

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate Case No. 2011-198246

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KRISTOPHER WILMONT BERRY,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	18

AUTHORITIES CITED

Cases

Atl. Coast Builders etc., LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) 11, 16

F'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 14, 16

Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951) 15

State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999) 9

State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) 15

State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) 16-17

State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008) 9

State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) 9

State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979) 9

State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010) 11, 17

State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002) 8

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) 10

State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999) 10

State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) 8

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) 14

State v. Jones, 392 S.C. 647, 709 S.E.2d 696 (Ct. App. 2011) 15

State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) 8

State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1992) 10

State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) 9

State v. Logan, 279 S.C. 345, 306 S.E.2d 622 (1983) 15

<u>State v. Major</u> , 301 S.C. 181, 391 S.E.2d 235 (1990)	9
<u>State v. McLaughlin</u> , 307 S.C. 19, 413 S.E.2d 819 (1992)	15
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997)	14, 15
<u>State v. Pickens</u> , 320 S.C. 528, 466 S.E.2d 364 (1996)	16
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000)	17
<u>State v. Reeves</u> , 301 S.C. 191, 391 S.E.2d 241 (1990)	11, 16
<u>State v. Rogers</u> , 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004)	14
<u>State v. Stephens</u> , 398 S.C. 314, 728 S.E.2d 68 (Ct. App. 2012)	8
<u>State v. Stroman</u> , 281 S.C. 508, 316 S.E.2d 395 (1984)	9
<u>State v. Taylor</u> , 333 S.C. 159, 508 S.E.2d 870 (1998)	9
<u>State v. Tucker</u> , 319 S.C. 425, 462 S.E.2d 263 (1995)	14
<u>State v. Tyndall</u> , 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999)	15

STATEMENT OF ISSUES ON APPEAL

- I. **The trial judge properly admitted a photograph of Appellant where the photograph was highly probative on the issue of credibility because it rebutted an assertion made by Appellant and where the photograph was not unduly prejudicial.**

- II. **Appellant's arguments raised for the first time on appeal regarding admission of Appellant's military offenses as impeachment evidence are not preserved for review where Appellant never made these arguments below and never objected to admission of the impeachment evidence.**

STATEMENT OF THE CASE

Appellant was indicted in Darlington County in September 2010 for lewd act upon a minor and criminal solicitation of a minor. On July 18-19, 2011, he proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Appellant not guilty of lewd act upon a minor but guilty of criminal solicitation of a minor. Judge Baxley sentenced Appellant to ten years, suspended to five years of active time and five years of probation. A timely notice of appeal was served and filed.

ARGUMENT

Background

Appellant, who was the fourteen-year-old victim's gymnastics coach, purchased a prepaid cell phone for the victim so that he and the victim could send private text messages to one another. (R. p. 64-65). Appellant told the victim that he and his wife had an "open relationship" and at one point sent a text message stating that he wanted to get the victim "out of her panties." (R. p. 73, lines 23-25; p. 248, lines 13-23). There were also several text messages from Appellant regarding setting up a time and location for a sexual encounter with the victim and asking if they could "take pics when we play." (See R. p. 73-74). Appellant also texted that he would try to get the victim alone at the gym that week so that he could kiss her, and he warned her that his hands would "wander" when they kissed. (See R. p. 75-76; p. 110; p. 118). In one text message, Appellant stated, "I can see us having sex, but the kiss should be interesting." (R. p. 75, lines 20-24; p. 414).

Appellant also gave the victim a digital camera and instructed her to take naked pictures of herself and provide them to him. (See R. p. 64-65; p. 71-72; see also p. 114, lines 18-24; p. 116-17). At one point, Appellant texted the victim the following: "Do I get my camera full of good pics tomorrow?" (R. p. 130, lines 21-23). Appellant assured the victim that no one would see the pictures except him. (R. p. 71-72). When Appellant learned that the victim's father had found the prepaid phone containing the incriminating material and requests for pictures, Appellant told the victim to go along with his cover story that he was requesting pictures of the victim's ex-boyfriend so that he would be

able to identify him if he came to the gym looking for the victim. (See R. p. 67-68).

