RECEIVED
Feb 17 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
The Honorable Donald Hocker, Circuit Court Judge

Appellate Case No. 2019-001477

THE STATE, ...RESPONDENT,

v.

BRANDON JEROME CLARK,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3713

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville County Courthouse
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. The trial judge properly refused to allow Appellant to cross-examine Victim's forensic interviewer about the specifics of Victim's forensic interview pursuant to Anderson and Kromah.

II. The trial judge properly admitted the forensic interview into evidence because it satisfied the requirements of S.C. Code Ann. Section 17-23-175.

III. The trial judge properly prohibited Appellant's "expert" witness from testifying after finding her testimony violated Anderson and Kromah. Further, the witness's testimony was not proper for two additional reasons found in the record: Appellant sought to "pit" his witness against the forensic interviewer; and the forensic interviewer possessed no training or direct knowledge of the interview technique used by the State and was not competent to discuss the subject matter.

IV. The trial judge properly denied Appellant's motion for directed verdict because both direct and circumstantial evidence supported the charge against him.

V. The trial judge properly found no Brady violation occurred because there was no evidence the missing material possessed any exculpatory value.

STATEMENT OF THE CASE

Appellant was indicted by the Pickens County Grand Jury for first-degree criminal sexual conduct (CSC with a minor. On August 19–22, 2019, Appellant proceeded to a jury trial before the Honorable Donald Hocker. Assistant Solicitors Britni McCall, Esquire, and B. Scott Todd, Esquire, represented the State; Jenny L. Barwick, Esquire, represented Appellant. The jury found Appellant guilty as charged and the trial judge sentenced him to twenty-five years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On August 22, 2017, Appellant was indicted for first-degree C.S.C. with a minor. (R.pp.537–38.) A.N.G. (Victim) was five years of age at the time of the abuse. When Appellant's trial occurred two years later on August 19–22 2019, Appellant was seven and about to start second grade. (R.p.24, line 13–R.p.26, line 17)

At trial, Victim testified about the abuse that occurred. In 2017, Appellant lived with Victim, her younger sister, and their mother Brittany Hudson—his girlfriend—in the mother's home. One night, Appellant picked her out of bed and carried her to the downstairs of her mother's home. Then, he pulled down his pants and "peed in [her] private[s]." Appellant remembered telling her parents about the event, and later being interviewed by a woman named "Amber." She recalled telling Amber true facts about the results, but also making untrue statements such as Appellant having a camera in his eyes and that Victim had driven a car, but could not recall the reason(s) for making these statements. (R.p.26, line 18–R.p.33, line 22)

Trial counsel cross-examined Victim, eliciting information such as Victim could not recall how many conversations she had with various individuals, such as her parents and the State's prosecutor, about the sexual assault. However, Victim affirmed that no one told her what to say during her interview with Amber or at trial. (R.p.33, line 22–R.p.40, line 9)

Brandon Gantt, Appellant's father, testified that on March 20, 2017, Victim approached him and his then-girlfriend Sarah and disclosed the sexual abuse. During the conversation, Victim was "crying, shaky, nervous." Following the revelation, Appellant immediately took Victim to the hospital. On cross-examination, Gantt testified that Victim told him the abuse occurred on the downstairs couch of Hudson's home. (R.p.140, line 13–R.p.154, line 14).

Hudson confirmed that she and Appellant dated in early 2017 and that he lived with her and her two daughter for about a year and a half or two years, including February and March of

that year. Hudson noted Victim had never seen any movies or other media which contained nudity or sexual acts. Hudson also explained that Victim did not know the proper terminology for her private, calling both her vagina and her buttocks her butt. The first time Hudson heard about the abuse was when Gantt called her on March 2017 when Victim informed her that she had been abused on the downstairs couch of the home. (R.p.154, line 24–R.p.170, line 11)

Elaine McGowans, Gantt's sister and Victim's aunt, spoke with Victim the day after she returned from the hospital. Victim, upset, told her the assault occurred at her mother's house and that it wasn't her fault. (R.p.170, line 22–R.p.173, line 13)

Allison Meena, a nurse working at the hospital to which Victim was taken on March 20, 2017. She met with Victim who informed her about the sexual abuse and told her that it occurred two days prior to the E.R. visit. She informed the doctor, law enforcement, and several agencies including the Julie Valentine Center, about the reported abuse. (R.p.187, line 8–R.p.215, line 21)

Zack Wilson, a caseworker with the Pickens County Department of Social Services, also spoke with Victim on March 20, 217 and was told by her that she had been abused in Hudson's home after Appellant approached her in her sleep and tried to get her to go downstairs. (R.p.251, line 23–R.p.266, line 10)

Dr. Mary-Fran Ratchford Crosswell, a child abuse pediatrician with Prisma Health System in Greenville and an expert in child sexual assault medical exams, performed a medical evaluation on Victim on April 13, 2017. Based on Victim's claims to her of abuse, she performed testing on her but did not find any physical evidence of abuse, a common result of the physical exams she performs on assault victims. (R.p.216, line 13–R.p.244, line 22)

