim was "wiggling" when she sat on his lap and caused him to ejaculate. Furthermore, Appellant failed to preserve any issue regarding the demonstration.

Appellant contends the trial court erred in permitting Appellant to demonstrate to the jurors how the Victim, J.L., was "wiggling" when she sat on his lap because the only purpose was to humiliate Appellant. Appellant further contends that this demonstration was "to obtain fodder" for the solicitor's closing arguments that "repeatedly mocked" Appellant. (Brief of App. p. 38.) However, the demonstration was not improper because it provided the jury a visualization of Appellant's claim of what J.L. was doing on his lap that caused him to ejaculate. Additionally, the issue is not preserved for review on appeal.

Preservation

Appellant testified his eighty-one-pound stepdaughter was "wiggling" on his leg and moving in "circular motion[s]" on his leg and these motions caused him to ejaculate. (Tr. p. 661, l. 11 – p. 662, l. 13.) The solicitor asked Appellant to come down and show the jury how the child victim was moving on his leg. (Tr. p. 661, ll. 18-21.) It was at this point that Appellant's counsel stated:

> **The State:** Your Honor, I don't - - I don't know if this is a proper demonstration even because it's - - having never heard of it before.

(Tr. pp. 661, l. 25 – 662, l. 1.) The trial judge responded:

> **The Court:** If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.

(Tr. p. 662, ll. 3-4.) Appellant's counsel never raised an objection on a specific ground. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal). Significantly, he never maintained the demonstration was so highly prejudicial as to require a new trial as he does on appeal. As a result, the issue is not preserved for review on appeal. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have

been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Standard of Review

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Merits

Demonstrative evidence explains or summarizes other evidence and testimony. Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). "Demonstrative evidence, [particularly], reenactments of events, can be highly persuasive" and provide the jury an opportunity "to see what supposedly happened can accomplish in seconds what might otherwise take days of testimony." U.S. v. Wanoskia, 800 F.2d 235, 237–38 (10th Cir. 1986). Demonstrations of various behaviors by the defendant are properly allowed and assist the jury in understanding the defendant's testimony. See e.g., Moore v. State of Texas, 154 S.W.3d 703, 708 (Tex. App. 2004) (holding a defendant's use of a doll during cross examination to demonstrate how he handled a child was a fair comparison to the act in question because the defendant was demonstrating his own conduct); State v. Fisher, 805 N.W.2d 571, 578–79 (S.D. 2011) (allowing defendant to demonstrate how he shook his baby with a rubber doll); Commonwealth v. McGee, 11 N.E.3d 1043, 1049 (Mass. 2014) (allowing demonstration, on a couch, to show position in which defendant's mother was lying as the he was choking her). As the Colorado Court of Appeals stated:

> Demonstrative aids can take various forms, including diagrams, maps, computer animations, or, as relevant here, models or mock-ups. See Black's Law Dictionary 675 (10th ed. 2014). Regardless of the particular form, demonstrative aids generally serve the same purpose: to illustrate or clarify a witness's testimony. In other words, the primary purpose of a demonstrative aid is to "illustrate other admitted evidence and thus to render it more comprehensible to the trier of fact." 2 George E. Dix et al., McCormick on Evidence § 214 (Kenneth S. Broun ed., 6th ed. 2006) (McCormick); see also Intermill v. Heumesser, 154 Colo. 496, 501, 391 P.2d 684, 686 (1964) ("[D]emonstrative aids should be encouraged since they give the jury and the court a clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words.").

People v. Palacios, 419 P.3d 1014, 1018 (Colo. 2018).

As our Supreme Court stated: "Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony." Clark, 339 S.C. at 383, 529 S.E.2d at 535. Here, this is exactly the purpose of having Appellant demonstrate to the extent he could how the child victim was moving on his leg. It enabled the jury to better understand and assess the defense he was setting forth by allowing them to visualize Appellant's allegation and not just rely on his testimony and descriptions. Accordingly, the trial court did not abuse its broad discretion in admitting the demonstration as it was relevant to the issues for the jury to resolve and allowed a "clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words."

V. Appellant's argument the solicitor improperly made inflammatory arguments during closing arguments to the jury is not preserved for appeal and does not meet any exception for review without proper preservation.