Appellant was convicted of criminal solicitation of a minor.¹

- I. **The trial judge properly admitted a photograph of Appellant where the photograph was highly probative on the issue of credibility because it rebutted an assertion made by Appellant and where the photograph was not unduly prejudicial.**

Relevant Facts

During the testimony of Bart Cave, an employee of SLED's computer crime center, the solicitor attempted to introduce State's Exhibit # 259, a cell phone collected from Appellant. (R. p. 146-47; see also p. 163-64). When the judge asked if there was an objection from the defense, Appellant, who was seated at the defense table, declared "[t]hat's not my phone." (R. p. 147, line 8). Appellant said this loudly and emphatically, so that both the judge and the jury could hear him. (See R. p. 267, lines 14-22). Appellant's counsel then stated that the defense did object to the introduction of the cell phone since "this is not the defendant's cell phone." (R. p. 147, lines 12-13). The phone was later admitted without objection as State's Exhibit # 259 during the testimony of Sergeant Young, who testified that he collected the phone from Appellant after Appellant's interview with police. (R. p. 163-64).

During his testimony before the jury, Appellant admitted sending "inappropriate" text messages to the victim but claimed they were just jokes. (See R. p. 205-209). However, Appellant continued to deny that State's Exhibit # 259 was his cell phone. (See R. p. 262-63). He testified that "[t]his does not look like my phone" and twice stated that he did not believe it was his phone. (R. p. 263, lines 3-6). He denied that he

¹ Appellant was also charged with lewd act upon a minor for allegedly kissing the victim, but the jury found Appellant not guilty of that offense. (See R. p. 68-70; p. 289; see also p. 294, lines 11-19).

deleted the incriminating text messages off his phone. (R. p. 263, lines 22-24). Notably, Appellant also told the jury "I never lie." (App. p. 261, lines 24-25).

Following Appellant's testimony, the State sought to re-call Bart Cave to testify that he recovered a photograph of Appellant from the cell phone in question. (See R. p. 264-67). The photograph depicted Appellant, without clothes on but covering his private area with his hand, holding the cell phone up in front of him to take a picture of himself in the mirror. (See State's Exhibit # 264; see R. p. 265, lines 15-21). Appellant's counsel asserted that the photograph was not pertinent to the main issues and pointed out that Appellant admitted he sent the text messages to the victim. (R. p. 266, lines 3-12). Counsel also argued that the photograph was unduly and unfairly prejudicial to Appellant. (R. p. 266, lines 14-16).

The trial judge first noted that when the cell phone was marked for identification, Appellant, while he was seated at the defense table, loudly denied that it was his phone. (R. p. 267, lines 14-22). Then, when Appellant was on the witness stand, he "left a clear impression with the court that the phone may not be his." (R. p. 268, lines 2-6). The judge explained that, since Appellant continued to deny ownership of the phone, the fact that a photograph of Appellant was found on the phone became "directly relevant and probative" on the issue of Appellant's credibility and believability. (R. p. 268, lines 7-13). The judge then stated that the remaining issue was whether or not the photograph was admissible under Rule 403, SCRE. (R. p. 268, lines 13-18).

In response, Appellant's counsel stated that the defense would stipulate that "the SLED agent testified that he pulled a picture of this defendant off of the phone." (R. p. 268, lines 20-22). He argued that introduction of a naked picture of Appellant is "too prejudicial" and that the State could "get what they want" via the stipulation without

showing the jury “that prejudicial photograph.” (R. p. 269, lines 15-18). The solicitor then stated that he would agree to crop the picture so as to reduce the prejudicial impact. (R. p. 269-70). However, the judge declined the solicitor’s offer because cropping the picture might suggest to the jury that “some worse activity is occurring” in the missing part of the photograph. (R. p. 270, lines 4-9).

The judge ruled that he would admit the photograph over Appellant’s objection since he felt it was the fair and appropriate thing to do inasmuch as Appellant took a position on the witness stand and there was “proof to the contrary of that position.” (R. p. 270-71). In his order denying Appellant’s post-trial motions, the judge explained that “[d]efense counsel’s offer to stipulate that the phone belonged to Defendant came too late,” and that he would not require the State to accept an offer of stipulation on a fact in controversy. (See R. p. 352). The judge further explained that the “[d]efendant himself placed this issue directly in controversy, and the photograph was the best evidence available on this issue.” (See R. p. 352). The judge concluded that, although the photograph was prejudicial to Appellant to some extent, “its probative value is much greater than its prejudice.” (See R. p. 352).