Victim's Forensic Interview Evidence

Prior to trial, the parties discussed the propriety of admitting the forensic interview of Victim into evidence. Trial counsel noted she was consenting to the forensic interview "on the condition that, one, the child testifies; two, the forensic interviewer testifies; and three, the transcript [of the interview is admitted into evidence]." The trial judge pressed trial counsel about her condition that the transcript be admitted into evidence, to which trial counsel requested the judge "let [her] ponder on that a little bit." When the parties revisited the matter several minutes later, trial counsel noted that if the transcript were not allowed into evidence, she would not object to the admission of the video provided the trial judge found it met the statutory requirements for admission as listed in S.C. Code Ann. Section 17-23-175. (R.p.2, line 3–R.p.3, line 3; R.p.4, line 12–R.p.6, line 21)

Trial counsel admitted that the video of the forensic interview "is probably the best evidence. You can see and hear." Trial counsel argued that it was important not only to see Victim's responses during the interview, but also the manner in which the questions were being asked. Trial counsel also admitted the purpose of the transcript was to support an argument that the interview was not reliable and it tainted any future testimony by Victim. (R.p.6, line 22–R.p.56, line 11)

In response, the State argued the best evidence rule required the video of the interview, not its transcript, be given to the jury. Further, reading the transcript could distract the jury from watching the video, which is supposed to be the basis upon which the jury bases its conclusions. The State also explained that it believed several statements could be taken out of context if ready rather than observed. The trial judge noted he would review the case referenced by both parties, State v. White, 416 S.C. 135, 784 S.E.2d 695 (Ct. App. 2016). (R.p.11, line 17–R.p.16, line 4)

After reviewing White and section 17-23-175, the trial judge concluded transcripts of forensic interviews are only admissible in situations in which the video is such a poor quality that a transcript is necessary to understand what is occurring during the recorded interview. However, in Appellant's case, the video of the forensic video was good quality and a transcript was unnecessary. However, the trial judge indicated he would hold off issuing a definitive ruling on the admissibly of the transcript until after the video was played at trial, in case any shortcomings with the courtroom's technology necessitated the use of the transcript. As to the general admissibility of the video under section 17-23-175, the trial judge found the totality of the circumstances surrounding the video and its content allowed its admission, including: (1) trial counsel not objecting to the video being admitted into evidence; and (2) the fact that leading questions were not used in the interview. (R.p.20, line 5–R.p.21, line 10; R.p.22, line 17–R.p.23, line 3; R.p.53, lines 4–15)

Amber Hiott Cheney, was the forensic interviewer who met with Victim following her reports of abuse. Cheney, then an employee of the Julie Valentine Center, conducted a recorded interview Victim on March 28, 2017. During trial, she confirmed she interviewed Victim and explained the purpose of the interview was to use a "child-friendly approach to try and get information as part of an active investigation" in a "neutral, fact-finding, non-biased interview." The State did not ask Cheney any details about the interview, but used her to identify the recording of it which was introduced into evidence along with the anatomical drawings utilized during the process which were used to memorialize Victim's language for describing the various parts of her body. (R.p.42, line 4–R.p.48, line 17; State's Exhibit 1)

On cross-examination, trial counsel questioned Cheney about the purpose of the Valentine center, and whether a "center that advocates for children" can perform "a neutral and

unbiased interview of a child." The State objected to the line of questioning, noting case law prevented the witness from testifying to any specifics of her interview with Victim because such answers could improperly bolster Victim's testimony; the sole purpose of Cheney's testimony was to authenticate the recording of the forensic interview. The Court agreed Cheney could not testify in any way which appeared to vouch for Victim's credibility. Trial counsel noted she asked her question whether someone working of a child advocacy center could be neutral and unbiased and signaled she was ready to move on. The trial judge, acknowledging trial counsel's plan to ask questions about Cheney's prior knowledge of Victim's case from before the interview, allowed counsel to proffer her planned questions in-camera. (R.p.48, line 18–R.p.52, line 22)

In camera, trial counsel began asking questions such as: "When you interview children, is it not the best practice to ask non-leading and open-ended questions?" which lead into questions about specific questions asked by Cheney and responses given by Victim during the interview. While the trial judge was initially inclined to allow trial counsel's line of questioning, the State argued that State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), prevented Cheney from testifying to such matters. After reviewing the case, the trial judge agreed with the State's assessment that Anderson prevented the forensic interviewer from providing any testimony on techniques of her personal interactions with or observations of Victim. The trial judge ruled trial counsel could cross-examine Cheney about her neutrality, but not about any other areas explored during cross-examination. The trial judge also noted the parties could debate the merits of the forensic interview during closing arguments. (R.p.52, line 23–R.p.95, line 17)

When the jury returned, trial counsel questioned Cheney about what material she had received prior to the forensic interview, to which she responded by explaining she had read a

police reports and spoken to a DSS caseworker, both of which were normal protocol pursuant to her training and used to inform her about what the interview is about. However, she emphasized she did not use leading questions "and bring information into the room that [she] [previously] obtained." (R.p.95, line 18–R.p.100, line 24)

The following day, trial counsel claimed that when she consented to admitting the forensic interview, "[she] personally did not stipulate to the factors listed in 17-23-175 as [she] did not believe the video possessed any particularized guarantees of trustworthiness." However, the trial judge noted he already ruled that the forensic video satisfied the factors listed in section 17-23-175, and no objection was made at that time nor was there a motion to redact any portions of the forensic interview. Appellant also renewed his request to submit the transcript of the recorded interview into evidence, to which the State again argued the video itself was the best evidence, and the jury utilizing a transcript would lead to them not focusing on the best evidence of the interview: it's recording. The transcript did not and could not capture the physical cues exhibited by the Victim. Further, the State noted that trial counsel sought to use the transcript in order to cross-examine Cheney on specific comments made by Victim, which was an improper request to ask Cheney to interpret Victim's behaviors and responses. Trial counsel even admitted the transcript was "impeachment evidence. [It] was impeaching what the forensic interviewer's on the interviewing [sic] saying the child did." Ultimately, the trial transcript was not admitted into evidence. (R.p.118, line 12–R.p.136, line 12)