Appellant maintains the solicitor made such inflammatory remarks during closing argument that he is entitled to a new trial even without having made the requisite objections during the closing argument. The statements by the solicitor do not rise to the level of "vicious

inflammatory argument" which "results in clear prejudice" as would be necessary to warrant the extreme remedy of a new trial.

The Supreme Court of South Carolina "has routinely held the plain error rule does not apply in South Carolina state courts." State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). Indeed, "it is the responsibility of trial counsel to preserve issues for appellate review. Only limited exceptions to this rule have been recognized." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997). In the absence of a contemporaneous objection, "a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (citing South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977)). Nevertheless, "the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." Dial v. Niggel Associates, Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998).

Here, Appellant contends the solicitor's closing argument remarks were "highly inflammatory" and even a "dehumanizing attack on the character of [Appellant] and his cousin, Mitchell Eubanks." (Brief of App. p. 39.) Appellant points to several arguments made by the solicitor that he maintains were unduly and clearly prejudicial. Nevertheless, Appellant never objected to the solicitor's argument, nor did Appellant make any post-trial motion based on the solicitor's arguments. In fact, Appellant concedes that the issue is not usually preserved for appeal, however, Appellant maintains the solicitor's arguments were so egregiously inflammatory and vicious that the issue falls within the narrow exception to our state's error preservation rules. In rare instances, South Carolina appellate courts have deemed that a new trial should be granted in the absence of a contemporaneous objection if a vicious or

inflammatory argument results in clear prejudice to one party. See Lynch, 314 S.C. at 263, 442 S.E.2d at 615.

For instance, in Lynch, the South Carolina Supreme Court granted a new trial in this case because there was a clear attempt by Lynch to depict the defendants as being Japanese thereby appealing to racial stereotypes. Lynch at 314 S.C. at 262-63, 442 S.E.2d at 615. Accordingly, the Court determined it "could hardly conceive of a more outrageous argument than that made here" and therefore found the prejudice to the appellant to be clear. Id. at 263, 442 S.E.2d at 615. Contrary to the central issue in Lynch, the solicitor's closing arguments in the case *sub judice* contained no disparaging racially inflammatory remarks, and further did not prejudice Appellant.

Notably, all but one case cited by Appellant deals with racially inflammatory remarks that required the granting of a new trial. In particular, Appellant cites State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), and attempts to guide the Court by asserting the "[s]olicitor's closing argument 'dehumanizing Appellant' required remand for new trial." (Brief of App. p. 41.) (internal citation omitted) However, Appellant's assertion from Northcutt is misguided and simply put, incorrect. The defense in Northcutt argued seven issues in that case asserting these issues warranted a new trial for the defendant:

> (1) crying numerous times throughout the argument;
> (2) telling the jury "we will kick the baby some more" if they returned a life sentence;
> (3) **dehumanizing Appellant ("I don't even call him a person")**;
> (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]");
> (5) declaring an "open season on babies;"
> (6) telling the jury he "expects" the death penalty; and
> (7) enacting a funeral procession complete with a black shroud covering the baby's crib."

Northcutt, 372 S.C. at 222, 641 S.E.2d at 881 (emphasis added). The Court in Northcutt *actually* found that the "first four alleged mistakes [were] permissible arguments because they were based on the record and reasonable inferences from it." Northcutt, 372 S.C. at n. 6, 641 S.E.2d at n. 6 (emphasis added); see State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument . . . should stay within the record and reasonable inferences to it."). Thus, Northcutt would serve to guide Respondent and Appellant that dehumanizing an appellant is permissible so long as it is based on the record.

To be sure, solicitors have "substantial latitude to present their case as they see fit" and "[t]hat latitude is not to be casually abridged." Bennett v. Stirling, 842 F.3d 319, 323 (4th Cir. 2016). In fact, the Supreme Court warns "[t]he line separating acceptable from improper advocacy is not easily drawn." Id. (quoting United States v. Young, 470 U.S. 1, 7 (1985)). Therefore, courts "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning" or that a jury "will draw that meaning from the plethora of less damaging interpretations." Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). As well, in cases where a solicitor does present an inflammatory argument, the issue must be raised to the trial court in a post-trial motion. See State v. Young, 364 S.C. 476, 494, 613 S.E.2d 386, 395-96 (Ct. App. 2005) (holding even though solicitor asked racially inflammatory questions of Young, the issue was not preserved for appeal because Young did not make a contemporaneous objection and did not present the issue during a post-trial motion and the issue was not preserved).