When the State offered the photograph into evidence as State’s Exhibit # 264, Appellant objected, stating before the jury that the photograph was “unfairly prejudicial” and that “there is no real issue about where the text message came from.” (R. p. 275, lines 1-4). Appellant’s counsel further stated that the defense would stipulate to the text messages but the photograph “is prejudicial to this jury.” (R. p. 275, lines 8-11). In response, the judge stated that since defense counsel “made a speech to the jury” in his objection, the court would clarify “what the issues are, and where we find ourselves.” (R. p. 275, lines 12-15). The judge then gave the following limiting instruction to the jury:

First of all, there was or apparently there is a dispute or a discrepancy about the ownership of the phone. You have been listening to the testimony here in the courtroom. And this is for you to decide. It came up during the prior testimony in the defense case, and thus the State has called a rebuttal witness on that issue. I will tell you ladies and gentlemen, that the photograph which I am going to admit over the objection of the defense is not to be considered by you as to whether or not the defendant committed the crimes for which he is charged here. It is not for that purpose. It is being admitted for the purpose of determining credibility and believability of the witness, if you believe that is important. It is up to you to give weight to any evidence. You give it the weight that you deem it is entitled to. That is the purpose for which the State puts it in. And I tell you that you should use it only for that purpose. It is the same thing that the evidence came in about the military record of the defendant. It is not for the purpose of showing whether or not he may have committed the crime for which he is charged today. But whether he is credible and believable as a witness when he took the witness stand. (R. p. 275, line 16 – p. 276, line 13).²

Later, during the jury charge, the trial judge instructed the jury that, although the defendant in this case did decide to take the witness stand, he was not required to prove his explanations “or anything else for that matter,” since the burden of proving the defendant’s guilt beyond a reasonable doubt remained upon the State at all times. (See R. p. 285, lines 3-17). After several hours of deliberation, the jury found Appellant guilty of criminal solicitation but not guilty of lewd act. (See R. p. 286-89).

² During closing argument, Appellant’s counsel elaborated on this:

I am sure you saw how [animated] I got yesterday about this photograph that has come into evidence of the defendant. Well, you know, Judge Baxley explained to you the purpose for that photograph was evidence that was brought in because the defendant denied or said, I don’t know if this is my phone or not. So that played really good into the hands of the prosecution. Because then the principle of law that comes in, well if he is denying that that is his phone, then we can pull out a not so appealing picture of him off of the SD-card that came out of the phone, and that is a picture of his standing up there in a mirror alone showing – revealing his abs to himself. That came off of his phone. There is no allegations anywhere that anybody else had any access to that phone so they could view those pictures. It came off of his phone. And I want to make sure that you understand that that picture didn’t come off of that camera phone, or off of a phone that the child had. But see that picture is supposed to be used only for the purposes of saying that it is really his phone and he denied it. . . . So the point that I am trying to make is, when you see that picture, that picture has nothing to do with guilt or innocence. (R. p. 283, line 11 – p. 284, line 15).

Discussion

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). Recently, in State v. Stephens, this Court stated as follows:

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. 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. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.")

State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) (citation omitted); see also State v. Grace, 350 S.C. 19, 28, 564 S.E.2d 331, 335 (Ct. App. 2002) ("A trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances.") (citation omitted).

In this case, there is no basis for overturning the trial judge's Rule 403 analysis regarding the admission of the photograph, since the photograph was highly probative on the issue of credibility and since the photograph was not unduly prejudicial. As the judge explained, the photograph found on the cell phone was the best evidence available on the issue of phone ownership, an issue that became relevant to credibility and believability

when Appellant himself emphatically denied that the phone was his. See State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004) (given defendant's denials regarding a particular issue, the State was properly allowed to make further inquiries because they were relevant to the defendant's credibility); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially."); State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008) (a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination, and he cannot complain of prejudice from evidence to which he opened the door); see also State v. Doby, 273 S.C. 704, 710, 258 S.E.2d 896, 900 (1979); State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999); State v. Taylor, 333 S.C. 159, 174-75, 508 S.E.2d 870, 877-78 (1998).