Shauna Galloway-Williams testified as the State's expert witness in child abuse dynamics. Galloway-Williams teaches courses on the issue; provided local, statewide, and national training to various people and agencies; had published various published, peer-reviewed articles on the issue; and Galloway-Williams had testified as an expert witness in her field in

over forty trials. Trial counsel did not object to her qualifications. Galloway-Williams never met with Victim and only testified regarding general concepts involved in child abuse dynamics, including: (1) accidental and purposeful disclosures; (2) delayed and immediate disclosures; (3) disclosures as a process in which additional information may be revealed over extended periods of time; (4) factors that impact disclosures such as a child's age and vocabulary; (5) the impact of trauma on a child's memory; (6) the existence of "grooming"; and other dynamics. On cross-examination, trial counsel questioned Galloway-Williams about interviewer influences and how they are trained to not use non-leading questions during forensic interviews. Galloway-Williams agreed that interviewers should generally use open-ended questions, but emphasized "there's no interview where every single question is an open-ended question," an assertion with which trial counsel agreed. (R.p.347, line 6–R.p.382, line 14)

Brady Motion

Sergeant Renee Elrod, an officer with the Pickens Police Department, was the officer dispatched to the hospital on March 20 and spoke with Victim and the various family members there. Victim disclosed the abuse, claiming she was woken in her bedroom and told to go downstairs, where the abuse continued. Sergeant Elrod also interviewed the family members present at the hospital to obtain more information. While speaking with the various family members, Sergeant Elrod's body camera recorded her conversations and she took notes. (R.p.266, line 19–R.p.285, line 13)

Although not body camera recording was not introduced at trial, defense counsel cross-examined Sergeant Elrod about a portion of the recording in which she asked Hudson about "Ashley." Hudson did not recognize the name, and Sergeant Elrod informed Hudson not to worry about the question, because it was just a name that was in her notes. When questioned

about the location of her notes, Sergeant Elrod stated she did not have them with her and did not remember why she asked Hudson who "Ashley" was. While she claimed she transferred all the information from her notes to the report she filed, Sergeant Elrod admitted there was no mention of "Ashley" in her incident report. (R.p.285, line 14–R.p.288, line 24)

After Sergeant Elrod reviewed the body camera footage from her interviews, she answered additional questions. Sergeant Elrod was unable to locate the notes from her interviews. Sergeant Elrod explained she asked Hudson whether Ashely was someone who did or use to live in the home, but Hudson denied knowing any such person or that any such person was ever in her residence. (R.p.386, line 20–R.p.390, line 23)

At the conclusion of the State's case, trial counsel argued the State committed a Brady violation when it did not send her Officer Elrod's investigative notes, which she claimed had a "strong possibility that it was Brady material" because of its reference to "Ashley." Trial counsel claimed he initially requested the notes in August of 2018, but was told by the solicitor handling the matter that the notes were no longer in existence and all information within them had been put into Sergeant Elrod's report. Trial counsel claimed there was an inference the notes were favorable because they were not provided to the defense. In response, the solicitor informed the trial judge it tried to obtain the notes from Elrond but was told Elrond no longer possessed them. The trial judge noted that he was unsure what kind of relief trial counsel was looking for, because there was no evidence the State had committed a Brady violation: there was no evidence indicating the missing notes possessed any exculpatory or impeachment value. (R.p.392, line 16–R.p.406, line 2; R.p.431, line 3–R.p.434, line 16)

Trial counsel also moved for a directed verdict, arguing that had the time period of the indictment been narrower, he was unable to put up evidence that his client was not living with

Victim at the time. The trial judge pointed out that trial counsel's argument was, in reality, an argument against the sufficiency of the indictment and should have been made prior to the jury being sworn. Appellant continued with his argument, claiming the trial court should consider the testimony and evidence presented by the State's witnesses when making his ruling. The trial judge denied the motion, noting the State provided sufficient evidence of the charged offense to send the matter to the jury. (R.p.418, line 15–R.p.424, line 15)

Dr. Amanda Salas's Proffered Testimony

The trial judge denied trial counsel's motion to allow him to introduce his own expert witness to testify regarding "the proper methodology for forensic interviews," noting the case law provided by the State throughout trial indicated that forensic interviewers are prohibited from discussing methodology and their own observations about a child victim's behavior because such testimony would improperly bolster that victim's testimony. Therefore, if the State is prohibited from presenting that evidence, the defense should also be prohibited from presenting evidence of that type, as the inference to be drawn from the defendant's evidence would be "don't believe the child." To preserve the record, the trial judge allowed trial counsel's witness proffer her testimony. Dr. Amanda Salas was a medical doctor of psychiatry who spent two years specializing in adolescent psychiatry from 2006 to 2008, and eventually became board certified in adult psychiatry, child and adolescent psychiatry, and forensic psychiatry, with about a quarter of her active practice involving child psychiatry. However, when the State questioned her about the forensic interview style used to interview Victim, ChildFirst. Dr. Salas conceded she had no substantive knowledge of it but "ha[d] heard of it. When questioned about trials in which she testified regarding techniques and best practice with a forensic interview, Dr. Salas could not recall the details about those cases, only that one case occurred in Charleston and one

in Orangeburg. Dr. Salas also did not dispute that the literature supports ChildFirst and other nationally recognize protocol for interviewing children. (R.p.427, line 23–R.p.428, line 19; R.p.443, line 9–R.p.456, line 7)

