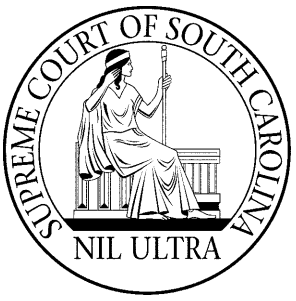


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 40**
**October 19, 2016**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

### PUBLISHED OPINIONS AND ORDERS



### UNPUBLISHED OPINIONS



### PETITIONS - UNITED STATES SUPREME COURT



### EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT



### PETITIONS FOR REHEARING

## The South Carolina Court of Appeals

### PUBLISHED OPINIONS



### UNPUBLISHED OPINIONS



### PETITIONS FOR REHEARING

| | |
|---|---|
| 5419-Arkay, LLC, v. City of Charleston | Pending |
| 5432-Daniel Dorn v. Paul Cohen | Pending |
| 5433-The Winthrop University Trustees v. Pickens Roofing | Pending |
| 5438-The Gates at Williams-Brice v. DDC Construction, Inc. | Pending |
| 5441-State v. David A. Land | Pending |
| 5443-State v. Steven Hoss Walters, Jr. | Pending |
| 5444-Rose Electric v. Cooler Erectors of Atlanta | Pendiing |
| 2016-UP-135-State v. Ernest M. Allen | Pending |
| 2016-UP-280-Juan Ramirez v. Progressive Northern | Pending |
| 2016-UP-348-Basil Akbar v. SCDC | Pending |
| 2016-UP-392-Joshua Cramer v. SCDC (2) | Pending |
| 2016-UP-402-Coves Darden v. Francisco Ibanez | Pending |
| 2016-UP-405-Edward A. Dalsing v. David Hudson | Pending |
| 2016-UP-406-State v. Darryl Wayne Moran | Pending |
| 2016-UP-408-Rebecca Jackson v. OSI Rest. Partners | Pending |
| 2016-UP-411-State v. Jimmy Turner | Pending |

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

| | |
|---|---|
| 5253-Sierra Club v. Chem-Nuclear | Pending |
| 5301-State v. Andrew T. Looper | Pending |
| 5326-Denise Wright v. PRG | Pending |
| 5328-Matthew McAlhaney v. Richard McElveen | Pending |
| 5329-State v. Stephen Douglas Berry | Pending |

| | |
|---|---|
| 5338-Bobby Lee Tucker v. John Doe | Pending |
| 5342-John Goodwin v. Landquest | Pending |
| 5344-Stoneledge v. IMK Development (Southern Concrete) | Pending |
| 5345-Jacklyn Donevant v. Town of Surfside Beach | Pending |
| 5346-State v. Lamont A. Samuel | Pending |
| 5355-State v. Lamar Sequan Brown | Pending |
| 5359-Bobby Joe Reeves v. State | Pending |
| 5360-Claude McAlhany v. Kenneth A. Carter | Pending |
| 5365-Thomas Lyons v. Fidelity National | Pending |
| 5366-David Gooldy v. The Storage Center | Pending |
| 5368-SCDOT v. David Powell | Pending |
| 5369-Boisha Wofford v. City of Spartanburg | Pending |
| 5371-Betty Fisher v. Bessie Huckabee | Pending |
| 5373-Robert S. Jones v. Builders Investment Group | Pending |
| 5374-David M. Repko v. County of Georgetown | Pending |
| 5375-Mark Kelley v. David Wren | Pending |
| 5378-Stephen Smalls v. State | Pending |
| 5382-State v. Marc A. Palmer | Pending |
| 5384-Mae Ruth Thompson v. Pruitt Corporation | Pending |
| 5387-Richard Wilson v. Laura B. Willis | Pending |
| 5388-Vivian Atkins v. James R. Wilson, Jr. | Pending |

| | |
|---|---|
| 5389-Fred Gatewood v. SCDC (2) | Pending |
| 5390-State v. Tyrone King | Pending |
| 5391-Paggy D. Conits v. Spiro E. Conits | Pending |
| 5392-State v. Johnie Allen Devore, Jr. | Pending |
| 5393-SC Ins. Reserve Fund v. East Richland | Pending |
| 5395-State v. Gerald Barrett, Jr. | Pending |
| 5398-Claude W. Graham v. Town of Latta | Pending |
| 5399-State v. Anthony Bailey | Pending |
| 5402-Palmetto Mortuary Transport v. Knight Systems | Pending |
| 5403-Virginia Marshall v. Kenneth Dodds | Pending |
| 5406-Charles Gary v. Hattie M. Askew | Pending |
| 5408-Martina R. Putnam v. The State | Pending |
| 5410-Protection and Advocacy v. Beverly Buscemi | Pending |
| 5411-John Doe v. City of Duncan | Pending |
| 5420-Darryl Frierson v. State | Pending |
| 5428-State v. Roy L. Jones | Pending |
| 5431-Lori Stoney v. Richard Stoney | Pending |
| 2015-UP-010-Latonya Footman v. Johnson Food Services | Pending |
| 2015-UP-091-U.S. Bank v. Kelley Burr | Pending |
| 2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v. Harley) | Pending |
| 2015-UP-262-State v. Erick Arroyo | Pending |

