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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2021-000457

THE STATE,

Respondent,

vs.

CHRISTOPHER P. COOPER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge somehow abuse his broad discretion by excluding evidence concerning a collateral matter that occurred roughly a year after the charged crimes when he correctly concluded the evidence's high potential to confuse the issues, mislead the jury, and result in unfair prejudice based on the specific circumstances involved warranted its exclusion pursuant to Rule 403 of the South Carolina Rules of Evidence?

II.

Did the trial judge somehow abuse his broad discretion by permitting Appellant's verbal and written confession to law enforcement to be admitted into evidence during trial when the record contains evidence and testimony that supports the trial judge's determination the confession was freely, knowingly, voluntarily, and intelligently made under the totality of the circumstances?

III.

Was any issue with the admission of the voice identification evidence properly preserved for appellate review when—instead of objecting—defense counsel acquiesced in the trial judge's ruling on the matter, did not object to the evidence when it was presented to the jury, and then personally elicited cumulative testimony from the victim? Moreover, notwithstanding any issue preservation concerns, did the trial judge properly allow the voice identification evidence to be introduced when sufficient testimony was presented to demonstrate the victim was able to recognize Appellant's voice after hearing her assailants' voices during the incident?

STATEMENT OF THE CASE

In August of 2017, Appellant Christopher P. Cooper was arrested following an investigation into a home invasion that occurred a few days earlier at a residence located in West Columbia, South Carolina. In November of 2017, the Lexington County Grand Jury indicted Appellant for first-degree burglary, first-degree criminal sexual conduct, armed robbery, kidnapping, conspiracy, and possession of a weapon during the commission of a violent crime. On April 19, 2021, a jury trial was commenced in the Lexington County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. At the conclusion of the five-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of life without parole for first-degree burglary, thirty years for first-degree criminal sexual conduct, thirty years for armed robbery, thirty years for kidnapping, and five years for conspiracy. Meanwhile, the trial judge did not impose a sentence for possession of a weapon during the commission of a violent crime based on his imposition of the life without parole sentence for first-degree burglary.¹ Appellant then timely filed a notice of appeal.

¹ Pursuant to South Carolina law, the five-year sentence for possession of a weapon during the commission of a violent crime “does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.” S.C. Code Ann. § 16-23-490(A).

STATEMENT OF FACTS

On the evening of Thursday, July 27, 2017, the twenty-one-year-old victim, Monesha Cook (“Victim”), got off work around 8:00 p.m. or 9:00 p.m., went to dinner with some friends, and was dropped off at her home—a two-story duplex—in West Columbia around 10:30 p.m. or 11:00 p.m. (Tr. p. 347; pp. 349-350; pp. 352-353; p. 389; p. 451). At that time, her husband, Jacob Cook (“Jacob”), was also at the residence, and she let him know she had arrived back home. (Tr. p. 345; p. 353).

Roughly an hour or so after that, Jacob decided to go visit with his sister, who was at work at a Waffle House restaurant, and left Victim—who had already had dinner that night—behind with her small dog, Talon. (Tr. p. 347; pp. 351-354; pp. 356-357). Once Jacob was gone, Victim decided to go to bed, and, before doing so, she made sure all the doors were locked, including the door to her upstairs bedroom. (Tr. pp. 349-350; p. 355).

A little while later, Victim was awakened by the sound of Talon excitedly barking, which was an unusual occurrence for the dog. (Tr. p. 347; pp. 356-357). Victim responded by looking out the window to see if anything was amiss but saw nothing out of the ordinary. (Tr. p. 357). Shortly after that, two unfamiliar men—one fatter and one skinnier—suddenly burst into Victim’s bedroom and demanded at gunpoint to know where money and drugs were located. (Tr. pp. 358-359; p. 450). In the terrifying ordeal that followed, the men ransacked the house, ordered Victim to open a safe she kept in her closet, directed her to use a dildo they found on herself, and threatened to kill her if she did not “come up with something.” (Tr. pp. 359-365).

Fearing she would be killed, Victim told the intruders she and her husband had some money saved up that was hidden in two piggybanks located downstairs. (Tr. p. 359; p. 365; pp. 419-420). The men responded by retrieving the piggybanks, smashing them, and stealing over a

thousand dollars in cash that was contained inside. (Tr. pp. 365-367; pp. 453-454). Upon taking the cash, the men told Victim they had seen a picture of her husband holding money on social media and stated there had to be more of it somewhere in the home.² (Tr. pp. 367-368; p. 450). They then forcibly dragged Victim, who was under five feet tall and weighed just ninety-eight pounds, downstairs by her hair, made her put her head down on the kitchen table, and continued ransacking the home in an effort to find more cash.³ (Tr. p. 368; pp. 370-371; p. 451). However, their search proved to be fruitless, and they did not find any other valuables to steal. (Tr. p. 371).

When the robbers realized there was no more money to be found, the skinnier of the two suggested they leave. (Tr. p. 371). However, the fatter man said they were not done yet and—horrifically—directed the skinnier man to begin raping Victim. (Tr. pp. 371-373). Following that, the two men proceeded to simultaneously rape Victim both anally and orally until each had ejaculated in her mouth.^{4 5} (Tr. pp. 372-373).

Once the intruders were done raping Victim, the men cleaned themselves up with some paper towels and a bottle of cleaner they found in the kitchen, and the fatter man forced Victim to swallow and then spit into a paper towel in an effort to get rid of any evidence that might have been left as a result of the sexual assault. (Tr. pp. 374-376). After that, the fatter man told Victim they were going to take her phone, would leave it outside, and would kill her if she did

² During trial, Victim confirmed her husband may have taken a picture of himself while holding some cash, but she noted that money belonged to her and was from work. (Tr. p. 423).

³ Earlier, the skinnier of the two robbers had been concerned about Victim looking at them and told the fatter man: “Cuz, she looking at you.” (Tr. p. 361) (emphasis added).

⁴ As they did so, the fatter man advised the Victim what was occurring was just like a “porno,” and the men told her to shut up whenever she whimpered in pain. (Tr. pp. 372-373).

⁵ The men only did not vaginally rape Victim because she demonstrated to them she was suffering from a yeast infection at that time in an effort to dissuade them from assaulting her. (Tr. p. 372).

not give them some time to escape. (Tr. p. 376). The intruders then fled from Victim's now-ransacked home with her phone and absconded from the area. (Tr. p. 376; p. 388; pp. 392-393).

Consistent with the burglars' commands, Victim, who was unsurprisingly distraught, waited for a period of time after they left, and she then got dressed and ran to several neighbors' houses in an effort to get some help. (Tr. p. 376; p. 385). When she did, none of Victim's neighbors opened their doors for her, but one of them called the police to report what was going on. (Tr. pp. 376-377; pp. 500-501). In response, officers from the West Columbia Police Department rushed to the scene and began arriving there just before 3:00 a.m. in the early morning hours of Friday, July 28, 2017. (Tr. p. 377; pp. 510-511; p. 516).

Upon the officers' arrival, Victim quickly alerted them of what had occurred, and an investigation into the incident was immediately initiated. (Tr. p. 377; p. 385; pp. 605-606). During the course of that investigation, officers discovered evidence indicating the intruders forced their way into the home by damaging an exterior door, searched and ransacked the entire home, and forced their way into Victim's bedroom by kicking in the bedroom door. (Tr. pp. 391-393; p. 611; pp. 615-617; pp. 619-620; p. 626). Officers also located various items of evidence, including a paper towel and bottle of cleaner used by Victim's assailants, and that evidence was collected and secured for further analysis.⁶ (Tr. p. 622; pp. 625-628). Furthermore, officers attempted to track the burglars, but the area in which the incident took place was highly-travelled and the attempt proved to be unsuccessful. (Tr. p. 609; pp. 623-624).

Meanwhile, as the investigation was taking place at the scene, Victim—along with Jacob, who had rushed home after being notified of what occurred—was transported by ambulance to Lexington Medical Center for a sexual assault examination. (Tr. pp. 294-296; pp. 399-400; pp.

⁶ Amongst the other items located, Victim's phone was recovered from a trash can outside the residence. (Tr. p. 388; p. 609).

504-507). At the hospital, Victim tearfully recounted the painful sexual assault she had endured. (Tr. p. 295; pp. 542-543; pp. 784-786). Based on the description provided, Brigitte DeGuzman, a sexual assault nurse examiner, conducted an examination of Victim, discovered multiple fresh lacerations to Victim's anus, and collected and secured multiple samples from Victim's body, including from her mouth, anus, and perineal area. (Tr. pp. 399-400; p. 774; pp. 778-779; pp. 784-787; p. 789; pp. 791-792; p. 796).