As the United States Supreme Court has concluded: "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' . . . The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make

the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986).[5] In the instant case, the commentary by the solicitor was derived from the testimony and record before the jury. Further, it was not of a racial nature nor was it so inflammatory that it infected the trial with unfairness. As a result, the issue should have been raised to the trial court to be preserved and this Court should not reverse Appellant's convictions because of the closing argument.

VI. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance to have a cell phone examined which was in the Appellant's possession until just before trial.

Appellant maintains the trial court erred in failing to grant a continuance in order to have a cell phone examined. The cell phone was in Appellant's possession until just before trial. He gave no reason why he could not have had the phone examined prior to trial. Appellant did not present sufficient grounds justifying the grant of a continuance directly before trial was set to begin. Thus, the trial judge properly denied the continuance request.

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial judge. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006); State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v.

[5] The comments in this case are not nearly as inflammatory and "dehumanizing" as those used in Darden. There, the closing argument included the prosecutor's desire that someone blow the defendant's face off with a shotgun, called defendant an animal, and argued only the death penalty could prevent the defendant from performing future similar acts. Darden, 477 U.S. at 180.

Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Greer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010)). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "Reversals of refusals of continuances '**are about as rare as the proverbial hen's teeth.**' " Yarborough, 363 S.C. at 266, 609 S.E.2d at 595 (quoting State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)) (emphasis added).

As the South Carolina Supreme Court has stated:

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Babb, 299 S.C. 451, 454–55, 385 S.E.2d 827, 829 (1989) (quoting State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)).

Appellant had possession of the cell phone until several days before trial. (T.94-96; 358; R.___). Prior to turning it over, the phone was in Appellant's possession and the only reason he explained he did not have it analyzed was because SLED would be cheaper than hiring his own expert to do it. (T.96; R.___). Further, Appellant never indicated his expert would be able to examine the phone. Finally, as the trial court correctly determined any issue related to the phone would be a collateral issue and not a central issue in the case.

This case is similar to Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012). In Meggett, the appellant argued that the trial judge erred in denying his motion for a continuance. Specifically, appellant argued that had he been permitted to have a comforter tested for Victim's

DNA then he could have produced critical evidence to impeach the Victim's testimony regarding their relationship and prior sexual encounters. Meggett, 398 S.C. at 523, 728 S.E.2d at 495. The appellant in Meggett had over 2 years to test the comforter. Id. This Court recognized in Meggett, that appellant "had a significant period of time to obtain the testing and his failure to do so was a result of his own inaction . . . ." Id. Consequently, this Court held the trial court did not abuse its discretion in denying appellant's continuance motion. Id.

Here, Appellant was in possession of his iPhone for over a year. Upon discovering the phone had not been analyzed, Appellant turned the phone over to the State because it was economically friendlier to have SLED analyze the phone than Appellant's expert. (Tr. p. 96, ll. 14-15.) However, when Appellant found out the State was not going to get it analyzed or was unable to get it analyzed because of the broken screen, Appellant sought a continuance that may or may not produce collateral evidence. Just as defendant in Meggett, Appellant here had ample opportunity and time to have the phone analyzed himself. Consequently, Appellant made a strategic decision regarding the iPhone and the trial judge properly denied his motion for a continuance.

Additionally, analysis of the phone would have provided minimal benefit to Appellant. If the phone were analyzed and the videos found on the phone then that would have been corroborative evidence of the child victim's claims. If no videos were found, it would establish nothing as the phone was in Appellant's sole possession for more than a year after the allegations were made and before it was finally turned over to the State. He would have had ample opportunity to ensure the videos were not located on the phone.

Accordingly, the trial court properly denied Appellant's request for a continuance because he had ample opportunity to avail himself of an examination of the phone and chose not

to and any result of the examination would have either been detrimental to Appellant or rendered no meaningful evidence.

VII. The trial court did not abuse its wide discretion in denying Appellant's motion for a continuance.

Appellant maintains the trial court erred in granting him a continuance to bring in his doctor to discuss his medical conditions. The trial court did not abuse its wide and wise discretion in denying Appellant's request because Appellant knew well in advance of trial his low testosterone and erectile dysfunction would be the subject of his defense and could have arranged to have his personal doctor available. Additionally, it is questionable whether the issue is properly preserved for review on appeal.