| | |
|---|---|
| 2015-UP-266-State v. Gary Eugene Lott | Pending |
| 2015-UP-303-Charleston County Assessor v. LMP Properties | Pending |
| 2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill | Pending |
| 2015-UP-311-State v. Marty Baggett | Pending |
| 2015-UP-330-Bigford Enterprises v. D. C. Development | Pending |
| 2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax | Pending |
| 2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners ( James, Harwick & Partners) | Pending |
| 2015-UP-378-State v. James Allen Johnson | Pending |
| 2015-UP-382-State v. Nathaniel B. Beeks | Pending |
| 2015-UP-388-Joann Wright v. William Enos | Pending |
| 2015-UP-403-Angela Parsons v. Jane Smith | Pending |
| 2015-UP-414-Christopher A. Wellborn v. City of Rock Hill | Pending |
| 2015-UP-466-State v. Harold Cartwright, III | Pending |
| 2015-UP-477-State v. William D. Bolt | Pending |
| 2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr. | Pending |
| 2015-UP-501-State v. Don-Survi Chisolm | Pending |
| 2015-UP-505-Charles Carter v. S.C. Dep't of Corr. (3) | Pending |
| 2015-UP-513-State v. Wayne A. Scott, Jr. | Pending |
| 2015-UP-524-State v. Gary R. Thompson | Pending |
| 2015-UP-547-Evalena Catoe v. The City of Columbia | Pending |

| | |
|---|---|
| 2015-UP-556-State v. Nathaniel Witherspoon | Pending |
| 2015-UP-557-State v. Andrew A. Clemmons | Pending |
| 2015-UP-564-State v. Tonya Mcalhaney | Pending |
| 2015-UP-568-State v. Damian D. Anderson | Pending |
| 2015-UP-574-State v. Brett D. Parker | Pending |
| 2016-UP-010-State v. James Clyde Dill, Jr. | Pending |
| 2016-UP-013-Ex parte State of South Carolina In re: Cathy J. Swicegood v. Polly A. Thompson | Pending |
| 2016-UP-015-Onrae Williams v. State | Pending |
| 2016-UP-021-State v. Darius Ranson-Williams | Pending |
| 2016-UP-023-Frankie Lee Bryant, III, v. State | Pending |
| 2016-UP-028-Arthur Washington v. Resort Services | Pending |
| 2016-UP-039-State v. Fritz Allen Timmons | Pending |
| 2016-UP-040-State v. Jonathan Xavier Miller | Pending |
| 2016-UP-052-Randall Green v. Wayne Bauerle | Pending |
| 2016-UP-054-Ex Parte: S.C. Coastal Conservation League v. Duke Energy | Pending |
| 2016-UP-055-State v. Ryan P. Deleston | Pending |
| 2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr. | Pending |
| 2016-UP-061-Charleston Harbor v. Paul Davis | Pending |
| 2016-UP-067-National Security Fire v. Rosemary Jenrette | Pending |
| 2016-UP-068-State v. Marcus Bailey | Pending |

| | |
|---|---|
| 2016-UP-069-John Frick v. Keith Fulmer | Pending |
| 2016-UP-070-State v. Deangelo Mitchell (AA Ace Bail) | Pending |
| 2016-UP-073-State v. Mandy L. Smith | Pending |
| 2016-UP-074-State v. Sammy Lee Scarborough | Pending |
| 2016-UP-084-Esvin Perez v. Gino's The King of Pizza | Pending |
| 2016-UP-089-William Breland v. SCDOT | Pending |
| 2016-UP-091-Kyle Pertuis v. Front Roe Restaurants, Inc. | Pending |
| 2016-UP-097-State v. Ricky E. Passmore | Pending |
| 2016-UP-109-Brook Waddle v. SCDHHS | Pending |
| 2016-UP-118-State v. Lywone S. Capers | Pending |
| 2016-UP-119-State v. Bilal Sincere Haynesworth | Pending |
| 2016-UP-127-James Neff v. Lear's Welding | Pending |
| 2016-UP-132-Willis Weary v. State | Pending |
| 2016-UP-137-Glenda R. Couram v. Christopher Hooker | Pending |
| 2016-UP-138-McGuinn Construction v. Saul Espino | Pending |
| 2016-UP-139-Hector Fragosa v. Kade Construction | Pending |
| 2016-UP-141-Plantation Federal v. J. Charles Gray | Pending |
| 2016-UP-151-Randy Horton v. Jasper County School | Pending |
| 2016-UP-153-Andreas Ganotakis v. City of Columbia Board | Pending |
| 2016-UP-158-Raymond Carter v. Donnie Myers | Pending |
| 2016-UP-160-Mariam R. Noorai v. School Dist. of Pickens Cty. | Pending |