In the days that followed, some of the evidence collected in the investigation was rapidly transported to the South Carolina State Law Enforcement Division ("SLED") and subjected to an expedited analysis due to the serious nature of the incident along with the absence of any viable suspects at that time. (Tr. pp. 726-728; pp. 816-817; pp. 870-872). Through the analysis, DNA profiles were developed from the bottle of cleaner and from semen found on the paper towel collected from the scene, and those profiles were submitted to the CODIS database to check for possible matches to known individuals. (Tr. pp. 875-881; pp. 938-939; pp. 942-943). Ultimately, Craig Cooper ("Craig") was identified as a possible contributor to the DNA profile developed from the bottle of cleaner, and the West Columbia Police Department was promptly alerted of that information within just a few days of the incident. (Tr. pp. 639-640; p. 708; pp. 718-719; pp. 942-944; p. 946).

Upon receiving that alert, Craig was brought in for an interview on August 1, 2017, and Investigator Chris Morris of the West Columbia Police Department proceeded to question him about the incident. (Tr. p. 1136). Initially, during that questioning, Craig falsely claimed he and his confederate had met with Victim by arrangement. (Tr. pp. 520-521; pp. 1122-1123). However, Craig eventually admitted the truth, confessed he went to Victim's residence on the date of the incident for the purpose of committing a burglary, acknowledged they committed a

sexual assault while there, and identified Appellant, who was his cousin, as his accomplice.⁷ (Tr. p. 137; pp. 152-153; pp. 163-164; p. 195; pp. 520-521; p. 657; pp. 1122-1123).

Later that same afternoon, officers made contact with Appellant at his place of employment based on what Craig had revealed, and Appellant voluntarily agreed to come to the police department for an interview. (Tr. pp. 146-148; p. 154; p. 157; pp. 559-560; p. 562; pp. 579-581; p. 640; p. 749; p. 752). At the outset of that interview, Investigator Morris advised Appellant of his rights, and Appellant waived those rights. (Tr. pp. 148-149; p. 160; pp. 170-171; p. 175; pp. 582-583; p. 590; pp. 640-642; pp. 646-649; pp. 752-753; State's Ex. # 2 (Waiver Form)). During the ensuing conversation, Appellant initially claimed he had not been in West Columbia at the time of the incident and had last been there a month earlier. (Tr. p. 178; p. 652; p. 657). However, when confronted with Craig's confession along with the incriminating DNA evidence, Appellant hung his head and admitted what he and his cousin had done. (Tr. pp. 178-179; p. 233; p. 658; p. 703; pp. 757-758; State's Ex. # 3 (Written Statement)). More specifically, Appellant stated a friend named Albert Bribane advised him Victim's husband was a drug trafficker, which led to him and Craig reaching a "mutual decision" to burglarize the Cook residence. (Tr. p. 178; p. 182; pp. 658-660; State's Ex. # 3). After that, Appellant indicated he and Craig went to the residence on the incident date, Craig kicked in the back door, and the two proceeded to search the home for the hoard of cash they believed would be inside based on their belief Victim's husband was a drug dealer. (Tr. pp. 181-182; p. 659; State's Ex. # 3). During

⁷ By the time of Appellant's trial, Craig had pled guilty to a number of crimes in connection to the incident and, pursuant to negotiations, was to receive a sentence of between ten and nineteen years in exchange for presenting truthful testimony during any proceedings involving Appellant. (Tr. p. 132). However, Craig ended up declining to testify during Appellant's trial. (Tr. pp. 137-139; p. 143; p. 555). As a result, Craig's confession was not introduced into evidence, and no testimony was presented before the jury concerning the substance of Craig's out-of-court statements or his identification of Appellant as his accomplice. (Tr. p. 555; p. 640; pp. 756-757).

that search, Appellant asserted they came upon Victim, Victim told them where some cash was hidden, they stole that cash, and they then both sexually assaulted Victim, whom he referred to as the “dealer’s girl,” orally and anally before fleeing from the scene. (Tr. pp. 181-182; p. 186; pp. 659-661; pp. 665-666; State’s Ex. # 3). Furthermore, Appellant alleged he had already spent his share of the stolen loot but indicated the gun he brought along with him during the crimes was hidden in a closet at his home. (Tr. p. 182; p. 190; pp. 660-661; p. 667; State’s Ex. # 3). As a result of that confession, Appellant was swiftly arrested. (Tr. p. 194; p. 680).

Following Appellant’s arrest, a search warrant was obtained for Appellant’s residence, and a loaded pistol was found hidden in a shoebox in his closet, which was exactly where Appellant had indicated the one used in the incident would be found. (Tr. p. 190; pp. 669-671; p. 675; p. 684). Additionally, a DNA sample was collected from Appellant with his consent and submitted for analysis. (Tr. pp. 186-187; pp. 676-677; p. 680). Upon analyzing that sample and comparing the DNA profile developed from it to the evidence that had been recovered in the investigation, Jennifer Clayton, a forensic DNA analyst at SLED, determined Appellant’s profile matched the profile of the major contributor of the sperm faction that was developed from the paper towel collected at the crime scene.^{8 9} (Tr. p. 902; p. 905; p. 948; p. 961; pp. 967-968; p. 1001). Significantly, Clayton further concluded the probability of randomly selecting an

⁸ Similarly, Clayton determined Craig’s profile matched the profile of the major contributor that was developed from the bottle of cleaner collected at the crime scene, the profile of the major contributor of the sperm faction that was developed from Victim’s rectal swab, and the profile of the major contributor of the sperm faction that was developed from Victim’s perineal swab. (Tr. pp. 964-967). For each of those matches, Clayton concluded the probability of randomly selecting an unrelated individual from the general population with a DNA profile matching the major contributor’s profile was exceedingly high with odds as high as one in 53,000,000,000,000,000,000,000,000. (Tr. pp. 964-966).

⁹ In conducting her analysis, Clayton employed the short tandem repeat method and tested twenty-one different loci. (Tr. p. 917; pp. 920-921; pp. 978-979).

unrelated individual from the general population with a DNA profile matching the major contributor's profile was one in 260,000,000,000,000,000,000,000,000. (Tr. p. 968).

Subsequently, Appellant was indicted for a number of offenses, including first-degree burglary, first-degree criminal sexual conduct, and armed robbery, and he elected to proceed forward to trial. (Tr. pp. 24-29; Indictments). During trial, Victim recounted the harrowing details of the incident, and she identified Appellant in-court as the skinnier of her two assailants based on her recognition of his voice at an earlier bond hearing. (Tr. pp. 345-407; pp. 418-457). Additionally, the law enforcement officer and other personnel involved in the response to the incident testified about what occurred after Victim ran to her neighbors for help, including about Victim's disclosure of the sexual assault and about the investigative discoveries that led to Craig and Appellant being identified as the culprits. (Tr. pp. 294-298; pp. 500-501; pp. 510-519; pp. 539-543; pp. 556-568; pp. 578-592; pp. 595-719; pp. 757-771; pp. 774-796). Likewise, Investigator Morris recounted the details of Appellant's confession, and Appellant's personally-written-and-signed statement admitting his involvement in the home invasion and sexual assault was introduced into evidence. (Tr. pp. 640-669). Furthermore, Clayton testified about the results of her DNA analysis, including about her determination Appellant's profile matched the profile developed from the paper towel collected at the crime scene in a statistically-significant manner. (Tr. pp. 902-968; pp. 978-1001).

At the conclusion of trial, the jury unanimously convicted Appellant as indicted after a little less than an hour of deliberations. (Tr. pp. 1097-1099). Following that, the trial judge—who indicated he viewed the evidence of Appellant's guilt as “overwhelming”—sentenced Appellant to an aggregate term of imprisonment of life without parole for his heinous crimes. (Tr. p. 1105; pp. 1118-1119).

STANDARD OF REVIEW

When reviewing an evidentiary ruling on appeal, an appellate court, which sits to review errors of law only, must give great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (“In criminal cases, the appellate court sits to review errors of law only.”).

Significantly, an appellate court will not reverse a trial judge’s decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge’s broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“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.”). Likewise, when the evidentiary ruling being reviewed on appeal concerns the voluntariness of a statement, the appellate court “does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court’s ruling is supported by *any evidence*.” State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (emphasis added); see State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (“Our role when reviewing a trial court’s ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence.”). Importantly, “[t]he trial judge’s determination of the voluntariness [of a statement] will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law.” State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998).

ARGUMENT

I.

The trial judge did not abuse his broad discretion by excluding evidence concerning a collateral matter that occurred roughly a year after the charged crimes because he correctly concluded the evidence’s high potential to confuse the issues, mislead the jury, and result in unfair prejudice based on the specific circumstances involved warranted its exclusion pursuant to Rule 403 of the South Carolina Rules of Evidence.