Indeed, the photograph was particularly probative considering that it actually shows *Appellant holding the cell phone* while taking the picture and considering that the cell phone was in evidence for the jury's comparison. (See R. p. 164-65). Further, although Appellant is not wearing clothes in the photograph, his private area is covered, and neither his facial expression nor his overall appearance conveys an impression of "sexual deviancy." Compare State v. Lee, 399 S.C. 521, 530-31, 732 S.E.2d 225, 229-30 (Ct. App. 2012) (photographs portraying nude adults in sexually suggestive positions were unduly prejudicial where one of the photographs showed the defendant's genitalia "in full view" and where the photographs' primary purpose was to raise the emotions of the jury and to establish that the defendant had a sexually deviant disposition). Further,

contrary to Appellant's suggestions, the trial judge was not required to allow defense counsel to attempt to remedy Appellant's apparent duplicity by stipulation, nor was the judge required to have the photograph cropped particularly where he believed that cropping the photograph might suggest something worse that would be more prejudicial to Appellant. Importantly, the judge, while acknowledging that there was some prejudice to Appellant from the nature of the photograph, found that the probative value – which stemmed from the fact that the photograph showed Appellant holding and using the phone he denied was his at trial - was “much greater” than the potential prejudice. See State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) (“Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.”) (citation omitted). The judge also gave a thorough cautionary instruction to ensure that the jurors considered the photograph properly. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow the law as instructed to them). In light of the legitimate probative force of the photograph on the issue of credibility, and considering the highly deferential standard that must be applied when an appellate court reviews a Rule 403 determination, this Court should affirm admission of the photograph.

In any event, even assuming the photograph should not have been admitted, its admission does not warrant a new trial in this case. Even if a photograph is wrongly admitted by a trial judge, its admission may constitute harmless error if the photograph does not affect the outcome of trial. See State v. Langley, 334 S.C. 643, 647-48, 515 S.E.2d 98, 100 (1992). Here, admission of the photograph could not reasonably have affected the outcome of Appellant's trial. First, the jury was thoroughly instructed that

the photograph was only to be considered on the issue of credibility. (See R. p. 275, line 16 – p. 276, line 13). Second, there was overwhelming evidence of Appellant’s guilt on the charge of criminal solicitation of a minor. (See R. p. 13-24; p. 62-76; p. 105-130; p. 141-42; p. 147-52; p. 161-67; State’s Exhibits # 3-4 and # 6-254; see also p. 297, lines 2-3). See State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant’s guilt). Appellant’s story that his text messages were just “jokes” was totally implausible. (See State’s Exhibits # 3-4 and # 6-254; see R. p. 187-264). Significantly, it is clear that the jurors were not improperly “lured” to convict based upon admission of the photograph because they found Appellant not guilty of the more serious lewd act offense. (See Brief of Appellant, p. 16). For these reasons, there was no reversible error with respect to admission of the photograph. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial).

II. Appellant’s arguments raised for the first time on appeal regarding admission of Appellant’s military offenses as impeachment evidence are not preserved for review where Appellant never made these arguments below and never objected to admission of the impeachment evidence.

Appellant now argues that evidence regarding his military offenses was not admissible to impeach him under Rule 609(a)(2) because his actions were not prosecuted criminally; because his offenses did not constitute “convictions” under Rule 609; and because the trial judge failed to conduct any Rule 404(b) analysis. However, Appellant’s arguments are clearly unpreserved for appellate review. See Atl. Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (the appellate court should follow longstanding precedent and resolve an issue on preservation grounds when it is clearly unpreserved).

Overview of Relevant Facts

Just before Appellant's trial testimony, defense counsel asked to "cover a matter briefly" and subsequently stated the following:

Well, judge, there are some military records. And, in regard to the military records, there was a discharge that I think said less than honorable discharge. And what it related to was this, and whether or not these are crimes of dishonesty. (R. p. 181, lines 14-24).

Defense counsel then detailed each of Appellant's military offenses.³ (R. p. 182, lines 3-18). The first offense was described as "misappropriation" of a military computer. (R. p. 182, lines 3-9). The second offense was described as "falsifying documents," and, in reference to that offense, defense counsel stated that "there was a separation in lieu of court-martial, which may be some type of plea-bargaining process." (R. p. 182, lines 10-12). The third offense was described as "trespass[ing] on some private property." (R. p. 182, lines 14-18). Defense counsel then stated, "So, the only one they may have a shot at might be falsifying." (R. p. 182, lines 20-21).