| | |
|---|---|
| 2016-UP-162-State v. Shawn L. Wyatt | Pending |
| 2016-UP-168-Nationwide Mutual v. Eagle Windows | Pending |
| 2016-UP-171-Nakia Jones v. State | Pending |
| 2016-UP-174-Jerome Curtis Buckson v. State | Pending |
| 2016-UP-182-State v. James Simmons, Jr. | Pending |
| 2016-UP-187-Nationstar Mortgage, LLC v. Rhonda L. Meisner | Pending |
| 2016-UP-189-Jennifer Middleton v. Orangeburg Consolidated | Pending |
| 2016-UP-193-State v. Jeffrey Davis | Pending |
| 2016-UP-198-In the matter of Kenneth Campbell | Pending |
| 2016-UP-199-Ryan Powell v. Amy Boheler | Pending |
| 2016-UP-204-Thomas Lowery v. SCDPPPS | Pending |
| 2016-UP-206-State v. Devatee Tymar Clinton | Pending |
| 2016-UP-210-Bernard Bagley v. SCDPPPS (2) | Pending |
| 2016-UP-220-SCDSS v. Allyssa Boulware | Pending |
| 2016-UP-239-State v. Kurtino Weathersbee | Pending |
| 2016-UP-245-State v. Rodney L. Rogers, Sr. | Pending |
| 2016-UP-247-Pankaj Patel v. Krish Patel | Pending |
| 2016-UP-253-Melissa Lackey-Oremus v. 4 K&D Corp. | Pending |
| 2016-UP-261-Samuel T. Brick v. Richland Cty. Planning Comm'n | Pending |
| 2016-UP-263-Wells Fargo Bank v. Ronald Pappas | Pending |
| 2016-UP-268-SCDSS v. David and Kimberly Wicker | Pending |

| | |
|---|---|
| 2016-UP-271-Lori Partin v. Jason Harbin | Pending |
| 2016-UP-274-Bayview Loan Servicing v. Scott Schledwitz | Pending |
| 2016-UP-276-Hubert Bethune v. Waffle House | Pending |
| 2016-UP-299-State v. Donna Boyd | Pending |
| 2016-UP-314-State v. Frank Muns | Pending |
| 2016-UP-315-State v. Marco S. Sanders | Pending |
| 2016-UP-318-SunTrust Mortgage v. Mark Ostendorff | Pending |
| 2016-UP-320-State v. Emmanual M. Rodriguez | Pending |
| 2016-UP-328-SCDSS v. Holly M. Smith | Pending |
| 2016-UP-330-State v. William T. Calvert | Pending |
| 2016-UP-331-Claude Graham v. Town of Latta (2) | Pending |
| 2016-UP-336-Dickie Shults v. Angela G. Miller | Pending |
| 2016-UP-338-HHH Ltd. of Greenville v. Randall S. Hiller | Pending |
| 2016-UP-340-State v. James Richard Bartee, Jr. | Pending |
| 2016-UP-344-State v. William Anthony Wallace | Pending |
| 2016-UP-351-Tipperary Sales v. S.C. Dep't of Transp. | Pending |
| 2016-UP-352-State v. Daniel W. Spade | Pending |
| 2016-UP-403-State v. Arthur Moseley | Pending |
| 2016-UP-404-George Glassmeyer v. City of Columbia (2) | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Russell Earley, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-001566

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Appeal from Sumter County
George C. James, Jr., Post-Conviction Relief Judge

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Opinion No. 27672
Submitted February 16, 2016 – Filed October 19, 2016

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**REVERSED**

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Attorney General Alan Wilson and Assistant Attorney General Daniel Gourley, both of Columbia, for Petitioner.

Tommy A. Thomas, of Irmo, for Respondent.

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**JUSTICE KITTREDGE:** This is a post-conviction relief (PCR) matter. Respondent Russell Earley was convicted of criminal solicitation of a minor and sentenced to eight years in prison. After withdrawing his direct appeal, Respondent filed a PCR application. The PCR court granted Respondent relief. We reverse and reinstate Respondent's conviction and sentence.

## I.

Respondent's criminal charge arose from an encounter with a fourteen-year-old male (Victim) outside a public restroom at Walmart in Sumter in November 2008. On the evening of the incident, the Victim visited Walmart with his grandmother, who had promised to buy him some headphones. The Victim and his grandmother went in separate directions when they entered the store—the Victim headed for the electronics department while his grandmother went to pick up a few grocery items.

After separating from his grandmother, the Victim stopped to use the restroom before shopping for headphones; as he entered the restroom, he noticed Respondent following him. The Victim stated he felt uncomfortable because Respondent stood in the restroom watching the Victim use the urinal. The Victim testified Respondent thereafter followed him out of the restroom, pointed to the Victim's genitals, and offered the Victim oral sex, which the Victim declined in no uncertain terms. The Victim immediately reported the incident to Walmart security, and multiple witnesses testified the Victim was visibly upset after the incident.