Appellant contends the trial judge reversibly erred by excluding evidence of acts of “bribery or extortion” purportedly committed by Victim. As support for that contention, Appellant—without acknowledging or attacking the actual basis upon which the trial judge excluded the evidence in question—maintains it should have been admitted because it was supposedly probative of Victim’s credibility and admissible to impeach her pursuant to Rule 404(b) of the South Carolina Rules of Evidence.¹⁰ Importantly though, the evidence at issue concerned a collateral matter that occurred roughly a year after the charged crime, and it related to an alleged incident involving Victim and Appellant’s brother as opposed to Appellant himself. Upon being confronted with that evidence, the trial judge appropriately evaluated it, recognized it had limited probative value due to its remote and unclear nature, and further recognized it had a high potential to result in unfair prejudice, confuse the issues, and mislead the jury. Based on

¹⁰ Since Appellant has neither acknowledged nor argued against the basis upon which the trial judge excluded the challenged evidence—Rule 403 of the South Carolina Rules of Evidence—on appeal, it is highly questionable whether Appellant’s current appellate challenge to that evidence is properly preserved for appellate review. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); see also Dreher v. S.C. Dep’t of Health & Env’t Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (“[S]hould the appealing party fail to raise all of the grounds upon which a [circuit court judge]’s decision was based, those unappealed findings—whether correct or not—become the law of the case.”); cf. Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (“[T]he trial court ruled the statement was admissible under Rule 803(3), SCRE. Because [Sheppard] does not appeal the trial court’s ruling that the statement is a Rule 803(3) exception to the hearsay rule, that ruling is the law of the case. Accordingly, the trial court did not err by admitting Lynch’s testimony.” (citation and footnote omitted)).

that, the trial judge properly exercised his broad discretionary authority to exclude the evidence pursuant to Rule 403 of our evidentiary rules, and his ruling in that regard did not constitute an abuse of discretion under the particular circumstances involved. Appellant's convictions should be affirmed.

Relevant Facts

Towards the outset of Appellant's trial on the charges stemming from the July 2017 crimes, the prosecutor alerted the trial judge the State was moving to suppress any evidence related to a purported bribery scheme. (Tr. pp. 53-54; pp. 108-109). In doing so, the prosecutor asserted there were two very different versions of events concerning a July 2018 incident that involved Appellant's brother, Earle Cooper ("Brother"), and she provided the trial judge with a summary of the facts concerning that incident. (Tr. pp. 108-113; p. 255; p. 459).

Specifically, according to the prosecutor, Brother came to the strip club where Victim worked roughly a year after the charged crimes were committed, Brother asked Victim her name, the two recognized each other, and Brother proceeded to offer her money. (Tr. pp. 109-113; p. 255). In response, Victim tried to get Brother ejected from the club, and she further promptly alerted the solicitor's office of what had occurred. (Tr. pp. 109-113). Later on, Victim went to Brother's place of employment to speak with him, Brother explained—in a conversation Victim recorded—he was simply trying to help her because what happened to her was wrong, and Victim believed Brother's assurances were sincere. (Tr. pp. 109-113). As a result, Victim alerted the solicitor's office of her belief, and, after that, she continued to meet with Brother. (Tr. pp. 109-113). Eventually, those meetings led to a claim Victim was indicating she would change her story or drop the charges in exchange for a bribe, and the conversations between

Victim and Brother ceased when both reported what was occurring to law enforcement. (Tr. pp. 109-113). However, Victim never actually offered to change her story. (Tr. pp. 109-113).

Upon providing that summary, the prosecutor contended the evidence was irrelevant and, even if relevant, should also be ruled inadmissible pursuant to Rule 403 of the South Carolina Rules of Evidence. (Tr. pp. 113-115). As support for that contention, the solicitor asserted no evidence established Brother was acting at Appellant's direction, any evidence on the incident involving Brother would distract from the real issue of what happened during the incident for which Appellant was charged, and it had a high potential to confuse the jury. (Tr. pp. 113-115). Furthermore, the prosecutor again noted Victim's account of the charged crimes had remained unchanged from when it was first provided and nothing suggested Victim was ever willing to alter that account. (Tr. pp. 113-115).

Following the solicitor's contentions, defense counsel asserted the evidence of the incident involving Brother was solely admissible to impeach Victim pursuant to Rule 404(b) of the South Carolina Rules of Evidence while contended it could only be introduced if Victim testified and denied attempting to get money from Brother. (Tr. p. 115). Defense counsel then presented the defense's view of the July 2018 incident. (Tr. pp. 116-117; p. 255).

According to defense counsel, Brother went to the strip club where Victim worked, he left a tip for her without knowing who she was, Victim disappeared after that, and Brother later found a note from Victim at his own place of employment asking him to call her. (Tr. pp. 116-117). Following that, discussions about money occurred between the two, Brother contacted the solicitor's office, the West Columbia Police Department became involved, he spoke to an investigator, and an investigation was subsequently initiated by the Lexington County Sheriff's Office. (Tr. pp. 116-117).

After recounting those facts, defense counsel asserted the matter presented a question of fact for the jury “in regards to [Victim’s] character only” while citing to the decision in State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989). (Tr. p. 117). Defense counsel further maintained Brother’s “impression” of what occurred was the charges would have gone away if he paid Victim \$25,000. (Tr. p. 126).

In rebuttal, the prosecutor contended the Finley decision was not applicable because, unlike what occurred in Finley, there was no evidence of an extortion attempt in Appellant’s case. (Tr. pp. 120-121). Instead, the prosecutor contended the July 2018 discussion of money centered around Brother’s offer to help Victim based on what had happened to her. (Tr. p. 120). In light of that, the prosecutor maintained the evidence would only “muddy the waters” and would be confusing and irrelevant under the circumstances involved. (Tr. pp. 122-123).

After hearing the counsel’s summaries and arguments, the trial judge noted the evidence would be a “double-edged sword” for Appellant, indicated it could lead to going down a “rabbit trail,” and stated it would divert from the actual issues involved in the case. (Tr. pp. 127-128). Upon hearing those remarks, defense counsel quickly agreed and conceded the evidence could be viewed as evidence of guilt if the jury believed Victim as to what happened. (Tr. pp. 127). Following that, the trial judge further explained he did not believe the evidence concerning the matter was clear and convincing. (Tr. p. 130). The trial judge then took the matter under advisement. (Tr. pp. 130-131).

Thereafter, upon considering the matter overnight, the trial judge noted the circumstances involved in Appellant’s case were very different from the circumstances of Finley because: (1) Brother initiated contact with Victim a year after the charged crimes; (2) Appellant had already confessed to those crimes; (3) Victim was never recorded actually attempting to extort money;

and (4) Victim notified the solicitor's office immediately after she had contact with Brother. (Tr. pp. 256-257). Moreover, the trial judge noted he had discretion to exclude the evidence even if otherwise admissible if he believed it would result in a trial within a trial, might confuse the issues, or might mislead the jury, and he found those things were exactly what could result from the admission of the evidence in Appellant's case. (Tr. p. 259). Accordingly, the trial judge ruled the evidence could not be introduced but indicated he would permit the defense to proffer anything it wished to proffer on the matter. (Tr. pp. 261-262).

Later on during trial, defense counsel proffered the testimony of Brother outside the presence of the jury. (Tr. p. 459). During the proffer, Brother on direct examination claimed he was at a strip club tipping the girls, Victim came over to him and began speaking with him, Victim then gave him a strange look and asked if she knew him, they shared a "weird moment," he addressed her by name, she responded by quickly leaving his company, and he decided to leave the strip club because he "didn't know if maybe she had called somebody or what." (Tr. pp. 460-461). Thereafter, Brother asserted Victim contacted him at his place of employment the next day, she met with him along with her cousin and a baby, the cousin confronted him and asked how he would feel if the incident had happened to a member of his own family, Victim advised him she needed \$25,000, and Victim said she would "help" his brother. (Tr. pp. 461-462). In response to that, Brother claimed he told Victim he could possibly get her \$10,000 but did not want to seem as if he was bribing her, Victim left after that, she called him a few minutes later and told him her husband wanted to meet with him, and he agreed to a meeting. (Tr. p. 462). Brother asserted he then met with Victim's husband, who advised him he was "real connected," stated he could have something done to him, and told him they would "go away" if he gave *him* \$10,000 and a car. (Tr. pp. 462-463). After that, Brother claimed he "let it be

known” Victim had reached out to him, he spoke with an officer, and he let the officer know Victim was trying to get money from him. (Tr. p. 463). On the following day, Brother alleged Victim contacted him, arranged a meeting, and showed him a message she had sent in “good faith” to a victim advocate stating she did not feel harmed. (Tr. pp. 464-465). Brother asserted he then told Victim he would get the money, contacted the officer again about what had transpired, the officer quit communicating with him, an investigation was initiated, that investigation was closed without any action being taken despite him speaking with both an investigator and a lawyer, and he had no further contact with Victim or her husband. (Tr. p. 465). Furthermore, Brother indicated he personally believed Victim was trying to get money out of the situation and again claimed she said she would “help”—and only “help”—his brother after asking for \$25,000. (Tr. pp. 467-468).