Preservation

On Thursday, the trial court excused the jury for the night. He also asked them to come in later the next morning to allow time for Appellant to obtain Dr. Brownlee to testify about Appellant's medical conditions. (T.680-681; R.___). When they returned in the morning, Appellant's counsel did not initially raise any issue related to Dr. Brownlee. Instead, he moved for a directed verdict on all charges, presumably because he had rested his case. (T.684; R.___). It was only after the trial court indicated that Appellant did not intend to call any further witnesses that he indicated he could not obtain Dr. Brownlee and asked to continue the case to the following Monday. (T.688; R.____). Accordingly, the request was not timely made.

Standard of Review

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of

discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

Merits

The trial court did not abuse its broad discretion in denying Appellant's request for a continuance to obtain the testimony of Dr. Brownlee. If the continuance is based on the absence of witnesses, Rule 7(b), SCRCrimP, requires:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP (emphasis added). "It is paramount that the party asking for the continuance show 'due diligence' was used in trying to procure the absent witness." State v. Colden, 372 S.C. 428, 439, 641 S.E.2d 912, 918–19 (Ct. App. 2007); see also, State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595-96 (Ct. App. 2005) (witness's sudden decision not to cooperate did not mandate a continuance where no evidentiary hearing was necessary and, alternatively, where due diligence in asserting an attempt to acquire affidavits was not shown).

In the instant case, Appellant indicated he had the medical records from Dr. Brownlee allegedly showing Appellant suffered from low testosterone and erectile dysfunction since at least February prior to trial July 31-August 3. (T.690; R.___). He also knew that part of his

defense was to allege the medical conditions. Further, he claimed at trial it was only after Deanie testified that he knew the medical condition was an issue. She testified prior to lunch on Thursday. Instead of attempting to obtain the testimony of Dr. Brownlee while her offices were clearly open on Thursday afternoon, he waited until later in the day and first thing Friday when the offices were closed to try and contact her. The trial court properly denied the motion for a continuance because Appellant did not exercise due diligence in obtaining the testimony of Dr. Brownlee, a witness he knew would be necessary as early as February prior to trial and not later than lunch time on Thursday when he could have contacted her office. See Herndon v. Southern R. Co., 118 S.C. 466 (1921) (finding no abuse of discretion in denying continuance when after plaintiff's evidence was introduced, defendant was unprepared to meet issue raised by evidence). Accordingly, the trial court did not abuse its wide discretion in denying Appellant's motion for a continuance.

VIII. The trial court did not abuse its discretion in refusing to dismiss a qualified juror who indicated they could be fair and impartial and did not intentionally conceal any information during voir dire.

Appellant maintains the trial court erred by not excluding juror Tony Bailey from the jury panel when Mr. Bailey informed the judge his ex-wife was related to the victim's family and he had sold a house to a relative of the child victim who was present in the courtroom. Appellant further contends that had this information been available during *voir dire*, Appellant would have used a peremptory strike against Mr. Bailey. However, Appellant did not object to the qualification of Mr. Bailey when the judge held additional *voir dire* to assess the possible issues. The issue is not preserved for review. Further, there was no error in qualifying the juror.

Preservation

The trial court properly conducted a hearing to determine whether or not juror Bailey needed to be excused. After conducting *voir dire*, Appellant never raised any issue to the *voir dire* conducted, nor did he object to the trial court's determination not to excuse the juror. As an initial matter, Appellant failed to timely object to the qualifying of Mr. Bailey and only raised this issue in post-trial motions which does not preserve this issue for review by this Court. Certainly, "[i]t is well settled that an issue may not be raised for the first time in a post-trial motion." State v. Geer, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010) (quoting S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007)). Moreover, "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." Id. at 193, 641 S.E.2d at 448-49.