As the Victim relayed the incident to store employees, a Walmart security officer spotted Respondent heading toward an exit and noticed a "steady pace about [Respondent's] step."[1] Respondent had not purchased anything and was leaving the store alone. The security officer immediately called law enforcement, followed Respondent out of the store, and watched him get into his vehicle and leave the parking lot. Within minutes, a police officer stopped Respondent's vehicle approximately half a mile from Walmart. Respondent was identified as the perpetrator and was arrested.

There were no witnesss to the incident, and nothing was captured on Walmart surveillance video. In an effort to undermine the Victim's character and thus his story at trial, defense counsel sought to introduce a cartoon image obtained from the Victim's Facebook page referencing marijuana use; however, the trial court

[1] The security officer stated Respondent was not running but explained Respondent's step was "not just your general [way of] casually" leaving the store.

denied the motion, finding the cartoon from the Victim's Facebook page was not admissible. The trial court did, however, find that Respondent's 2003 federal conviction for bank robbery would be admissible as impeachment evidence.[2]

At trial, Respondent testified in his own defense, and defense counsel questioned Respondent about his federal bank robbery conviction on direct examination in a strategic effort to mitigate its prejudicial impact. According to Respondent, he ate dinner with friends on the evening of his encounter with the Victim, and after dinner, the group went to Walmart in search of a birthday gift for a friend's son. After failing to locate the desired item, Respondent testified the group decided to try another store, and he stopped by the restroom before leaving Walmart. Respondent admitted encountering the Victim in the restroom; however, Respondent denied propositioning the Victim and being attracted to young boys.

Essentially, the theory of his defense was that the Victim fabricated the whole story and the motivation for doing so was that Respondent had caught the Victim trying to shoplift CDs. According to Respondent, he was already in the restroom using the urinal when the Victim entered the restroom. Respondent testified the Victim kept both his hands in the front pocket of his sweatshirt and was acting nervous. Respondent testified he heard "tearing up plastic, like opening CDs," and on his way out of the restroom, Respondent passed by the Victim, who was standing by the sinks, and said "hey, I wouldn't be doing that, I wouldn't be stealing."[3] However, Respondent admitted that he never actually saw the Victim attempting to steal any merchandise; rather, Respondent *assumed* the Victim was stealing CDs because he thought he heard plastic rustling in the Victim's sweatshirt pocket.

---

[2] We are aware of this Court's opinion in *State v. Broadnax*, 414 S.C. 468, 779 S.E.2d 789 (2015), upon which the dissent relies. However, the issue of whether the trial court conducted a balancing test pursuant to Rule 609(a)(1), SCRE, before determining this federal bank robbery conviction was admissible as impeachment evidence is not an issue before the Court.

[3] Although Respondent admitted being aware that the Walmart security officer followed him out the store, he offered no explanation for why he did not report the Victim's purported theft at that time.

The issue in this PCR matter involves a line of questioning during the State's cross-examination of Respondent. Specifically, the State had evidence that Respondent posted the message "See ya" on the Victim's Facebook wall the week before trial, despite having been ordered after his arrest not to have any contact with the minor Victim. The State's theory was that by posting such a message, Respondent was attempting to intimidate or threaten the Victim on the eve of trial. *See State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (Ct. App. 2009) (holding that "witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt"). It is undisputed that the State did not provide defense counsel with a copy of Respondent's Facebook post "See ya" prior to trial.

Initially, Respondent was unaware the State had a copy of the message he posted on the Victim's Facebook page and denied having any contact with the Victim since the incident in the Walmart bathroom four years earlier. However, once the State confronted Respondent with a copy of the message, Respondent admitted contacting the Victim and explained he did so "[be]cause his time will come." Defense counsel did not object or otherwise alert the trial court that the State had failed to disclose the "See ya" Facebook posting prior to trial. In response to the Solicitor's questions about his bank robbery conviction, Respondent volunteered that he had been convicted of not one, but *nine* bank robberies. Respondent's testimony concluded shortly thereafter, and the defense rested without presenting any other evidence.

Immediately thereafter, the trial court invited counsel to place upon the record the substance of several side-bar conversations that took place off the record during the defense presentation. At that time, defense counsel stated:

> [Defense Counsel]: I understand Your Honor's ruling on the side bar, but our position was that while my client testified[,] Mr. [Solicitor] had asked him about going on to [the Victim's] Facebook page and leaving a message. And obviously, Judge, what we had talked about before was the [marijuana cartoon] that we had gotten off of [the Victim's] Facebook page and printed a copy. We talked about that earlier in trial, and *it was our intent to talk about that in response to Mr. [Solicitor's] question about the Facebook page*.