Following that, on cross-examination, Brother offered more details about his interactions with Victim. (Tr. pp. 468-487). Specifically, Brother again asserted Victim approached him at the strip club, but he now admitted she did so for the purpose of thanking him for giving her a tip. (Tr. pp. 469-471). Brother further acknowledged Victim became uneasy when she realized his identity while claiming he himself was also uneasy. (Tr. p. 473). In addition to that, Brother admitted Victim told him she had been raped, had lost her home after the incident, had her money stolen, and no longer felt safe at work because he was now coming to her place of employment. (Tr. p. 475). Similarly, Brother admitted he told Victim he had to watch what he said when speaking with her but was willing to do whatever he could to get “it” behind everyone. (Tr. pp. 474-475). Additionally, Brother acknowledged he told Victim he had fifty men willing to do whatever he told them to do after discussing whether she was in danger, advised Victim she had not done anything wrong, told Victim he was on her side instead of Appellant’s, and advised

Victim money could not change “what was done” but it was nonetheless better to come away with something. (Tr. pp. 475-477; pp. 479-480). Furthermore, Brother seemingly acknowledged the “good faith” message Victim had shown him was a communication from Victim stating she believed Brother was genuinely trying to help her. (Tr. p. 479). Beyond that, Brother—contrary to his earlier testimony—conceded he was the one that suggested meeting with Victim’s husband after offering her \$10,000 as soon as possible. (Tr. p. 462; pp. 480-481).

At the conclusion of the proffer, the trial judge noted the events to which Brother had testified occurred a year after the incident while Appellant—as opposed to Brother—was the one being tried. (Tr. p. 487). Accordingly, the trial judge reaffirmed his earlier ruling excluding the evidence of the later events involving Victim and Brother. (Tr. p. 487).

Analysis

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006); see Rule 402, SCRE (“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.”). However, even if relevant, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, 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.”).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008) ("Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation."); see also Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in *exceptional* circumstances. Lyles, 379 S.C. at 339-340, 665 S.E.2d at 207. Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d

494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Hamilton, 344 S.C. at 358, 543 S.E.2d at 594; see Lyles, 379 S.C. at 340, 665 S.E.2d at 208 (“[W]e are obligated to give great deference to the decision of the trial judge in this matter and should only reverse in exceptional circumstances when there is a clear abuse of discretion.”).

In the case sub judice, the defense sought to introduce evidence of the July 2018 incident involving Victim and Brother.¹¹ Importantly though, that evidence did *not* establish Victim ever provided a different account of the July 2017 events that led to Appellant’s charges and did *not* establish Victim ever denied she was robbed and brutally sexually assaulted. Instead, even in the version of events to which Brother was apparently willing to testify, Victim continued to maintain she was sexually assaulted and robbed, which was fully consistent with both the account she provided in the immediate aftermath of what had occurred and the testimony she presented during trial. And, since the events to which that evidence related occurred approximately a year after the incident, the excluded evidence had no bearing on or relevance to the actual evidence of Appellant’s guilt that had already been uncovered prior to that point, including the evidence of Appellant’s signed-and-handwritten confession to the crimes for which he was indicted. See State v. Tutton, 354 S.C. 319, 332, 580 S.E.2d 186, 193 (Ct. App. 2003) (recognizing remoteness—while not necessarily dispositive—can be a factor affecting the admissibility of evidence of an act other than the charged incident). Furthermore, no evidence

¹¹ In seeking to introduce that evidence, defense counsel limited the defense’s proffer to testimony from Brother and did not attempt to proffer any testimony on the matter from Victim. (Tr. p. 109; p. 487). Notably, without any proffer of testimony from Victim related to the matter, it is not clear exactly how she would have responded to any questions posed to her about the incident involving Brother. Cf. Vanover v. State, 433 S.C. 31, 44, 856 S.E.2d 160, 167 (Ct. App. 2021) (“We have no idea what Daughter’s answer or explanation for the Doe allegation would have been. . . . We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter’s explanation would have been.”).

was presented suggesting Victim ever threatened Brother—or Appellant—or expressed an actual willingness to recant her earlier statements, and, instead, Brother’s belief that Victim was attempting to extort him or soliciting a bribe was merely an impression he drew from Victim’s supposed offer to “help” in some unspecified way. See Mizell v. Glover, 351 S.C. 392, 400, 570 S.E.2d 176, 180 (2002) (“Rule 608 permits questioning about the underlying event from the actor in the event, not rumors or *reports of what others perceived about the event*.” (emphasis added)). As a result, the evidence the defense sought to introduce during trial was by its very nature speculative and, thus, was very different from evidence introduced in a case like Finley involving an actual offer to “drop the charges” in exchange for payment. See State v. Sims, 426 S.C. 115, 144, 825 S.E.2d 731, 746 (Ct. App. 2019) (explaining “inferences must be grounded in fact and not mere speculation”); cf. State v. Finley, 300 S.C. 196, 198-199, 387 S.E.2d 88, 89-90 (1989) (holding the trial judge erred by excluding a corroborative recording of an extortion attempt in a case in which testimony was presented during trial indicating Finley’s accuser told Finley’s girlfriend she would “drop the charges” in exchange for money).

Under such circumstances, the evidence surrounding the incident involving Brother had—at best—limited probative value to any material issue in dispute during Appellant’s trial.¹² See, e.g., Gause v. Livingston, 251 S.C. 8, 13, 159 S.E.2d 604, 607 (1968) (“If there is no such logical or rational connection between the fact sought to be presented and a matter of fact in

¹² In arguing the evidence was relevant to and probative of Victim’s credibility, Appellant maintains on appeal the issue in dispute in his case was the matter of “whether the sexual contact was consensual or not.” (App. Br. p. 9). Importantly though, Appellant never alleged he engaged in consensual sexual contact with Victim, and defense counsel did not raise such a contention to the jury during trial, including through his closing argument remarks. (Tr. pp. 1072-1091). Moreover, to extent Craig—and not Appellant—suggested at one point his interactions with Victim had been by arrangement before he admitted the truth, Craig’s assertions in that regard were *not* presented to the jury and, instead, were only referenced outside the jury’s presence. (Tr. pp. 520-521; pp. 1122-1123).

issue in the case the evidence is immaterial and inadmissible.”). Meanwhile, even assuming that evidence—including the *extrinsic* evidence the defense proffered through Brother—had some probative value for impeachment purposes *and* was allowable pursuant to one of our evidentiary rules, it at the same time had a high potential to result in undue prejudice in a number of different ways.^{13 14} See Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (“[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.”); see also Rule 608(b), SCRE (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the

¹³ On appeal, Appellant—like defense counsel during trial—maintains the evidence was admissible for impeachment while *solely* identifying Rule 404(b) as the basis pursuant to which the evidence should have been allowed. (Tr. p. 115; App. Br. p. 2; p. 4). However, in raising that contention, Appellant has *not* included any actual arguments concerning Rule 404(b), has *not* explained how the evidence would have been admissible pursuant to that rule, and has *not* even identified which of the rule’s articulated grounds for potential admission—motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent—he believes was applicable in his case. (App. Br. pp. 4-10). Under such circumstances, it remains unclear exactly what Appellant’s theory is as to how the evidence could have been admitted pursuant to Rule 404(b), which is the *lone* rule he has identified as support for his claim the trial judge committed an abuse of discretion in his case. See Ahrens v. State, 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2011) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”); cf. State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999) (concluding Tyndall’s reliance of identified authorities was abandoned where Tyndall any discussion on the applicability of those authorities in his appellate brief).

¹⁴ During trial, defense counsel appeared to concede the matter could only be brought up if Victim “t[ook] the stand and if a question [wa]s asked of her if she attempted to get money from the brother and she sa[id] no.” (Tr. p. 115).

witness being cross-examined has testified.”); State v. DuBose, 288 S.C. 226, 231, 341 S.E.2d 785, 788 (1986) (“[W]here . . . a witness denies an act involving a matter collateral to the case in chief, the inquiry ends. The inquiring party is not permitted to introduce evidence in contradiction or impeachment.”).

Most significantly, the evidence—just as the trial judge recognized and defense counsel conceded—could have been construed as evidence of Appellant’s guilt if the jury believed Appellant’s own brother was attempting to bribe Victim or influence her testimony against Appellant. Importantly though, no evidence was presented connecting Appellant to Brother’s actions, and, therefore, the evidence could not validly be considered as evidence of Appellant’s guilt due to the fact Brother’s actions were *not* Appellant’s and not linked to Appellant. See State v. Rogers, 96 S.C. 350, ___, 80 S.E. 620, 621 (1914) (explaining evidence of an attempt to influence or intimidate a prosecution witness is highly prejudicial to a defendant and cannot be introduced unless there is some evidence connecting the defendant with the attempt). Resultantly, that collateral evidence had a high potential to cause undue prejudice to Appellant by leading to an inference of guilt being invalidly imputed to Appellant based purely on the actions of another, which constituted a compelling reason for its exclusion under Rule 403. See id. (reversing Rogers’s conviction as a result of the jury’s exposure to a letter purportedly written by Rogers’s father that was not connected to Rogers through any evidence and that contained an offer of “valuable inducement” to encourage a witness not to testify against Rogers).