The solicitor responded, arguing that Appellant's military offenses were highly probative on the issue of Appellant's "truth and veracity," and stated as follows:

These military convictions really, are what they are. It took place before a tribunal, where I am sure he had an attorney, a JAG attorney. He did this. He was convicted of this. He was found guilty of less than honorable things. I think – how can it not go to the truth and veracity of what he is saying. (R. p. 183, lines 12-16).

When the judge asked the solicitor to explain how the military offenses were admissible under Rule 609, the solicitor responded:

I was looking at Rule 608. If you want to talk strictly about Rule 609, I think it fits within the time limit. I think just generally it fits the exact rule. Subject to Rule 403, I don't see a problem with that.

³ Appellant's "military dossier" was entered into evidence as Court's Exhibit #2. (See R. p. 271, lines 11-15).

Rule 609(a)(2), that if he be convicted of a crime, shall be admitted if it involves dishonesty or false statement regardless of the punishment. (R. p. 183, line 24 – p. 184, line 15).

The trial judge then asked defense counsel to again review Appellant's charges, the first of which was "misappropriation of a computer." (R. p. 184, lines 16-18). Defense counsel responded that the second charge was "separation in lieu of a court-martial which was for falsifying government documents," and the third was "opening an unlocked storage building on private property at a mall. And there was no adjudication for that, although it may have been considered by the military as a basis for the less than honorable discharge. I don't think that the local Sheriff's Office charged him with anything." (R. p. 184, line 19 – p. 345, line 2).

The solicitor explained that "[b]asically, what he did was he broke into a building, had sex with someone who wasn't his wife. He was convicted of that. I read this as that was one of the things that they took into consideration when they gave him an other than honorable discharge. That is just how I read it. Now, that being said, Your Honor, I'm not an expert at reading these documents." (R. p. 185, lines 3-11).

The trial judge then ruled that "each of these specifications involve dishonesty" under Rule 609 and that he would permit them into evidence. (R. p. 185, lines 14-19). The judge further stated that the solicitor would be allowed to "ask about the separation and about those three specific issues, if the defendant wishes to testify. The Court finds that all of that complies with Rule 609(a)(2)." (R. p. 186, lines 5-9). Defense counsel did **not** object or make any argument regarding this ruling. (See R. p. 185-86). Subsequently, during Appellant's direct examination, Appellant raised the issue of his military offenses and discussed the specific instances of misconduct. (See R. p. 223-26). The solicitor also questioned Appellant regarding these matters. (See R. p. 229-30).

During this questioning, Appellant stated that the process related to his leaving the military was an “adjudication.” (R. p. 230, lines 16-24).

Discussion

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Here, although Appellant’s counsel requested a hearing to determine which offenses could be used to impeach Appellant, the only issue defense counsel raised was regarding whether or not the offenses were, as he put it, “crimes of dishonesty” – an issue not being raised on appeal. (See R. p. 181, lines 20-24; p. 182, lines 20-21). See, e.g., State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue different ground on appeal). Appellant never raised **any argument at all** to the trial judge regarding whether or not the military offenses constituted “convictions” under Rule 609(a)(2) and never asked the trial judge to make any rulings pursuant to Rule 404(b).⁴ Significantly, Appellant’s counsel did not

⁴ Appellant’s argument regarding Rule 404(b) is conclusory and should be deemed abandoned. See, e.g.,

object when the solicitor indicated that the offenses were “military convictions” and that Appellant was “convicted of this.” (See R. p. 183, lines 12-16). Counsel also did not object when the judge stated that he was admitting the impeachment evidence under Rule 609(a)(2). (R. p. 185-86). Notably, Appellant stated in his testimony before the jury that the process related to leaving the military was an “adjudication.” (R. p. 230, lines 16-24).

Appellant cannot now complain that the judge erred in finding that his military offenses constituted “convictions” under Rule 609(a)(2) when he never disputed this below. See, e.g., State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant cannot complain of an error which results from his own conduct, or to which his conduct has contributed); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded below cannot be argued on appeal); State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (no issue is preserved where the party accepts the judge’s ruling and does not contemporaneously make an additional objection); Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951) (an issue was not preserved even though the trial court explicitly approached the issue, because the appellant did not mention the issue in its directed verdict motion; the trial court’s discussion of the issue “does not have the effect of enlarging the grounds upon which said motion was made.”); see also State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (failure to request a more explicit ruling constitutes a waiver of any objection to a trial court’s general ruling regarding admissibility).