> The Court: And I ruled that you not—that I was not allowing you to put in the information you got off of the [V]ictim's Facebook about smoking marijuana, whatever.
>
> [Defense Counsel]: And Judge, I wanted to make sure—I was not going to offer it into evidence, but I wanted to ask my client what did he find on the Facebook page.
>
> The Court: Yeah, *I would have allowed you to get into anything regarding him leaving a message on [the Victim's] Facebook page*, but not any other information that he might have come across on the Facebook so that's why I ruled that you do not introduce that, okay?

(emphasis added).

The jury returned a guilty verdict, and the trial court sentenced Respondent to eight years in prison. A direct appeal was timely filed but subsequently dismissed upon Respondent's motion to withdraw his appeal. Thereafter, Respondent filed a PCR application, in which his only legal or factual allegation was the general statement "ineffective assistance of counsel." Respondent's PCR application included no further details regarding his legal claims or any facts which supported his asserted ground for relief. Specifically, neither Respondent's PCR application nor his testimony at the PCR hearing referred, in any way, to his "See ya" Facebook posting or the word "mistrial."

At the beginning of the PCR hearing, Respondent's PCR attorney summarized for the PCR court the ineffective assistance of counsel claims Respondent wished to assert; however, this summary likewise made no reference to the Facebook comment or the word "mistrial."[4] Indeed, the Facebook posting was not mentioned

[4] This summary of ineffective assistance of counsel claims included counsel's failure to adequately prepare for trial; failure to review the State's discovery with Respondent; failure to adequately discuss a plea offer with Respondent; failure to interview and call as witnesses Respondent's friends who were with him at Walmart just before the incident; failure to effectively cross-examine the Victim; and failure to adequately advise Respondent regarding his decision whether to

until defense counsel brought it up during questioning by the State's attorney about his efforts to prepare for trial. In response to a question about why the defense did not interview or call as witnesses Respondent's friends who were with him at Walmart around the time of the incident, counsel explained that Respondent's friends' testimony would not have been helpful since none of Respondent's friends were present at the restroom when the solicitation was alleged to have taken place, and in dismissing the impact of his failure to interview and call those witnesses, counsel testified that he believed the turning point of the trial was the evidence that Respondent contacted the victim on Facebook—not the lack of defense witnesses.

After hearing trial counsel's testimony on direct examination that he was surprised to learn of the Facebook posting, Respondent's PCR attorney raised, for the first time, the issue of Rule 5, SCRCrimP, during cross-examination:

> Q. Now, you filed a Rule 5?
>
> A. I did.
>
> Q. Was this contact or this [Facebook] statement, do you think it was exculpatory? [Did the State] have an obligation to provide this information to you prior to trial?
>
> A. Well, I guess they could have shared it with me.
>
> Q. Could it have been potentially a Rule 5 violation?
>
> A. Come to think of it, it's a statement or alleged statement by my client.

Defense counsel testified that he did not receive a copy of the "See ya" message Respondent posted on the Victim's Facebook wall in response to the defense's Rule 5, SCRCrimP request and that Respondent "didn't tell me anything about it." Accordingly, defense counsel was "totally unaware" that Respondent had contacted the victim via Facebook prior to the trial. Defense counsel explained:

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testify at trial and the ramifications of his prior criminal record. The PCR court denied relief on all these grounds.

> We had the case set for trial in front of Judge Young. And Judge Young . . . saw [Respondent] in the courtroom and said, hey, you know, I got a conflict. I can't do this. And that's what caused it to get continued to the next week . . . . We had done some—one of the assistan[ts] in my office had done some [] research. . . . And we discovered that this [Victim] had a Facebook page. And it had on there some character. And it says, "I smoke weed all day." So we thought, hey, you know, maybe this is something we could eventually [use to] impeach this [Victim's] character. So we had it in preparation for the trial . . . .
>
> And, of course, when [the trial] got continued, I had told [Respondent] about that and showed him, look at this thing we found on this [Victim]'s Facebook page. Anyway, I said, well, [Respondent], we'll get back together next week. It looks like . . . they're going to call it for trial next week and we'll be prepared for it. . . .
>
> What did happen and I was totally unaware of this is that [Respondent] had had some communication with the [Victim] during . . . the week between when it got continued . . . and I didn't know that he had done this. And, of course, what actually happened is, he sent this communication to the [Victim] and evidently the [Victim] turned around and gave it to [the Solicitor].

Defense counsel testified that he believed, up until that point on cross-examination, the trial was going well for his client:

> I thought on direct, I thought [Respondent] was coming across very well with the jury. You know, . . . [he] had this conviction in Federal Court . . . but it wasn't . . . something that I thought would hurt him in this situation, get it out so the jury would understand. And the fact that he had pled to that showed that he had taken responsibility for that. . . . I didn't think the [Victim] came across as a star witness or [was] as sound and [a]s believable as you would like as a prosecutor.