As to general techniques for interviewing children, Dr. Salas, like Galloway-Williams, explained the importance of making children feel comfortable and using open-ended questions. Dr. Salas shared the acronym of another child interview theory she discovered in her month of research leading up to the trial, called NICHD that was looked on favorably in jurisdictions outside of South Carolina. Trial counsel also asked Dr. Salas her opinion on specific sections of the forensic interview, in which she critiqued, among other things, the questions asked by Cheney. (R.p.458, line 1–R.p.481, line 3)

The trial judge noted Dr. Salas had a lot of credentials, but due to the case law could not qualify her as an expert for the purposes of commenting on Cheney's testimony. (R.p.456, line 8–R.p.457, line 25)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "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). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008).

ARGUMENT

I.

The trial judge properly refused to allow Appellant to cross-examine Victim's forensic interviewer about the specifics of Victim's forensic interview pursuant to Anderson and Kromah.

Appellant argues the trial judge erred in refusing her to cross-examine the forensic interviewer about her the specifics of her interview with Victim. The State disagrees with this allegation of error and notes Appellant's argument is flatly contradicted by recent case law which prohibits interviewers from testifying in such a manner.

During a trial, the scope of cross-examination is a matter falling within the discretion of the trial judge. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-248 (2000); see State v. Avant, 85 S.C. 570, 575, 67 S.E. 908, 910 (1910) ("The conduct of the case in respect to cross-examination must be left, in large measure, to the sound judgment of the presiding Judge[.]"). However, a trial judge should not permit a solicitor or defense counsel to cross-examine a witness in such a matter as to force that witness to attack the veracity of another witness. State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994); see State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988) ("It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness."); State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) ("It is improper to cross-examine in a way that requires a witness to attack another witness's credibility."). Such "argumentative questioning" constitutes improper witness pitting. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998).

"'Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact

and the inference to be drawn is not beyond the ken of the average juror.'" State v. Taylor, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Generally, bolstering is prohibited to prevent a witness from testifying whether another witness is credible, which is exclusively within the province of the jury. Id.

In Anderson, the person who conducted a forensic interview of the child victim was qualified "as a forensic interviewer in child abuse assessment" without the trial court holding a hearing to determine if the forensic interviewer possessed the requisite experience in child abuse assessment. This Court found it was error for the trial court to deny an in camera hearing to determine if the forensic interviewer possessed the requisite expertise. This Court also noted the forensic interviewer's behavioral expert testimony vouched for the Victim's credibility because she testified "only to those characteristics **which she observed** in the minor." Id. at 219, 776 S.E.2d at 79 (emphasis added). The Supreme Court found the following limitations should be placed on her testimony before the jury:

> "The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. There is no testimony to such things as techniques, of the instruction to the interview subject of the important of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted."

Id. at 220-21, 776 S.E.2d at 80.

In the instant case, the trial judge's decision to limit the cross-examination of Cheney aligns perfectly with Anderson. Appellant sought to cross examine Cheney on the techniques she used and her specific observations about Victim's reactions to her techniques and questions.

Cheney's responses to these questions and any questions used by the State to rehabilitate her on these matters would necessarily involve testimony prohibited by Anderson.

Just because Appellant was prohibited in cross-examining Cheney in his desired manner does not mean Appellant was unable to defend against the interview. Most importantly, the jury was able to review the evidence and draw their own conclusions from the recording. Further, trial counsel was free to (and did) argue about the conclusions which could be drawn from the video during her closing argument. Accordingly, the trial judge did not err in prohibiting trial counsel from cross-examining Cheney on matters prohibited by Anderson.

II.

The trial judge properly admitted the forensic interview into evidence because it satisfied the requirements of S.C. Code Ann. Section 17-23-175.

Appellant argues the trial judge erred in admitting the forensic interview recording into evidence. Initially the State notes that this issue is not preserved, because trial counsel did not object to the admission of the video until the day after it was played to the jury. As to the merits of Appellant's claim, the State asseverates the trial judge properly found the video possessed particularized guarantees of trustworthiness required by the Section 17-23-175.

Issue Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation

requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

Notably, this issue is not preserved for appellate review. Appellant did not object to the admission of the video, or the trial judge's findings regarding the application of S.C. Code Ann. Section 17-23-175 until the day following the admission of the video. Accordingly, Appellant's objection was not timely and improper. See Rogers, 361 S.C. at 183, 603 S.E.2d at 912–13.

Merits of Appellant's Claim

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 79, 606 S.E.2d 215, 218–19 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In determining whether the statement possesses the particularized guarantees of trustworthiness under S.C. Code Ann. § 17–23–175(B), the trial judge must make certain findings also identified by statute. S.C. Code Ann. § 17–23–175(B), grants the trial judge broad discretion. In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, **but is not limited to,** the following factors:

> (1) whether the statement was elicited by leading questions;
>
> (2) whether the interviewer has been trained in conducting investigative interviews of children;
>
> (3) whether the statement represents a detailed account of the alleged offense;
>
> (4) whether the statement has internal coherence; and
>
> (5) sworn testimony of any participant which may be determined as necessary by the court.