Beyond that, the evidence concerning the incident with Brother had the potential to be confusing and misleading since: (1) during Victim’s conversations with Brother, she continued to insist he had been robbed and sexually assaulted just as she had previously disclosed in the immediate aftermath of the incident; (2) Victim never made any extortionate threats to Brother

during their interactions; and (3) even in Brother's account of what occurred, Victim never specifically offered to alter her testimony or refuse to appear for trial in exchange for payment. In light of that, any impeachment value the evidence had towards Victim's credibility could only be derived through speculation about what was meant by Victim's vague—and disputed—offer to “help,” and any such impeachment value was further limited by the fact the purported offer of “help” was made contemporaneously with a statement asserting the crimes actually had been committed. As a result, the evidence had a high potential to be misleading and confusing and could have led to the jurors potentially drawing unsupportable inferences from the evidence. Cf. People v. Harper, 552 N.E.2d 148, 150-151 (N.Y. 1990) (explaining even evidence of an offer by a complainant to “drop charges” does *not* provide a sufficient basis from which a rational jury could infer the complainant entered into an agreement prohibited by an anti-bribery law and instructing: “As common sense and experience suggest, agreeing to ‘drop’ charges is certainly not the same as agreeing to alter testimony or absent oneself entirely from a proceeding. Consequently, evidence that someone has agreed to the former cannot alone be used as a basis to infer the existence of an agreement to do the latter. To the contrary, an agreement to ‘drop’ criminal charges says nothing about the promisor's intention to appear and testify truthfully in the event the prosecutor decides to proceed despite the promisor's wishes to the contrary. At worst, it suggests a fundamental misunderstanding by one or both parties of the power that private citizen-complainants have over the conduct of criminal proceedings.”).

Recognizing the evidence of the July 2018 incident concerned a collateral issue, the trial judge considered the probative value of that evidence in conjunction with its potential to mislead the jury and confuse the issues, and, upon doing so, he elected to exclude that evidence pursuant to Rule 403. See Lyles, 379 S.C. at 338, 665 S.E.2d at 206 (“When evidence's prejudicial effect

outweighs its probative value, it should be excluded, even if otherwise relevant.”). Significantly, the trial judge’s ruling was fully warranted under the circumstances involved and did not constitute an abuse of his broad discretion in light of the fact the excluded evidence had—at best—limited probative value while simultaneously possessing a high potential to be distracting, misleading, and confusing. Cf. State v. Henley, 428 S.C. 649, 663, 837 S.E.2d 639, 646 (Ct. App. 2019) (“Even assuming, arguendo, that the evidence was relevant, the circuit court did not abuse its discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury.”); State v. Williams, 409 S.C. 455, 467, 761 S.E.2d 770, 777 (Ct. App. 2014) (“Considering the low probative value of the evidence, we do not find exceptional circumstances that warrant reversal of the trial court’s finding the prejudicial value of the evidence substantially outweighed its probative value.”). Accordingly, in light of the highly deferential standard of review applicable to such matters, the trial judge’s ruling excluding the collateral evidence concerning the incident involving Brother must be affirmed on appeal. See State v. Cottrell, 421 S.C. 622, 640, 809 S.E.2d 423, 433 (2017) (“The decision whether to admit evidence under [Rule 403 of the South Carolina Rules of Evidence] is . . . left to the sound discretion of the trial judge, and the decision will only be set aside in *extraordinary circumstances* where the discretion has been *plainly* abused.” (emphasis added)); see also State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019) (recognizing it is conceivable the discretionary rulings of two different trial judges who reached opposite conclusions from the same set of circumstances will both be affirmed on appeal due to the deferential nature of the abuse of discretion standard of review). Appellant’s convictions should be affirmed.

II.

The trial judge did not abuse his broad discretion by permitting Appellant’s verbal and written confession to law enforcement to be admitted into evidence during trial because the record contains evidence and testimony that supports the trial judge’s determination the confession was freely, knowingly, voluntarily, and intelligently made under the totality of the circumstances.

Appellant contends the trial judge reversibly erred by admitting evidence of his confession to law enforcement. As support for that contention, Appellant—while ignoring the applicable standard of review and focusing heavily on his own self-serving testimony—maintains his confession should have been suppressed because he invoked his right to counsel and the State failed to show his confession was knowingly and voluntarily made. To the contrary, the trial judge did not abuse his discretion by finding Appellant’s confession to be admissible because he appropriately considered the totality of the circumstances surrounding the confession, including the testimony from multiple officers establishing Appellant confessed without ever invoking his right to counsel and after being properly advised of and waiving his rights, before concluding Appellant’s confession was freely, knowingly, voluntarily, and intelligently given. And, critically, the trial judge’s ruling in that regard had ample evidentiary support based on what was presented during trial. Accordingly, pursuant to the deferential standard of review applicable to voluntariness determinations, the trial judge’s ruling must be affirmed on appeal. Appellant’s convictions should be affirmed.

Relevant Facts

Towards the outset of Appellant’s trial, an issue was raised concerning the admissibility of the incriminating out-of-court statement Appellant made to law enforcement, and the trial judge conducted an in camera hearing on the matter. (Tr. p. 145). During the course of that hearing, several West Columbia Police Department officers involved in the investigation into the

incident testified about the circumstances surrounding Appellant's confession. (Tr. pp. 146-195; pp. 232-239). More specifically, Investigator Jody Putney stated he went to Appellant's place of employment on August 1, 2017, to speak with Appellant and Appellant voluntarily agreed to come to the police department for an interview. (Tr. pp. 147-148; p. 154). Investigator Putney further indicated he did not remember Appellant ever asking for an attorney and was present when Appellant was advised of his rights prior to any questioning occurring. (Tr. pp. 148-149; p. 158; p. 160). Similarly, Investigator Morris affirmed he conducted Appellant's interview after Appellant was brought to the police department, the interview was conducted in an interview room after Appellant was informed of his rights and agreed to make a statement, Appellant appeared to understand what was occurring, no threats or promises were made to Appellant, and Appellant voluntarily gave both a verbal and written statement without ever invoking his right to counsel or any other right. (Tr. pp. 166-168; pp. 175-177; pp. 179-180; pp. 183-184; p. 187; pp. 194-195). Likewise, Captain Bruce Wade testified he was present for Appellant's verbal statement after he came into the interview room to relieve Investigator Putney, Appellant was never threatened when he was present, he never heard Appellant ask for an attorney, and he would have stopped the interview immediately if Appellant had made such a request. (Tr. pp. 232-233; pp. 237-239). In addition to that testimony, Appellant's handwritten statement was introduced into evidence along with the waiver form Appellant had initialed and signed prior to giving his confession. (Tr. p. 177; p. 189).

Conversely, Appellant offered his own testimony during the hearing and claimed he repeatedly invoked his right to counsel prior to making any statements, including when he was initially approached by officers at his place of employment, when he was brought into the interview room, when an officer allegedly yelled at him during questioning, when an officer

supposedly threatened him, and when a different officer again purportedly threatened him. (Tr. pp. 197-200). Additionally, Appellant asserted he defecated on himself—or “[l]ost [his] bowels”—due to the horrific circumstances he experienced during the interrogation and was not informed of his rights until after he had already written and signed a confession. (Tr. pp. 200-201). However, Appellant, who acknowledged having attended college for a year, further confirmed he initialed and signed the waiver form and understood what he was doing when he signed his handwritten statement. (Tr. p. 204; pp. 207-208). Beyond that, Appellant, after swearing to tell the truth during the hearing, falsely testified he had *never* been arrested before and only admitted the truth—he had, in fact, been arrested in 2016 and was actually awaiting trial on a drug trafficking charge at the time of his interview with law enforcement in connection to the incident—when confronted with evidence of an earlier arrest. (Tr. p. 196; pp. 217-218).

Following the presentation of that testimony and evidence, the prosecutor argued Appellant’s incriminating statement was made after a knowing waiver of his rights and, thus, should be found to be admissible. (Tr. p. 240). In reply, defense counsel contended the issue regarding the admissibility of the statement hinged on whether the trial judge believed Appellant’s testimony or the testimony of the officers. (Tr. p. 241).

After hearing counsel’s arguments, the trial judge conducted an analysis of the totality of the circumstances surrounding Appellant’s confession. (Tr. p. 241). In doing so, the trial judge noted: (1) the officers testified no promises or threats of violence were made; (2) nothing was withheld from Appellant during the interview process; (3) the interview only lasted roughly two hours; (4) Appellant’s age did not raise any concerns; (5) Appellant was a high school graduate with some college experience; (6) nothing suggested Appellant had any issues understanding what was going on; (7) Appellant’s actions during the trial proceedings up to that point had not

suggested he had any issues with his ability to understand; (8) the officers testified Appellant was advised of his rights prior to questioning; (9) Appellant initialed and signed the waiver form; and (10) Appellant was literate. (Tr. pp. 241-244). In addition to that, the trial judge—while recognizing the testimony presented from the officers conflicted with Appellant’s—further expressly noted Appellant had testified falsely under oath during the in camera hearing when asked about his arrest history. (Tr. p. 245; p. 253). Upon considering all those circumstances, the trial judge found Appellant freely, knowingly, voluntarily, and intelligently made his statement. (Tr. p. 245). As a result, the trial judge ruled that statement could be admitted into evidence during trial. (Tr. p. 245).