Although defense counsel acknowledged that the evidence of Respondent's intimidating Facebook post was "going to come out just like [Respondent's] bank robbery conviction came out" had the State disclosed it before trial, counsel testified:

> Obviously, [my trial strategy] would have changed because then I would have known it was coming. . . . if I had known about it, I would have brought it out as a part of my direct questioning to [Respondent]. So that would have taken the sting out of it . . . .

Ultimately, the PCR court granted relief, finding the State should have disclosed the "See ya" Facebook posting in response to Respondent's motion pursuant to Rule 5(a)(1)(A), SCRCrimP, because the Facebook posting was a "statement" made by the defendant, the existence of which was known to the State. The PCR court further found the statement was relevant for both impeachment and witness intimidation purposes. Relying on *State v. Lawton*, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009), the PCR court concluded the statement was "material to the preparation" of the defense, and counsel was therefore deficient for failing to move for a mistrial based on the Rule 5 violation. Specifically, the PCR court found "there was no practical way for the [Respondent] to avoid testifying, because if he did not testify, the only story the jury would have heard was the victim's relatively uncontracticted testimony"; nevertheless, the PCR court found the Facebook posting was material to the preparation of the defense because, had it been disclosed, "trial counsel would have counseled [Respondent] how to respond to the question of whether he'd had any contact with the victim." As to prejudice, the PCR court found a curative instruction would have been insufficient to redress the prejudice resulting from the State's failure to disclose the Facebook posting. In fact, the PCR court essentially ruled that the trial court would have been compelled

*as a matter of law* to grant a mistrial.[5] This Court issued a writ of certiorari to review the PCR court's order.

**II.**

The State argues the PCR court erred in granting relief because the Facebook posting was not subject to disclosure under Rule 5, SCRCrimP, and alternatively, that the PCR court erred in finding a mistrial would have been required as a matter of law given the facts of this case. Specifically, the State argues that because the PCR court found that Respondent would have had to take the stand to rebut the State's evidence at trial regardless of his prior knowledge about the State's evidence of the comment, disclosure of the comment was immaterial to his defense strategy. Even assuming the Facebook posting was subject to disclosure under Rule 5, SCRCrimP, and that counsel was deficient for failing to move for a mistrial based on the State's nondisclosure, we find that the PCR court committed an error of law in holding that a mistrial would have been mandated as a matter of law.

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[5] The dissent contends the PCR judge's findings about prejudice were actually an exercise of discretion and points out the words "'as a matter of law' do not, at any point, appear in the PCR order." What the dissent fails to point out or appreciate are the actual words that *do* appear in the PCR order: the PCR court found "the analysis of the [prejudice] prong must include an analysis of the question of whether the trial judge would have been required to grant a motion for a mistrial," and the PCR court ultimately concluded "the *trial judge would have been compelled*, upon proper motion, to grant a mistrial"; that "[a] *curative instruction would not have been sufficient* to cure the prejudice"; and that "the *applicant has established that a mistrial would have to have been granted if trial counsel had objected* to the discovery violation and moved for a mistrial." (emphasis added). These findings clearly support our view that the PCR court ruled that the trial court would have had only one choice—to grant a mistrial. Moreover, even Respondent acknowledges in his brief, "the PCR Court found Respondent was prejudiced because had Trial Counsel objected and moved for a mistrial, the Trial Court *would have been required* to grant a mistrial." (emphasis added). Thus, we reject the suggestion that the PCR court viewed its decision on prejudice as involving an exercise of discretion.

"'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components.'" *Walker v. State*, 407 S.C. 400, 404, 756 S.E.2d 144, 146 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." *Id.* at 404–05, 756 S.E.2d at 146. "To satisfy the first prong, a defendant must show counsel's performance 'fell below an objective standard of reasonableness.'" *Id.* at 405, 756 S.E.2d at 146 (quoting *Franklin v. Catoe*, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001)). To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion. *Cf. Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (finding PCR applicant met his burden of proving he suffered prejudice under *Strickland* as a result of counsel's failure to request a continuance where the applicant demonstrated the trial court's refusal of the continuance would have amounted to an abuse of discretion); *accord Weinn v. State*, 281 S.W.3d 633, 641 (Tex. Ct. App. 2009) ("The failure of appellant's counsel to request a mistrial could only be termed an act of ineffective assistance of counsel if a mistrial should have been granted."). Where there is no support for the PCR court's conclusion, reversal thereof is proper. *See Johnson v. State*, 325 S.C. 182, 187–88, 480 S.E.2d 733, 735–36 (1997) (reversing the grant of PCR where counsel did not object or seek a mistrial in response to the solicitor's statement during closing that "the defendant has not put up a defense, he's not testified" and finding there was no evidence the accused was deprived of a fair trial because the trial court instructed the jury that it was not to consider the accused's failure to testify in any way and could not use it against the accused).

Rule 5, SCRCrimP, requires disclosure of evidence by the State, including statements by the defendant:

> Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution . . . .

Rule 5(a)(1)(A), SCRCrimP. "The rule, of course, is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial." *United States v. Gleason*, 616 F.2d 2, 24 (1979) (discussing the underlying purpose of the similar federal rule).