S.C. Code Ann. § 17–23–175(B) (Supp. 2010). Notably, a "leading question" is one which suggests the answer to the person being interrogated. Black's Law Dictionary (10th ed. 2014).

In the instant case, trial counsel consented to the admission of the video into evidence. Notably, he only objected to its admission when, later, he was not allowed to introduce his

transcript of the video. His objection was not based on the content of the video, merely the fact that he could not use his own transcript of the video when cross-examining witnesses.

The trial judge correctly observed the interview itself was based on broad, open-ended questions which allowed the Victim to tell her story. Further, it was undisputed in the evidence the forensic interviewer was trained in conducting investigative interviews of children, the recorded contained an extended description of the abuse by Victim. While the five-year-old Victim did make some fictionalized claims in the interview, such as the fact she drove a car, the description of the abuse was consistent and internal coherent. Accordingly, the trial judge properly admitted the video into evidence.

III.

The trial judge properly prohibited Appellant's "expert" witness from testifying after finding her testimony violated Anderson and Kromah. Further, the witness's testimony was not proper for two additional reasons found in the record: Appellant sought to "pit" his witness against the forensic interviewer; and the forensic interviewer possessed no training or direct knowledge of the interview technique used by the State and was not competent to discuss the subject matter.

Appellant argues the trial judge improperly prohibited his expert witness from testifying about her observations on the recorded forensic interview. As argued supra in Issue I, Anderson prohibits the questioning of forensic interviewers about their techniques or observations about their interviews because it can lead to improper bolstering of the child victims. See Anderson, 413 at 220-21, 776 S.E.2d at 80. However, Appellant's attempt to call her expert witness to testify was also improper for several additional reasons. The defense sough to improperly "pit" Dr. Salas against Victim and Cheney. Further, Dr.Salas had no experience in utilizing ChildFirst, the procedure used during Victim's forensic interview. Accordingly, the trial judge properly excluded her testimony.

"Pitting of the witnesses" refers to a question which asks one witness to comment in some way on the veracity of another witness. This may be a request to comment on the truthfulness of an adverse witness or to explain the testimony of another witness who has testified. Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998). No matter how the question is worded, this kind of argumentative questioning is improper. Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998).

Pursuant to Rule 702, SCRE, "[i]f scientific technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Initially, the State asserts that Dr. Salas could have potentially testified at trial had Appellant used her testimony in a manner consistent with Kromah and Anderson. Specifically, Dr. Salas could have been used similarly to Galloway-Williams and testified generally about forensic interviewing of children and the different techniques used. However, Dr. Salas was not proffered for such purposes. Instead, trial counsel sought to use her to directly attack Victim's forensic interview and the techniques used by Cheney. To defend against this testimony, the State's only recourse would be to itself elicit testimony and evidence which violated Anderson.

Additionally, while not discussed at trial, Appellant sought to pit Dr. Salas against Cheney and Victim. As demonstrated by Appellant's proffered direct examination of Dr. Salas, her questions focused on attacking the veracity of not only Cheney and her techniques, but also Victim's testimony and her statements made during the forensic interview. This kind of questioning is improper under South Carolina law. See. Burgess, 329 S.C. at 88, 495 S.E.2d at 445.

Finally, the State contends that Dr. Salas's testimony was also inadmissible because she lacked knowledge central to her ability to critique or comment on the forensic interview: Dr. Salas admitted she was never trained or practice Childfirst, the interviewing technique used on Victim. Her only experience with the subject matter came from articles she reviewed in the month prior to trial. Notably, while she did discuss the use of other interviewing techniques she had discovered during her research, she was unable to describe them or cite to any particular research which stated ChildFirst was an improper way to interview child victims. See Rule 702, SCRE.

Accordingly, the trial judge properly refused to allow Dr. Salas to testify at trial.

IV.

The trial judge properly denied Appellant's motion for directed verdict because both direct and circumstantial evidence supported the charge against him.

Appellant argues the trial court erred in denying his motion for directed verdict because the evidence did not conform to the allegations of the indictment because the witnesses supporting the indictment's timeframe were not credible. The State disagrees with these allegations for numerous reasons. First, it is critical to note that trial counsel's motion at trial did, in fact, focus on the sufficiency of the indictment, which was an untimely argument when it was made. Further, a directed verdict motion is based on the existence of evidence, not its weight. In the instant case, the State presented evidence that Appellant's charged conduct occurred within the timeframe alleged in the indictment. In an abundance of caution, the State will address both the sufficiency of the indictment and directed verdict arguments below.

Sufficiency of the Indictment

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a notice document, and its "primary purpose" is " 'to put the defendant on notice of what he is called upon to answer, *i.e.*, to [apprise] him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.' " State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation omitted); see State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document.").

When evaluating an indictment, the indictment shall be considered to be sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be

contrary to the statute in such case made and provided."). Importantly, "the true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999); see Gentry, 363 S.C. at 103, 610 S.E.2d at 500 ("[W]hether the indictment could be more definite or certain *is irrelevant*." (emphasis added)).