Thereafter, the trial proceeded forward, and several of the officers involved in the investigation offered testimony about the circumstances surrounding Appellant’s confession. (Tr. pp. 556-568; pp. 578-592; pp. 595-718; pp. 745-771). Through their testimony, the officers confirmed for the jury Appellant voluntarily came to the police department for an interview, Appellant was advised of his rights prior to being questioned, Appellant never invoked his right to counsel, questioning would have ceased if he had done so at any point, and Appellant freely and voluntarily provided both a verbal and written confession without being subjected to threats or promises during an interview that lasted less than two hours. (Tr. pp. 559-560; pp. 581-583; p. 592; pp. 640-641; pp. 646-652; pp. 657-669; p. 703; p. 705; p. 753; pp. 759-760). Along with that testimony, both the signed waiver form and Appellant’s written confession were admitted into evidence over defense counsel’s renewed objection. (Tr. p. 642).

Analysis

When a crime is committed, law enforcement questioning of a suspect is a critical component of the investigatory process, and admissions from a guilty party are “essential to

society's compelling interest in finding, convicting, and punishing those who violate the law.” Moran v. Burbine, 475 U.S. 412, 426 (1986); see McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (“[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good.”). Importantly though, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a suspect] unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” Miranda v. Arizona, 384 U.S. 436, 444 (1966). Therefore, prior to custodial interrogation, the suspect must be warned he has a right to remain silent, any of his statements may be used against him, he has a right to an attorney, and an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one. Id. at 479.

Once a suspect has been warned of his constitutional rights and given an opportunity to exercise them, the suspect may knowingly and intelligently waive his rights and make a statement. Id.; see North Carolina v. Butler, 441 U.S. 369, 375-376 (1979) (instructing a suspect may waive his constitutional rights expressly or implicitly before making a knowing and voluntary statement to the authorities). Contrastingly, the suspect may choose to invoke any of his rights, including his right to counsel, and not make a statement. See Miranda, 384 U.S. at 473-474 (recognizing a suspect can invoke his rights and not make a statement).

If a suspect chooses to invoke his right to counsel during custodial interrogation and does so in an unambiguous and unequivocal manner, interrogation must cease until counsel is made available to the suspect or the suspect personally initiates further conversations with law enforcement. Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). Meanwhile, if the suspect does *not* make an unambiguous and unequivocal invocation, custodial interrogation may continue unless and until the suspect actually invokes his rights in an unambiguous and

unequivocal manner. See Davis v. United States, 512 U.S. 452, 461 (1994) (“[A]fter a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.”); State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) (“[P]olice officers are not required to cease questioning a suspect unless her request for counsel is unambiguous.”).

Significantly, in the event a defendant chooses to make a statement after being advised of his constitutional rights, the burden is on the State to prove by a preponderance of the evidence the defendant knowingly, intelligently, and voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990); see Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (instructing the prosecution must establish the accused understood his rights in order for the accused’s waiver of those rights to be valid). In determining whether a valid waiver of rights occurred, the particular facts and circumstances surrounding the case must be examined, including the background, experience, and conduct of the accused. Butler, 441 U.S. at 374-375. Importantly, a valid waiver of rights can be established through proof of express written or oral statements or can be inferred from the actions and words of the person interrogated. Id. at 373; see Berghuis, 560 U.S. at 384 (“An ‘implicit waiver’ of the ‘right to remain silent’ is sufficient to admit a suspect’s statement into evidence.” (citation omitted)); State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) (“An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by Miranda.”).

However, even if a defendant validly waives his rights and makes a statement, a confession or statement by a defendant is nonetheless inadmissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). The reason for the prohibition against the use of an involuntary confession is that “coerced confessions” have been recognized

to be “inherently untrustworthy.” Dickerson v. United States, 530 U.S. 428, 433 (2000); see also Jackson v. Denno, 378 U.S. 368, 385-386 (1964) (“[T]he Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,’ and because of ‘the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.’ ” (citations omitted)).

Importantly, “[t]he process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury.” Breeze, 379 S.C. at 543, 665 S.E.2d at 250. Pursuant to the bifurcated process, the trial judge must first determine whether the State proved the statement was voluntarily made by a preponderance of the evidence, which is a standard that does *not* require proof to an absolute certainty or proof excluding all but one possible conclusion. Id.; see Black’s Law Dictionary 1301 (9th ed. 2009) (defining “preponderance of the evidence” as “[t]he greater weight of the evidence, not necessarily established by the greatest number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other”). Then, if the trial judge finds the State met its burden, the statement is submitted to the jury to allow for a determination as to whether the statement’s voluntariness was proven beyond a reasonable doubt. Breeze, 379 S.C. at 543, 665 S.E.2d at 250; see State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992) (“Once the

court determines that a defendant received and understood his rights, the court allows a confession into evidence. It then is for the jury ultimately to decide whether the confession was voluntary.”), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

When considering the voluntariness and admissibility of a defendant’s statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of the interrogation, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused and whether the accused was a juvenile; (2) the educational level and intelligence of the accused; (3) the accused’s knowledge of his constitutional rights; (4) the length of the accused’s detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

Significantly though, “no one factor is determinative,” and “each case requires careful scrutiny of all the surrounding circumstances.” State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007). In the end, the “ultimate test” of voluntariness involves determining whether the confession was “the product of an essentially free and unconstrained choice by its maker” or was the product of an overborne will and critically-impaired capacity for self-determination.

Schneckloth, 412 U.S. at 225-226; see State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (“The question is whether the defendant’s will was overborne when he confessed.”); see also Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir. 1986) (“We emphasize that the test for voluntariness is not a but-for test: we do not ask whether the confession would have been made

in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all.”).

In the case at bar, the trial judge was presented during trial with evidence and testimony establishing Appellant was fully informed of his rights prior to being subjected to any questioning, personally confirmed he understood those rights, initialed and signed a waiver form, and confirmed he wished to waive his rights and make a statement. Likewise, evidence and testimony was presented establishing Appellant, who had some prior experience with law enforcement, appeared to understand his rights along with the questions he was asked. From that evidence and testimony, the trial judge found through his ultimate voluntariness determination Appellant understood and knowingly waived his rights, and his finding in that regard was fully supported by the record. See Berghuis, 560 U.S. at 388-389 (“[A] suspect who has received and understood Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police.”); see also Oregon v. Elstad, 470 U.S. 298, 307 (1985) (explaining statements made after a Miranda violation are presumed to be compelled)

In addition to that, the trial judge was presented with evidence and testimony establishing Appellant made incriminating admissions to the officers after confirming he understood his rights and agreeing to speak with them, and both a waiver form and handwritten statement signed by Appellant were introduced to support the voluntariness of Appellant’s decision to make a statement.¹⁵ See Berkemer v. McCarty, 468 U.S. 420, 433, n. 20 (1984) (“[C]ases in which a

¹⁵ Although the signed waiver form and handwritten statement were introduced to demonstrate the voluntariness of Appellant’s confession, Appellant—in seeking reversal on appeal—appears to heavily fault the officers for not *also* electronically recording the interview. (App. Br. pp. 11-12; pp. 14-15). Importantly though, officers are *not* required to electronically record a confession in order for that confession to later be found to have been knowingly and voluntarily

defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.”). Similarly, the evidence and testimony presented established Appellant—an adult with both prior experience with the criminal justice system and some college education—was subjected to less than two hours of questioning in total, was not deprived of anything prior to confessing, was not subjected to any threats or promises, and was interviewed at a routine location for a law enforcement interview. Cf. Berghuis, 560 U.S. at 387 (finding no coercion where “[t]he interrogation was conducted in a standard-sized room in the middle of the afternoon” and rejecting the suggestion three hours of interrogation was “inherently coercive”). Furthermore, testimony and evidence was presented establishing Appellant confessed without ever invoking his rights, and his own self-serving testimony to the contrary was—just as the trial judge explicitly recognized—greatly undermined by the fact Appellant admittedly lied under oath during the same hearing in which he presented his claim of having repeatedly invoked his right to counsel in vain. See State v. Suber, 82 S.C. 159, ___, 63 S.E. 684, 685 (1909) (explaining the existence of contradictory statements by a witness can constitute important evidence tending to discredit the witness’s testimony); see also State v. Pittman, 137 S.C. 75, ___, 134 S.E. 514, 526-527 (1926) (noting the existence of the maxim “falsus in uno, falsus in omnibus”); cf. State v. Middleton, 295 S.C. 318, 322, 368 S.E.2d 457, 459 (1988) (“The trial judge properly submitted the conflicting evidence on the issue of voluntariness for the jury’s consideration.”); Breeze, 379 S.C. at 545, 665 S.E.2d at 251 (“Based upon Black’s testimony, we cannot conclude the trial court’s ruling is unsupported by any evidence.”). From those circumstances taken together, the trial judge could and did properly find Appellant’s incriminating admissions were

made. See, e.g., United States v. Yunis, 859 F.2d 953, 961 (D.C. Cir. 1988) (explaining “there is no constitutional requirement that confessions be recorded by any particular means”).

knowingly and voluntarily made, and that ruling indisputably had evidentiary support. See Colorado v. Connelly, 479 U.S. 157, 164 (1986) (explaining cases involving coerced and involuntary confessions have historically been based on the “crucial element of police overreaching” and have involved “a substantial element of coercive police conduct”).