Standard of Review

When presiding over a trial, the trial judge is entrusted with the duty to ensure a jury comprised solely of fair, impartial, and unbiased jurors is impaneled. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998); see State v. Holland, 261 S.C. 488, 495, 201 S.E.2d 1,18, 122 (1973) ("It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial."); see also S.C. Code Ann. § 14-7-1010 ("The presiding judge shall at each term of court ascertain the qualifications of the jurors."). In the event information is discovered during trial reflecting on a seated juror's qualifications or partiality, the trial judge has broad discretion to attend to the situation in several different ways; such as replacing juror with an alternate juror, proceeding forward with the trial without removing the juror, or declaring a mistrial. State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014); see generally State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007) (finding a trial

judge did not abuse his discretion in declining to remove a juror and replace the juror with an alternate juror and further noting such a decision rested within the trial judge's discretion).

Merits

The South Carolina Supreme Court has laid out a two criteria test to assess whether a juror's failure to disclose a potential bias warrants granting a defendant a new trial; and if either of the criteria is missing, the trial judge may not remove the juror. Id. 410 S.C. at 329-330, 764 S.E.2d at 264; cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) ("The Court developed a two-part test to determine whether a juror's failure to disclose a potential bias warranted granting the defendant a new trial."). First, the trial judge must determine whether the concealed information was done intentionally by the juror. Sparkman, 358 S.C. at 496, 596 S.E.2d at 377; State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). Next, if the answer to the first question is yes, then the trial judge must consider whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Id.

Significantly, the intentional concealment of information by a juror supports the inference of impartiality by that juror. Coaxum, 410 S.C. at 328-329, 764 S.E.2d at 246; see State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial."). Notably though, a juror's unintentional withholding of information, including material information, does not support an inference of partiality or bias. Id. 410 S.C. at 329, 764 S.E.2d at 246. Furthermore, the objecting party bears the heightened burden of establishing the juror's concealment was prejudicial and prevented the objecting party from exercising a peremptory strike grounded on a possible material source of bias. Id.; see

Woods, 345 S.C. at 589, 550 S.E.2d at 282 ("[W]here the failure to disclose is innocent, no inference of bias can be drawn.").

Ultimately, a decision as to whether to dismiss a juror and replace the juror with an alternate juror falls within the sound discretion of the trial judge. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); see Simmons, 360 S.C. at 43, 599 S.E.2d at 452 (recognizing decisions regarding the removal of veniremen rest in the sound discretion of the trial judge). On appeal, an appellate court will not reverse such a decision absent a prejudicial abuse of discretion. See State v. Rogers, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974) ("[T]he general principle that error must be prejudicial in order to grounds for reversal applied to rulings on excusing a juror."); see also Coaxum, 410 S.C. at 331, 764 S.E.2d at 247 ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.").

In the case *sub judice*, the trial judge and parties learned just after opening arguments that juror, Mr. Bailey, sold a home to a relative of the victim and was related to a relative of the victim. The record clearly indicates Mr. Bailey did not intentionally conceal the information regarding his prior marriage and the real estate transaction with Appellant's relatives; in fact, when he realized it, he candidly revealed it to the bailiff. (Tr. pp. 123, l. 24 – 124, l. 6.) See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.").

Critically, the fact Mr. Bailey did not intentionally conceal information was extremely significant as to whether he could be fair and impartial in deciding Appellant's case because an unintentional failure to disclose even material information does not support an inference of

partiality or bias on the part of a juror. See id. at 589, 550 S.E.2d at 282 ("Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred. Conversely, where the failure to disclose is innocent, no inference, of bias can be drawn."). Thus, the record shows that Mr. Bailey did not intentionally withhold the information during voir dire.

Next, the trial judge would typically assess whether the second factor analysis would or would not establish Appellant was either biased or potentially biased and would it be materially significant to the manner in which the parties exercised their peremptory challenges. However, this case, there is no indication from the record that Mr. Bailey intentionally withheld the information during *voir dire*. Thus, "if either of the criteria is absent, the judge may not remove the juror on that basis." Coaxum, 410 S.C. at 330, 764 S.E.2d at 246; State v. Burgess, 391 S.C. 15, 19–20, 703 S.E.2d 512, 514–15 (Ct. App. 2010); see Sparkman, 358 S.C. at 497, 596 S.E.2d at 378 ("Because [the juror's] concealment was unintentional our inquiry is over, however, we fail to see how [the defendant] was prejudiced given that the trial judge questioned the jury after the verdict."); Stone, 350 S.C. at 448, 567 S.E.2d at 247–48 (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the State had the juror remained on the jury). The trial judge properly questioned Juror Bailey and correctly determined no cause existed for excusing him because he demonstrated he could be fair and impartial in the exercise of his duties.