If a defendant wishes to challenge the sufficiency or validity of an indictment, the defendant must move to quash or dismiss the indictment prior to the jury being sworn. See S.C. Code Ann. § 17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."); also Gentry, 363 S.C. at 101–02, 610 S.E.2d at 499. Such a motion challenging the sufficiency or validity of the indictment raises "a question of whether a defendant properly received notice he would be tried for a particular crime." State v. Tumbleston, 376 S.C. 90, 96, 654 S.E.2d 849, 852 (Ct. App. 2007); see also State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

When a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and to be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. Tumbleston, 376 S.C. at 96-97, 654 S.E.2d at 852. In

making such a determination, the trial judge must look to the indictment with a practical eye and examine the circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him as a result of the indictment. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash or dismiss the indictment. See State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990) (holding a motion to dismiss an indictment was properly denied because the indictment was facially valid and instructing the validity of an indictment is not affected by the character of the evidence considered by the grand jury); see also Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.").

Notably, in State v. Wade, our Supreme Court considered a challenge to the sufficiency of a first-degree criminal sexual conduct with a minor indictment that alleged Wade sexually abused the victim at some unspecified point in time during a twenty-four-month span of time. Id., 306 S.C. at 80, 409 S.E.2d at 781. In finding that indictment to be sufficient and not overbroad, the Supreme Court rejected Wade's contention the broad span of time alleged in the indictment denied him an ability to prepare a defense to the charged offense, noting Wade proceeded with a defense of complete denial and further noting an ordinary individual would not be able to account for his whereabouts for purposes of an alibi defense even if the span of time alleged was just a month or some shorter period of time. Id. at 83-84, 409 S.E.2d at 783. Furthermore, the Supreme Court noted the time span alleged in the indictment was narrowed "as much as possible under the circumstances" based on the fact the victim was eight years old and

unable to pinpoint the exact date on which the offense occurred. Id. at 84, 409 S.E.2d at 783. In light of those circumstances, the Supreme Court analyzed the indictment in Wade's case and determined it was neither unconstitutionally overbroad nor prejudicial to Wade in the sense it took him by surprise and prevented him from combating the charges against him. Id. at 86, 409 S.E.2d at 784.

Similarly, in State v. Tumbleston, this Court considered a challenge to the sufficiency of two indictments alleging Tumbleston sexually assaulted his granddaughter during a forty-two-month span of time. Id., 376 S.C. at 93, 654 S.E.2d at 850-851. In finding the indictments to be sufficient, this Court noted a two-pronged test had been adopted for determining whether a purportedly overbroad indictment was sufficient that required a court to determine whether time was a material element of the offense charged and whether the time period alleged in the indictment occurred prior to the return of the indictment. Id. at 98-99, 654 S.E.2d 853-854. Applying that test to Tumbleston's case, this Court concluded both prongs were satisfied as time was not an element of the charged sexual offenses and the indictments were issued subsequent to the time periods in which the offenses were alleged to have occurred. Id. at 99, 654 S.E.2d at 854. Furthermore, this Court rejected Tumbleston's contention the broad time period specified in the indictments prevented him from adequately preparing his defense in light of the fact the indictments contained the necessary elements of the offense coupled with the fact Tumbleston proceeded forward with a defense of denial that was simply disbelieved by the jury. Id. at 102, 654 S.E.2d at 855.

More recently, in State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015), our Supreme Court considered a challenge to the sufficiency of multiple indictments that alleged sexual offenses involving minor victims occurred over a six-year span of time. In finding those

indictments to be insufficient, a two-justice plurality joined by a single additional justice in result only noted the indictments in Baker's case originally alleged the sexual abuse occurred during an identifiable span of the summers of three separate years but were amended approximately two weeks before trial to greatly expand the time frame of the allegations to cover a period extending continuously over the course of *six entire years*.[1] Id. at 590, 769 S.E.2d at 864 (plurality opinion). In light of that exceedingly broad six-year time frame coupled with the lack of specificity included in the indictments, the plurality concluded the indictments were unconstitutionally overbroad due to the fact no defendant "could effectively defend himself against a six-year time frame." Id. at 591-591, 769 S.E.2d at 864-865 (plurality opinion). Furthermore, the plurality concluded Baker was personally prejudiced in his case based on the short preparation time he had in light of when the overbroad indictments were issued coupled with the fact potentially exculpatory evidence was destroyed prior to his trial. Id. at 590-591, 769 S.E.2d at 864 (plurality opinion). As a result, the plurality concluded the indictments issued in Baker's case were unconstitutionally overbroad and the trial judge erred by refusing to grant his motion to quash. Id. at 592, 769 S.E.2d at 865 (plurality opinion). However, the plurality

---

[1] Notably, because the decision in Baker was a plurality decision, the portion of the decision reached on the narrowest ground constituted the precedential portion of that decision. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' "). In Baker, Justice Pleicones's concurrence *in result only* constituted the narrowest ground upon which the plurality's decision was reached. See Baker, 411 S.C. at 592, 769 S.E.2d at 865 (plurality opinion) (reversing Baker's case after two justices specified particular reasons why they believed reversal was appropriate while a single justice agreed reversal was appropriate but joined in the result only without specifying any grounds as to why he believed the case should be reversed). As a result, the decision in Baker has *no* precedential value beyond the peculiar facts of that case. Cf. Wolfe v. Legg, 60 Wash. App. 245, 249, n. 2, 803 P.2d 804, 807 (Wash. Ct. App. 1991) ("[A particular appellate decision] was the result of a plurality decision with the fifth vote, concurring in the result only, being unaccompanied by an opinion. We therefore do not find it possible to assess the correct holding of the case.").

expressly noted the indictments would have been sufficient "[h]ad [they] alleged that the conduct occurred during the summer months of the years 1998 through 2004, i.e., June 1 until September 1"—a span of time covering twenty-one total months. Id. at 592, n. 5, 769 S.E.2d at 865 (plurality opinion).