Critically, because the trial judge’s voluntariness determination was supported by evidence and testimony appearing in the record, there are no proper grounds upon which that ruling could be overturned on appeal in light of the applicable—and highly deferential—standard of review. See Saltz, 346 S.C. at 136, 551 S.E.2d at 252 (“When reviewing a trial court’s ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court’s ruling is supported by *any* evidence.” (emphasis added)); see also State v. Smith, 259 S.C. 496, 500, 192 S.E.2d 870, 872 (1972) (explaining the question of the admissibility of a confession “was one of fact”). Accordingly, the trial judge’s ruling on the admissibility of Appellant’s confession must be upheld on appeal. See Reed, 332 S.C. at 43, 503 S.E.2d at 751 (“The trial judge’s determination of the voluntariness will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law.”); State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) (“Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.”). Appellant’s convictions should be affirmed.

III.

Any issue with the admission of the voice identification evidence was not properly preserved for appellate review because—instead of objecting—defense counsel acquiesced in the trial judge’s ruling on the matter, did not object to the evidence when it was presented to the jury, and then personally elicited cumulative testimony from the victim. Moreover, notwithstanding any issue preservation concerns, the trial judge properly allowed the voice identification evidence to be introduced because sufficient testimony was presented to demonstrate the victim was able to recognize Appellant’s voice after hearing her assailants’ voices during the incident.

Appellant contends on appeal the trial judge reversibly erred by permitting Victim to testify about an out-of-court identification she made after hearing Appellant’s voice. As support for that contention, Appellant maintains the identification evidence should not have been admitted because the “identification procedure” used was purportedly unnecessarily suggestive and conducive to irreparable misidentification in light of the fact Victim recognized Appellant’s voice as the voice of one her assailants at Appellant’s bond hearing. Initially, Appellant’s current challenge to the voice identification evidence was not properly preserved for appellate review because defense counsel acquiesced in the trial judge’s ruling, did not end up objecting to the evidence, and elicited cumulative testimony on the matter. Moreover, even if the issue had been preserved, the trial judge did not abuse his broad discretion by allowing the introduction of the voice identification evidence because sufficient testimony was introduced to demonstrate Victim was familiar with her assailants’ voices and was able to recognize Appellant’s voice as the voice of one of her assailants when she heard Appellant speak at the bond hearing.¹⁶

Appellant’s convictions should be affirmed.

¹⁶ Beyond that, even assuming the trial judge somehow erred by permitting Victim to testify about how she recognized Appellant’s voice at the bond hearing as the voice of the skinnier of her assailants, any error related to the admission of that testimony was harmless beyond a reasonable doubt because the other evidence presented during trial, which included statistically-powerful DNA evidence linking Appellant to the incident and a handwritten-and-signed confession from Appellant himself, overwhelmingly linked Appellant to the charged crimes and

Relevant Facts

Throughout the frightening incident, both the fatter intruder and skinnier intruder spoke to each other in Victim's presence and also spoke to Victim directly. (Tr. p. 359; p. 361; pp. 364-365; pp. 366-368; p. 371; p. 373; pp. 375-376). Based on that, Victim was able to hear their voices multiple times, and she was able to distinguish between their voices because one's sounded older while the other's sounded younger.¹⁷ (Tr. p. 361; p. 437).

Later on, Appellant was arrested in connection to the incident, and he made an appearance at a bond hearing in an effort to obtain release on bond. (Tr. p. 407; p. 680). During that hearing, Victim, who was in attendance, heard Appellant speak, and, when she did, she recognized his voice as the voice of her skinnier assailant. (Tr. pp. 418-419; p. 437).

Subsequently, during trial, Victim recounted the details of the harrowing home invasion, robbery, and sexual assault, and she confirmed she both remembered the voice of the skinnier

established his guilt in a manner entirely independent from the voice identification evidence. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant's guilt); see also Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him[.]" (citations and internal quotations)); cf. State v. Hardin, 425 S.C. 1, 15, 819 S.E.2d 177, 184 (Ct. App. 2018) (finding the erroneous admission of out-of-court identification evidence was harmless beyond a reasonable doubt because "the State also presented substantial evidence independently establishing Hardin's participation in the T-Mobile armed robbery"). Under such circumstances, any error that possibly could have been committed in connection to the admission of the voice identification evidenced was harmless and could have had no impact on the outcome of Appellant's case. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."); cf. State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) ("Given the abundant evidence of Tench's guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt.").

¹⁷ Notably, Appellant was more than a decade younger than Craig. (Tr. p. 468; pp. 1128).

man who perpetrated those crimes and had heard it again at “bond court.” (Tr. p. 407).

Immediately in response to that testimony, defense counsel requested an in camera hearing, and the trial judge obliged that request. (Tr. pp. 407-408).

Once the jury was out of the courtroom, defense counsel asserted he objected to Victim’s voice identification testimony on the grounds no procedure was done to see whether Appellant’s voice “sounded like this person versus another person.”¹⁸ (Tr. p. 408). In response to that assertion, the trial judge noted Rule 901 of the South Carolina Rules of Evidence specifically stated voice identification was a proper method of authentication and, thus, explained he believed Victim could identify Appellant’s voice after recognizing it during the bond hearing based on that rule. (Tr. pp. 408-409). The trial judge then asked defense counsel if he disagreed with his interpretation, and defense counsel responded: “I think that’s exactly what that rule says, Judge.” (Tr. p. 410).

Following that, the prosecutor indicated she intended to next ask Victim if she could identify anyone in the courtroom connected to the voice she had heard, and defense counsel asserted he did not believe a foundation for such a question had yet been established in light of the testimony Victim had presented up to that point. (Tr. p. 410). In response, the trial judge explained: “Well, [Victim] can testify to that, if she, in fact, heard it in the courtroom. And if she heard it in the courtroom, can you identify the person that that voice came from? And then she can identify your client.” (Tr. p. 410). Upon hearing that explanation, defense counsel remarked: “That would be accurate, Your Honor, if she says that.” (Tr. p. 410).

¹⁸ Defense counsel also alleged the testimony put Appellant’s character into issue by indicating he had been arrested, but, in raising that allegation, defense counsel conceded the fact Appellant had been arrested was already known. (Tr. p. 408).

Thereafter, the jury returned to the courtroom, and Victim resumed her testimony. (Tr. p. 418). As her testimony continued, Victim explained the skinnier assailant's voice was distinct from the fatter assailant's voice, she heard the skinner man's voice at a bond hearing, she saw who was speaking when she heard that voice, and—*without* objection—she positively identified Appellant in the courtroom as the speaker. (Tr. pp. 418-419). Furthermore, Victim confirmed she was certain of her identification and believed there was “no question” Appellant's voice was the voice of her skinnier assailant. (Tr. p. 419). Defense counsel then questioned Victim on cross-examination, and, in doing so, he personally elicited cumulative testimony from her about her identification of Appellant by voice.¹⁹ (Tr. pp. 420-421; p. 437). After that, the prosecutor elicited additional testimony on the matter from Victim, and Victim—again without objection—confirmed Appellant's voice matched the voice of the skinnier intruder. (Tr. pp. 456-457).

Analysis

A. Absence of Proper 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). Amongst the requirements for preserving an issue for appeal in our state, the most basic and fundamental one is an issue must be raised to and ruled upon by a trial judge before it can properly be presented for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Significantly, unless an error is both presented to and ruled upon by the trial judge,

¹⁹ Significantly, by eliciting testimony from Victim on cross-examination concerning her out-of-court identification of Appellant, defense counsel rendered the testimony elicited by the State on that subject wholly cumulative. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”); cf. State v. Pickrell, 435 S.C. 417, ___, 867 S.E.2d 465, 481 (Ct. App. 2021) (finding any error in the admission of testimony challenged on direct examination was harmless in part based on the fact it was cumulative to evidence elicited by defense counsel on cross-examination).

it cannot be raised to the appellate court to be ruled upon for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

Similarly, even if a party properly raises an objection during trial, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O’Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Amongst the ways a party can do so, a party can waive an objection by eliciting similar testimony to testimony to which the party previously raised an objection or by acquiescing in the trial judge’s ruling on the objection. See State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (instructing an appellant cannot complain on appeal about a particular ruling if the appellant acquiesces to that ruling during trial); O’Neal, 210 S.C. at 312, 42 S.E.2d at 526 (“An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector.”).