State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (“An issue is also deemed abandoned if the argument in the brief is merely conclusory.”) (citation omitted); State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 282-83 (Ct. App. 1999) (argument was deemed abandoned where a single conclusory statement in the appellant’s brief left un-argued the purported error being raised).

Further, since Appellant did not raise **any challenge** regarding the applicability of Rule 609(a)(2) or Rule 404(b) below, the trial judge never considered whether or not the military offenses qualified as “convictions” or whether a Rule 404(b) was applicable. See F’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. at 422, 526 S.E.2d at 725 (preservation requirements are meant to enable the lower court to rule properly after it considered *all relevant facts, law, and arguments*) (emphasis added); Atl. Coast Builders and Contractors, LLC v. Lewis, 398 S.C. at 329, 730 S.E.2d at 285 (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”) (citation omitted). In that vein, this Court would not be able to conduct a proper review because of the underdeveloped record and lack of clarity regarding the meaning and impact of the documents contained in Appellant’s military records. (See R. p. 300-351). Accordingly, since the issues Appellant now raises on appeal are not preserved for review, this Court should deny relief on error preservation grounds.

In any event, even assuming the trial judge erred in permitting Appellant to be impeached with his military offenses, the error would not warrant a new trial in this case. An error that could not reasonably have affected the result of the trial is harmless. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). Here, any error with respect to admission of Appellant’s military offenses was harmless. First, the military offenses were in no way similar to the offenses for which Appellant was on trial. Compare State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) (admission of prior convictions is highly prejudicial where the offenses are similar to the ones for

which the defendant is on trial). Second, there was overwhelming evidence of Appellant's guilt on the charge of criminal solicitation of a minor. (See R. p. 13-24; p. 62-76; p. 105-130; p. 141-42; p. 147-52; p. 161-67; State's Exhibits # 3-4 and # 6-254; see also p. 297, lines 2-3). See State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). Again, Appellant's story that his text messages were just "jokes" was totally implausible. (See State's Exhibits # 3-4 and # 6-254; see R. p. 347-424). Moreover, as mentioned previously, it is apparent that the jurors were not improperly "lured" to convict based upon Appellant's military offenses because they found Appellant not guilty of the more serious offense. For the above reasons, the State submits there was no reversible error with respect to admission of evidence of Appellant's military offenses.⁵

⁵ Notably, as the solicitor pointed out, evidence regarding Appellant's military offenses was likely admissible under Rule 608, SCRE. (See R. p. 184, line 9). See State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000) (under Rule 608(b), specific instances of a witness's misconduct may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



CHRISTINA J. CATOE

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 16, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 16 2013
SC Court of Appeals

Appeal from Darlington County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate Case No. 2011-198246

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KRISTOPHER WILMONT BERRY,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


CHRISTINA J. CATOE

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 16, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 16 2013
SC COURT OF APPEALS

Appeal from Darlington County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate Case No. 2011-198246

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

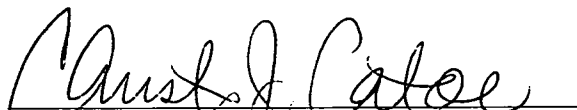
v.

KRISTOPHER WILMONT BERRY,

APPELLANT.

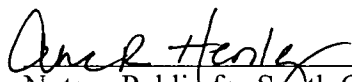
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **CARMEN V. GANJEHSANI**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **16th day of May, 2013**.


CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 16th day of May, 2013.


Notary Public for South Carolina.
My Commission Expires: 7/18/2017



RECEIVED
MAY 16 2013
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

May 16, 2013

VIA HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Kristopher Wilmont Berry
Appellate Case No. 2011-198246

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent**, along with **Certificate of Counsel** and **Proof of Service**, in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Christina J. Catoe
Assistant Attorney General
SC Bar No. 73562

cc: Carmen V. Ganjehsani, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

William B. Rogers, Jr., Solicitor, Fourth Judicial Circuit
Trisha Allen, Victim Services