IX. The trial court properly denied the motion for a new trial based on the juror's connection to a witness's grandmother and an investigator when no juror bias has been established.

Appellant maintains the trial court erred in failing to hold a hearing regarding juror Bailey's Facebook connection to a witness's grandmother and to the investigator who testified at

trial. There is no basis upon which to grant a new trial because intentional concealment has not been established. In the event the information provided to the trial court is insufficient for him to have reached a decision denying the motion for a new trial, the proper remedy is to remand for a hearing on whether Juror Bailey intentionally concealed information.

In the event of juror misconduct, a new trial is reasonable if the complaining party can show that "(1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627-28 (2013) (emphasis added); see also State v. Woods, 345 S.C. 583, 587–89, 550 S.E.2d 282, 284 (2001) (finding that a juror's intentional failure to disclose a relationship may provide the inference of bias and rejecting the State's contention that a new trial should be granted only if the complaining party shows they were prejudiced by the juror failing to disclose the relationship).

During *voir dire*, the trial judge read a list of potential witnesses that included Hunnicutt. The trial judge then asked if any member of the venire was "related by blood or marriage" or if they had "any close business or social relationships" with any of the listed potential witnesses. (Tr. pp. 15, l. 19 – 16, l. 17.) No one responded affirmatively. The trial court specifically found the questions asked were not sufficient to require a response regarding Facebook friends. Additionally, the trial court was presented an email from Deputy Solicitor Dale Scott which indicated Bailey did not become friends on Facebook with the investigator until after the trial concluded. (Order Denying New Trial, p.2 n.1; R.___). As other courts have determined: "It is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed." McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013).

Given the ambiguity of the question posed to the prospective jurors, there was no intentional concealment by juror Bailey because he was not asked about his social media connections. See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.").

The trial judge, in considering the evidence presented to him and the facts and circumstances regarding the alleged underlying concealment determined a hearing was not necessary to find Appellant was not entitled to a new trial. Even if the trial judge erred in deciding the issue without a hearing, the proper remedy is to remand for a hearing in which Juror Bailey can testify to explain his relationship with the investigator and can explain his Facebook connections. See McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing."). Nothing has been presented establishing the right to a new trial.

X. The trial court properly refused to charge second degree assault and battery as a lesser included offense of third degree criminal sexual conduct because it is not a lesser included offense and even if it were, there is no evidence indicating Appellant was solely guilty of second degree assault and battery instead of third degree criminal sexual conduct.

Appellant maintains the trial court erred by declining to charge the jury with second-degree assault and battery (A&B) as a lesser-included offense of third-degree criminal sexual conduct with a minor (CSCM). In support of that contention, Appellant avers that a jury could have found that Appellant touched J.L. without "the intent of arousing, appealing to, or

gratifying the lust, passions, or sexual desires of the actor or the child." Contrary to Appellant's contentions, second-degree A&B is not a lesser included offense.

Generally, "[t]he law to be charged to the jury is determined by the evidence presented at trial." State v. Dantonio, 376 S.C. 594, 608, 658 S.E.2d 337, 344-45 (Ct. App. 2008) (citing State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). Additionally, it is the duty of the trial court to instruct the jury on a requested instruction if and when that instruction "is supported by the evidence and correctly states the law applicable to the issues." Dantonio, 376 S.C. at 608, 658 S.E.2d at 345 (citing State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996)).

In particular, the instruction of law to a jury requires a trial judge "to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than greater, offense was committed." State v. Williams, 427 S.C. 148, 829 S.E.2d 702, 706 (2019) (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)).)). Primarily, "[t]he . . . test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." State v. Brandenburg, 419 S.C. 346, 350-51, 797 S.E.2d 416, 418 (Ct. App. 2017) (quoting State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 2002)).

A person is guilty of third-degree CSCM "if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or 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." S.C. Code Ann. § 16-3-655(C) (2015) (emphasis added). To compare, a person is guilty of second-degree A&B if they "unlawfully injure[] another person or offer[] or attempt[] to injure another

person with the present ability to do so and: (a) moderate bodily injury resulted or could have resulted; or (b) the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing." S.C. Code Ann. § 16-3-600(D)(1) (2015) (emphasis added).