"[W]here a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances." *State v. Kerr*, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (citing Rule 5(d)(2), SCRCrimP; *State v. Trotter*, 322 S.C. 537, 542, 473 S.E.2d 452, 4585 (1996)). "Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id*. (citing *State v. Davis*, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992)). Moreover, the trial court also has the prerogative to waive the disclosure requirements "for good cause shown." Rule 5(g), SCRCrimP ("The court may, for good cause shown, waive the requirements of this rule.").

When the actions of the Solicitor rise to the level of prosecutorial misconduct, the question of whether a mistrial is warranted "'is determined by (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court.'" *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar*, 428 F.3d 1102, 1112 (8th Cir. 2005)). "The power of the court to declare a mistrial should be used with the greatest caution and for plain and obvious causes." *State v. Johnson*, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) (citing *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997)). "The granting of [a] motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). "Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial." *Id*.

In his order granting relief, the PCR court relied heavily upon *Lawton*, a decision in which the court of appeals found reversible error in the admission of a letter Lawton sent his ex-wife from jail, which stated "I know that my story is full of lies" and which the State failed to disclose under Rule 5, SCRCrimP, prior to trial. In *Lawton*, defense counsel immediately objected to the introduction of and

questioning about the letter based on the State's failure to disclose it during discovery. The trial court overruled defense counsel's objection, finding that the letter was being used only for impeachment purposes, and therefore it was not "relevant" within the meaning of Rule 5, SCRCrimP, and did not fall within the scope of materials the State was obligated to disclose. On direct appeal, the court of appeals reversed, finding the letter was "relevant" within the meaning of Rule 5(a)(1)(A), even if the letter impacted only the defendant's credibility, and therefore, the letter should have been disclosed by the State prior to trial. The court of appeals further reasoned that "[d]isclosure of the letter was clearly material to the preparation of Lawton's defense because it likely would have affected his decision to testify," and because there was "a reasonable probability [the defendant] would not have testified had he known the State possessed such strong impeachment evidence," the court of appeals concluded Lawton was prejudiced by the trial court's error in admitting the undisclosed statement. *Id*. at 127–28, 675 S.E.2d at 457.

Here, although the PCR court properly found Respondent's undisclosed Facebook posting was relevant for the purposes of witness intimidation, the PCR court nevertheless erred in concluding the posting had impeachment value prior to trial. Unlike the statement in *Lawton*—"my story is full of lies"—Respondent's statement in this case—"See ya"—is not impeaching on its face. Indeed, there is nothing in the message "See ya" that inherently calls into question Respondent's credibility. Rather, the impeachment value of the "See ya" statement in this case did not arise until Respondent denied contacting the Victim during his trial testimony. *See Gleason*, 616 F.2d at 24 (finding, in bank fraud prosecution, that defendant's handwritten notes on agendas and financial statements were not "relevant" within the meaning of the similar federal criminal discovery rule, and thus subject to disclosure by the prosecution, because those documents "became relevant for impeachment purposes only after [the defendant] testified on direct that he did not personally keep acquainted with the bank's day-to-day operations"). Nevertheless, even absent any inherent impeachment value, the probative value of the "See ya" statement as evidence of witness intimidation was apparent to the State prior to trial, and therefore, this statement was "relevant" and should have been disclosed by the State under Rule 5, SCRCrimP.[6] *See Edwards*, 383 S.C. at

[6] We note the precedent that "where evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." *Anderson v. Leeke*, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978);

72, 678 S.E.2d at 408 (holding that "witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt").

That being said, the State's nondisclosure does not, *a fortiori*, mandate the conclusion that trial counsel was deficient in failing to seek a mistrial on that basis. As to the deficiency prong of the *Strickland* analysis, a PCR applicant must show that trial counsel's performance fell below an objective standard of reasonableness. In discussing this issue, the PCR court borrowed the "materiality" analysis from *Lawton* and found counsel was deficient in failing to seek a mistrial because knowledge that the State possessed the "See ya" Facebook posting was material to the preparation of Respondent's defense. In so finding, the PCR court acknowledged that "there was no practical way for [Respondent] to avoid testifying" at trial, yet the PCR court nevertheless concluded the Facebook posting was "material to the preparation of [Respondent]'s defense" because if defense counsel had been made aware of the posting before trial, "counsel would have counseled [Respondent] about not denying its existence." In other words, although the nondisclosure did not, as a practical matter, impact Respondent's decision whether to testify, the PCR court found it nevertheless materially undermined Respondent's ability to prepare to meet the charges against him because defense counsel was denied the opportunity to advise Respondent not to lie about having made the Facebook posting. This was error.