In the present case, defense counsel asked the trial judge to conduct a hearing outside the presence of the jury after Victim indicated she heard the voice of the skinnier of her two assailants at “bond court.” During the course of that hearing, defense counsel initially appeared to begin to object to the admission of any voice identification evidence based on the fact no procedure was employed to compare different voices. Critically though, the trial judge responded to defense counsel’s remarks by explaining why he believed evidence of a voice identification could properly be admitted during Appellant’s trial, and, after hearing that explanation, defense counsel indicated to the trial judge he believed what the trial judge had said was correct. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing a matter conceded in the circuit court cannot subsequently be argued on appeal). Following that, defense counsel did *not* raise any objections when Victim testified before the

jury on both direct and redirect examination about her recognition of Appellant's voice as the voice of one of her assailants, and, instead of doing so, defense counsel personally elicited cumulative testimony from Victim on the exact same subject on cross-examination. See State v. Washington, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1993) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel."); O'Neal, 210 S.C. at 312, 42 S.E.2d at 526 (explaining a party waives an objection to evidence by eliciting the same or similar evidence); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.").

Accordingly, because defense counsel acquiesced in the trial judge's ruling, did not object to Victim's testimony about her recognition of Appellant's voice, and personally elicited cumulative testimony from Victim, Appellant's current appellate challenge to the voice identification evidence's introduction was not properly preserved for appellate review and cannot now appropriately be considered or addressed on appeal. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to a ruling on an issue during trial and then complain of an error with the issue on appeal); cf. Mitchell, 330 S.C. at 195, 498 S.E.2d at 645 ("The trial judge ruled [Mitchell] could ask Erway if she had pending charges, but could not 'go into those specific charges.' [Mitchell]'s counsel's response was, 'Right.' Because counsel acquiesced in the judge's limitation of his cross-examination, and made no other objections regarding wanting the criminal files, [Mitchell] cannot now complain about this issue."). Appellant's convictions should be affirmed.²⁰

²⁰ Furthermore, to the extent Appellant maintains—for the first time on appeal—a "full vetting" was necessary before the voice identification evidence could be admitted, no such argument was presented to the trial judge, and, therefore, such an argument cannot now properly be raised or

B. Admissibility of the Voice Identification Evidence

In South Carolina, a witness's testimony identifying a person via familiarity with the person's voice has long been permitted as legitimate and competent evidence for the purpose of establishing identity. State v. Plyler, 275 S.C. 291, 294, 270 S.E.2d 126, 127-128 (1980); see State v. Porter, 251 S.C. 393, 398, 162 S.E.2d 843, 846 (1968) ("It is a matter of common knowledge that a person may be recognized and identified by his voice."). Importantly, expertise or special training is *not* needed for such testimony to be admissible. State v. Smith, 307 S.C. 376, 386, 415 S.E.2d 409, 415 (1992). Instead, voice identification testimony is ordinarily admissible so long as sufficient evidence is presented to demonstrate the witness's recognition of the person's voice. Plyler, 275 S.C. at 294-294, 270 S.E.2d at 128.

Notably, in State v. Stewart, 275 S.C. 447, 451, 272 S.E.2d 628, 630 (1980), our Supreme Court addressed an issue involving the admission of voice identification evidence. In that case, a masked man committed a robbery of a restaurant with several employees present. Id. at 449, S.E.2d at 629. Roughly two weeks later, Stewart was identified as the perpetrator of the crime from a physical line-up by one of the employees. Id. Later on, during a court proceeding that took place approximately six months after the robbery, Stewart spoke in the presence of the witnesses to the robbery. Id. at 451, 272 S.E.2d at 630. When he did, the witnesses "unequivocal[ly]" recognized his voice and identified him as the robber. Id. Subsequently, during Stewart's trial, the witnesses testified about identifying Stewart as the robber by his voice with certainty based on their opportunity to hear the robber's voice during the crime. Id. On

considered on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because Vang did not ask the trial judge during trial to take the action Vang contended on appeal should have been taken).

appeal, Stewart challenged the admission of that testimony, but the Supreme Court affirmed. Id. In doing so, the Supreme Court concluded the trial judge properly admitted that testimony because the totality of the circumstances—including the witnesses’ explanations regarding the certainty of their identification after hearing Stewart’s voice during the prior court proceeding—demonstrated the reliability of the evidence.

Similar to what occurred in Stewart, Victim was able to hear her assailants’ voices multiple times during the frightening incident and, thus, had a basis upon which she would be able to recognize their voices if she heard them again. See State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-542 (Ct. App. 1999) (“A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby.”). Likewise, just as in Stewart, Victim heard Appellant’s voice during a subsequent court proceeding and recognized it with certainty as the voice of one of her assailants. Critically, nothing suggested Victim’s presence at Appellant’s bond hearing was arranged by law enforcement for the purpose of her making an identification, and, instead, Victim—like in Stewart—appears to have made the identification by chance. See Perry v. New Hampshire, 565 U.S. 228, 232, n. 1 (2012) (“[W]hat triggers due process concerns is *police use* of an unnecessarily suggestive identification procedure[.]” (emphasis added)); see also State v. Tisdale, 338 S.C. 607, 612-613, 527 S.E.2d 389, 392 (2000) (explaining the typical reliability analysis to be conducted when determining the admissibility of identification evidence is not applicable to identifications made without any law enforcement involvement). Moreover, since both Victim and Appellant had a constitutionally-protected right to be present at the bond hearing, there was nothing *unnecessary* about Victim’s opportunity to hear and recognize Appellant’s voice at that proceeding. See S.C. Const. art. I, § 15 (“All persons shall be, before conviction, bailable by sufficient sureties, but bail may be

denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.”); S.C. Const. art. I, § 24 (setting out the rights of crime victims in South Carolina, which include a right to “be reasonably informed of and be allowed to submit either a written or oral statement at all hearings affecting bond or bail” and to “be heard at any proceeding involving a post-arrest release decision, a plea, or sentencing”); see also State v. Wyatt, 421 S.C. 306, 315, 806 S.E.2d 708, 712 (2017) (recognizing necessity is part of the analysis for determining the admissibility of evidence procured from an out-of-court identification procedure); cf. Norris v. State, 356 N.E.2d 204, 206 (Ind. 1976) (“[S]ince newspapers are free to print what they feel is appropriate, it is difficult to imagine how this type of witness-accused contact can be avoided, and no legitimate purpose would be served by subjecting the witness’ subsequent in-court identification testimony to possible exclusion.”).

Since evidence was presented establishing Victim had a basis upon which to become familiar with her assailants’ voices during the terrifying incident that occurred prior to her hearing Appellant’s voice at the bond hearing and Victim was certain of her identification upon again hearing her assailant’s voice, there was a sufficient foundation upon which Victim could recognize and reliably identify Appellant’s voice as the voice of one of her assailants. See State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) (“Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable.”); cf. Porter, 251 S.C. at 398-399, 162 S.E.2d at 846 (“Upon the basis of a comparison of the

telephone voice with that of defendant, the witness positively identified the defendant as the one with whom he had been talking and placing bets over the telephone. We think that the basis for comparison of the telephone voice with that of defendant was sufficient to sustain the competency of the testimony.”). Under such circumstances, the trial judge—just like the trial judge in Stewart—properly permitted Victim to identify her assailant during trial and did not abuse his discretion by allowing the introduction of the voice identification evidence. See Smith, 307 S.C. at 386, 415 S.E.2d at 415 (“For some time, a witness’ testimony of identification of a person by having heard his voice has been regarded as legitimate and competent evidence to establish identity in criminal cases.”); see also Perry, 565 U.S. at 245 (“[T]he jury, not the judge, traditionally determines the reliability of evidence.”). Appellant’s convictions should be affirmed.

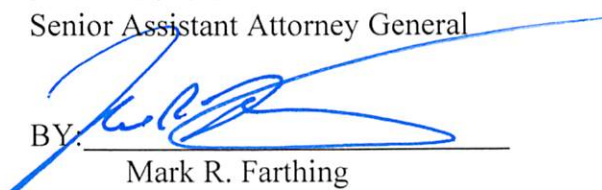
CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

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BY: 

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ATTORNEYS FOR RESPONDENT

March 9, 2022

RECEIVED

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2021-000457

THE STATE,

Respondent,

vs.

CHRISTOPHER P. COOPER,

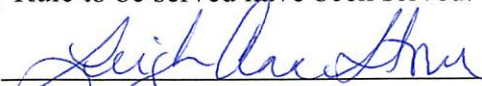
Appellant.

PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Elizabeth Franklin-Best, Esquire
S.C. Appellate Law Group, LLC
2725 Devine Street
Columbia, South Carolina 29205

I further certify all parties required by Rule to be served have been served.
This 9th day of March, 2022.


LEIGH ANN STONE
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Leigh Ann Stone

From: Leigh Ann Stone
Sent: Wednesday, March 9, 2022 4:28 PM
To: 'elizabeth@franklinbestlaw.com'
Cc: Mark Farthing; William Blitch
Subject: The State v. Christopher P. Cooper (2021-000457)
Attachments: Cooper.IBOR (02920347xD2C78).PDF

Good Afternoon Ms. Franklin-Best,

Attached please find a copy of the Initial Brief of Respondent in The State v. Christopher P. Cooper (2021-000457). This brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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