Second degree A&B does not meet the elements test for inclusion as a lesser included offense. First, second degree A&B requires proof of an injury or an offer or attempt to injure and nonconsensual touching of a person's private parts. This is not required by third degree CSCM. Additionally, the ages of the victims are different considerations. As a result, second degree A&B does not meet the elements test and is not a classic lesser included offense.

Further, as explained recently by the South Carolina Supreme Court, the legislature recently codified the assault and battery crimes and as part of the codification indicated what crimes are lesser included offenses of other crimes. See State v. Hernandez, Op. No. 27923 (S.C. Sup. Ct. filed Oct. 23, 2019). As a result, it would not be a lesser included offense even if it would have previously been considered a lesser included offense under prior case law.

XI. Appellant's argument regarding cumulative error is not preserved for review on appeal and he has failed to establish entitlement to a new trial.

Appellant maintains this Court should grant a new trial because of the cumulative error associated with several of the issues he raises. This issue was never presented to the trial court and therefore is not preserved for review on appeal. Additionally, even if it is considered there is no error which so affected the fairness of Appellant's trial as to require the grant of a new trial.

Preservation

First, Appellant never raised the cumulative error doctrine to the trial court. He never raised it during trial or even in a post-trial motion after trial, and as a result, the issue is not

preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Appellant seems to be asking this court to completely ignore longstanding preservation and waiver rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

Merits

First, none of the issues Appellant contends combined to create cumulative error were errors. As discussed above, Appellant has failed to establish errors by the trial court, even insubstantial ones. Also, rather than Appellant showing how the errors adversely affected his right to a fair trial and providing supporting case law, Appellant merely restated the alleged errors he had already fully argued in his brief and alleged the combination of the errors had tainted the proceedings based on the prejudicial effect. See Beekman, 405 S.C. at 237, 746 S.E.2d at 490 (finding "[a]n appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground."). Accordingly, this Court should not grant Appellant a new trial.

XII. This Court should decline the opportunity to issue what is at most an advisory opinion requested by Appellant. Further, the issue was addressed by this Court in ruling on Appellant's motions prior to briefing.

Appellant asks this Court to issue an advisory opinion regarding the proper procedure to be followed when a court reporter assigned to record a trial accepts employment with one of the parties that participated in that trial prior to completing the transcript. Appellant has already submitted this argument to this Court in his Petition for this Court to Take Possession of the Tapes of Mr. Eubank's Trial and Order Independent Review and Verification of the Trial Transcript. This Court on January 24, 2019, denied his request and directed Appellant to the appropriate procedures outlined in the Court Reporters Manual.

Notably, in Appellant's Initial Brief he directs this Court to footnotes 17 and 19 and contends the "errors remain that are directly relevant to the questions presented in this appeal." (Initial Brief of App. pp. 57-58.) As of July 13, 2019, Tara Scott reviewed and corrected a total of three errors. On page 435 lines 13 and 16, Dr. Brownlee was mistakenly transcribed as Dr. Bradley and on page 648 line 21 Rule 404(b) was incorrectly transcribed as 404.3. All three of these errors have been corrected and Appellant is in receipt of the corrected pages.

Anything further by this Court would be nothing more than an advisory opinion, which is not appropriate. See Sangamo Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127 (1992) (concluding that appellate courts will not issue advisory opinions that are purely academic and do not affect the outcome of the case); Matter of Angela Suzanne C., 286 S.C. 186, 189, 332 S.E.2d 542, 543 (Ct. App. 1985) ("It is settled law that this [c]ourt will not issue advisory opinions on questions for which no meaningful relief can be granted."); Gainey v. Gainey, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983) ("This Court will not issue advisory opinions on questions for which no meaningful relief can be granted.").

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

November 5, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge
Appellate Case No: 2018-001684

THE STATE, Respondent,

vs.

MICHAEL CLIFF EUBANKS, Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 2964611

I further certify that all parties required by Rule to be served have been served.
This 5th day of November, 2019.

CAROLINE COLLINS
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ALAN WILSON
ATTORNEY GENERAL

November 5, 2019

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

RE: State v. Michael Cliff Eubanks
Appellate Case Tracking No. 2018-001684

Dear Mr. Grose:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services