In the case sub judice, Appellant was indicted for one count of first-degree criminal sexual conduct with a minor, and the indictment issued in his case included the relevant language from the statute defining the offense with which Appellant was charged, identified the one-month time span during which the abuse was alleged by the victims to have occurred, listed the specific victim, and specifically stated Appellant's actions were alleged to have occurred in Pickens County, which is the county in which Appellant's case was called to trial. See S.C. Code Ann. § 16-3-655(A)(1) (explaining a person is guilty of first-degree criminal sexual conduct with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age"); see also State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) ("An indictment is ordinarily sufficient if it is in the language of the statute."); State v. McIntire, 221 S.C. 504, 510, 71 S.E.2d 410, 412-413 (1952) ("The twofold purpose of the statute in requiring the indictment to allege the place of the commission of the crime is to lay jurisdiction of the court, and inform the accused of the county in which he is charged with the violation of the law."). Under those circumstances, the indictments was sufficient to provide Appellant with notice that apprised him of the elements of the charged offense, allowed him to decide whether to plead guilty or stand trial, and enabled the trial judge to know what judgment to pronounce in the event Appellant was convicted. See Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) ("[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the

elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted."); see also Smalls, 336 S.C. at 307, 519 S.E.2d at 796 ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.").

Additionally, neither the specific time of the alleged abuse nor the specific location where the abuse was alleged to have occurred were elements of first-degree criminal sexual conduct with a minor, which was the statutory offense Appellant was charged with in each of the counts for which he was brought to trial. See State v. Moore, 24 S.C. 150, 156 (1886) (recognizing it is sufficient for an indictment to simply identify the county in which the crime was alleged to have occurred "[w]here the place is not a matter of essential description of the crime, but is alleged as a matter of jurisdiction only in the court"); State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."); cf. Morgan v. State, 287 A.2d 592, 595 (Me. 1972) ("[Morgan] contends . . . that the indictment alleges only that the offense was committed in Cumberland County without particularizing a specific place in the County. . . . Since place is not an essential element of the crime of robbery, . . . the allegation of the present indictment . . . that the offense was committed in Cumberland County is adequate."). In light of that fact, the solicitor was *not* required to identify the specific date, time, and location of the charged crimes with exactitude in order for the indictments to be sufficient. See State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991) ("Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly

occurred. . . . Here, both indictments sufficiently notified Wingo of the offenses with which he was charged since time is not a material element of either the offense of first degree criminal sexual assault or the offense of contributing to the delinquency of a minor and since the indictments allege the commission of the offenses during periods that preceded the date of the indictments."); see also United States v. Kimberlin, 18 F.3d 1156, 1159 (4th Cir. 1994) ("Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required." (citation and internal quotations omitted)); Stacey v. State, 214 Ga. App. 130, 131, 447 S.E.2d 339, 340 (Ga. Ct. App. 1994) (recognizing the particular location where a crime is alleged to have occurred—aside from the county—is immaterial for indictment purposes when a specific location is not an element of the charged crime). Instead, the solicitor was only required to fully apprise Appellant of the information available to the State regarding the time, place, and date of the crimes, and he did just that to the best of his abilities, which was demonstrated by defense counsel's expressed knowledge during the hearing on the motion to quash of the "broad" and "confusing" allegations raised by the victims during their recorded forensic interviews. See State v. Wilcox, 808 P.2d 1028, 1033 (Utah 1991) ("[W]e have recognized that there are notice problems, especially as to the date, place, and time inherent in prosecutions based on the testimony of very young victims. . . . If we were to hold that in all such circumstances, no offense could be charged because the alleged victim is too young to testify with certainty concerning the times, dates, or places where the abuse occurred, we would leave the youngest most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child's inability to remember the exact dates and places of the abuse impaired the abuser's ability to prepare an alibi defense. In frank recognition of this fact, we have been less vigorous in requiring specificity as to time and place when young

children are involved than would usually be the case where an adult is involved. . . . We have suggested that so long as the elements of the crimes are covered by the factual allegations and the defendant is fully apprised of the State's information regarding the time, place, and date of the crimes, any lack of factual specificity goes not to the constitutional adequacy of notice, but to the credibility of the State's case."); see also S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Critically, when viewing those facts and circumstances with a practical eye while also taking into consideration the inability of the young victim, who was only five years old when she was sexually assaulted, to be more consistent and precise in identifying the dates, times, and locations of the repeated instances of sexual abuse, the time periods and other information alleged in the different counts of the indictment issued in Appellant's case was reasonable and sufficient to provide Appellant with adequate notice to prepare his defense without being unconstitutionally overbroad. See Smalls, 336 S.C. at 307, 519 S.E.2d at 796 (recognizing "the true test of an indictment's validity is *not* whether it could be made more definite and certain" (emphasis added)); cf. Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 ("We reject the notion that a specified time period prevented Tumbleston from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses charged and sufficiently apprise Tumbleston that he must be prepared to address his conduct towards [the victim] between 2001 and June of

2004."). Demonstrating the reasonableness of the indictment issued in Appellant's case, the eighteen-month time frame alleged in the different counts was much, much more narrow than the six-year time period found to be improper in the Baker decision. Cf. Baker, 411 S.C. at 592, 769 S.E.2d at 865 (plurality opinion) ("[W]e hold the trial judge erred in refusing to quash the indictments as the non-specific, *six-year* period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred." (emphasis added)). In fact, the time period alleged in Appellant's case was even *shorter* than the twenty-one-month span of time the plurality indicated would have been sufficiently specific to pass constitutional muster in Baker. See id. at 592, n. 5, 769 S.E.2d at 865 (plurality opinion) (expressing belief the indictments in Baker's case would have been sufficient if they had alleged the sexual abuse occurred during a span of time covering twenty-one months in total).

For all the foregoing reasons, the indictment issued in Appellant's case—like the indictments issued in Wade and Tumbleston—was sufficiently specific to provide Appellant with the required notice in regard to the charges he was facing and was not unconstitutionally overbroad, particularly in light of the fact the one-month time frame identified in the indictment could not reasonably be narrowed any further due to the victim's young age and inability to remember or distinguish the repeated instances of sexual abuse with complete precision. Cf. Wade, 306 S.C. at 86, 409 S.E.2d at 784 (finding an indictment alleging the charged incident occurred at some point during a twenty-four-month span of time was not unconstitutionally overbroad where the time frame identified in the indictment had been narrowed as much as possible in light of the fact *the victim was eight years old at the time of trial* and was unable to identify the exact date of the offense); Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (rejecting Tumbleton's contention the indictments issued in his case, which alleged the charged incidents

occurred at some point during a forty-two-month span of time, were unconstitutionally overbroad). Accordingly, the trial judge properly refused to quash the multi-count indictment issued in Appellant's case. See Tumbleston, 376 S.C. at 94, 654 S.E.2d at 851 ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."). Appellant's convictions should be affirmed.

Directed Verdict

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236–37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955). "Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

In the instant case, the State presented sufficient information to merit submission of its case to the jury. Meena, who testified pursuant to the medical diagnosis exception to hearsay, stated Victim told her that her attack occurred a few days prior to her March 20, 2017 hospital

visit. Additionally, Victim, during her forensic interview, also stated the abuse occurred during the indictment's timeframe. Although Appellant may dispute the reliability of these statements, the evidence existed and was presented during trial. Accordingly, the trial judge properly denied Appellant's motion for a directed verdict. See Bennett, 415 S.C. at 236–37, 781 S.E.2d at 354.

V.

The trial judge properly found no Brady violation occurred because there was no evidence the missing material possessed any exculpatory value.

Appellant argues the trial judge erred in failing to find the State committed a Brady violation when it failed to provide him with Sergeant Elrod's notes during discovery. The State disagrees with this allegation of error. Notably, the prosecution never had access to these notes, and they were either lost or destroyed prior to the discovery process. Most importantly, however, there was no exculpatory value to the notes: the testimony at trial indicates that "Ashley" was not a person who, if real, had any access to Victim or was capable of abusing her.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Brady disclosure rule requires that the prosecution provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012); Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985); Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Materiality of evidence is determined based on the reasonable

probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman at 45, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Hyman at 45-46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2d at 356. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97 (1976); Hyman at 46, 723 S.E.2d at 380; Porter at 384, 629 S.E.2ds at 356. Thus, "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004); see also Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

"In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record." State v. Gathers, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). This Court in Kennerly further explained: "In a Brady analysis, information is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220; see also, State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) ("Evidence is not considered 'material' if the defense discovers the information in time to adequately use it at trial."). Further, "[t]he lack of

demand . . . [of a continuance] is often taken as strong evidence that the discovery violation has not been prejudicial." 5 Wayne R. LaFave, et. al, Criminal Procedure § 20.6(b) (3d. ed. 2010); see also, Gorham v. Wainwright, 588 F.2d 178 (5th Cir.1979) (denying the defendant's mistrial motion and holding the defendant was not prejudiced by the prosecution's failure to turn over certain reports prior to trial because, although defense counsel requested and received a ten minute recess to review the new evidence, he did not request a continuance); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992) (the trial court's failure to suppress evidence of a defendant's oral statements because the prosecution did not disclose the statements pursuant to Rule 5, SCRCrimP, despite a timely request for them, was upheld where the defendant was permitted to view and copy the prosecution's file and did not request a continuance or recess to review the prosecution's file).

In the instant case, Appellant fails to prove Sergeant Elrod's notes rose to the level of a Brady violation. The record indicates the Elrod's notes were, indeed lost at some point and she was unable to locate them and they were never given to the prosecution. Further, because prosecution believed the notes did not exist at the time of trial counsel's request, the evidence was not suppressed by the prosecution. Finally, and most importantly, there is no evidence the lost notes contained information favorable to Appellant. None of the witnesses at trial, which included Victim's parents, had any idea of who "Ashley" was, rendering it very unlikely it was a real person who had access to Victim. Additionally, Ashley's name was not referenced by Victim during her forensic interview, rendering it even more unlikely that this person, even if she existed, had any information regarding Victim's sexual abuse. Accordingly, the trial judge did not err in finding the State's failure to discover and disclose McCrae's criminal history was not a Brady violation justifying a new trial for Appellant. See Gathers, 295 S.C. at 481, 369 S.E.2d at

143 (1988). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: _____
FOR William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

ATTORNEYS FOR RESPONDENT

February 16, 2021

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of General Sessions
The Honorable Donald Hocker, Circuit Court Judge

Appellate Case No. 2019-001477

THE STATE, ...RESPONDENT,

v.

BRANDON JEROME CLARK,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: _____
FOR WILLIAM F. SCHUMACHER, IV
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 16, 2021