First, there is no evidence in the record that the nondisclosure of Respondent's "See ya" statement had *any* impact (much less a *material* impact) upon Respondent's trial preparation or his decision to testify; thus, there is no evidence in the record to support the PCR judge's finding that the nondisclosure was material to the preparation of Respondent's defense. Moreover, it was an error of law for the PCR court to rely upon the "materiality" or prejudice analysis from *Lawton* to guide its analysis of the first prong of the *Strickland* framework. Indeed, *Lawton* dealt only

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*accord United States v. Meregildo*, 920 F.Supp.2d 434, 445 (S.D.N.Y. 2013) (explaining that in the context of evidence the government failed to disclose during the criminal discovery process, "there is no remedy for a defendant who possesses or has access to the information he claims was withheld"). However, because there is no evidence in the record as to the relevant social media privacy settings and whether or to what extent Respondent had access to his Facebook posting after making it, we decline the State's invitation to address this issue.

with the existence and prejudicial impact of a trial court error on direct appeal and provides no logical basis for evaluating whether counsel's failure to seek a mistrial as redress for a Rule 5 violation fell below reasonable professional norms in this PCR matter. Although this Court has held the "presumption of adequate representation based on a valid trial strategy disappears when . . . there was **no** trial strategy in mind" in *failing to object* to improper evidence, *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010), the claim at issue here is not that counsel rendered deficient performance in failing to object to the State's use of the undisclosed Facebook statement. Rather, the claim at issue is that counsel was deficient in *failing to move for a mistrial* based on the State's use of the "See ya" statement that was not disclosed under Rule 5, SCRCrimP.

At the PCR hearing, there was simply no evidence or discussion about the issue of a mistrial or the factors used to evaluate whether a Solicitor's actions constitute prosecutorial misconduct sufficient to justify a mistrial. Indeed, the word "mistrial" does not appear in the PCR transcript, nor is it included in Respondent's PCR application or in Respondent's post-hearing memorandum of law. Rather, trial counsel's testimony at the PCR hearing reveals that counsel believed that up until the disputed line of questioning, the trial was progressing favorably for Respondent, that defense counsel wished to impeach the Victim's character with the marijuana cartoon obtained from Facebook, and that Respondent was anxious to reach a resolution of the charges against him. All of these factors weigh against seeking a mistrial and could be construed as valid, strategic reasons why trial counsel did not seek such a sanction in response to the State's discovery violation; nevertheless, we ultimately need not resolve the issue of deficiency because, in any event, the PCR court committed an error of law as to the prejudice prong of the *Strickland* analysis.

Even assuming that counsel was deficient for failing to move for a mistrial based on the State's nondisclosure, we conclude the PCR court's order was controlled by an error of law. Specifically, we hold the PCR court incorrectly found a mistrial was the *only* remedy available to cure the prejudice resulting from the State's non-disclosure of the Facebook posting. In reaching this conclusion, the PCR court acknowledged the granting of a mistrial is "a serious and extreme measure," one within the trial court's discretion. The PCR court nevertheless concluded that "the trial judge would have been compelled, upon proper motion, to grant a mistrial." This was error in two respects. First, the PCR court ignored the other sanctions available to the trial court to remedy nondisclosure, and secondly, the PCR court

focused myopically on the impeachment value of the Facebook posting and ignored its probative value as to witness imtimidation.

Moreover, in evaluating whether a mistrial would have been granted, the PCR court narrowly considered the prejudicial impact to Respondent's credibility—prejudice which resulted from Respondent's lack of candor on the stand rather than from the State's failure to disclose the existence of the witness intimidation evidence. This was error, for Respondent was under oath when he denied having contacted the Victim, and the prejudice resulting from his failure to be truthful cannot be fully attributed to the State or otherwise operate as an automatic benefit to Respondent by mandating a mistrial as the only option.[7] *See State v. Needs*, 333 S.C. 134, 152 n.11, 508 S.E.2d 857, 866 n.11 (1998) (finding a party may not complain about an error induced by the party's own conduct (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); *State v. Epes*, 209 S.C. 246, 271, 39 S.E.2d 769, 780 (1946))).

We further note that Respondent volunteered on cross-examination that he had been convicted of bank robbery *nine* times, not the single conviction that was discussed prior to his testimony. Surely, when evaluating the entirety of the evidence and the alleged prejudice to Respondent from his denial of his Facebook "See ya" comment, it is essential to consider all of the impeachment evidence. The error of the PCR court is illustrated by the PCR court's paradoxical finding that

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[7] The dissent suggests "an equally plausible reading is that Respondent did not intentionally lie, or withhold truth on the witness stand, but rather, merely provided an inartful response to an imprecise question." There was, of course, nothing imprecise about the question or the answer, and trial counsel so conceded. Trial counsel, according to the PCR order, acknowledged Respondent "was caught in a blatant lie." Moreover, we note the logical inconsistency in the positions taken by the dissent as to Respondent's denial about having contacted the Victim; specifically, the dissent urges that this denial undermined Respondent's credibility to a degree great enough to warrant a mistrial, yet, that it also was "an inartful response to an imprecise question." To the extent Respondent's denial was merely "an inartful response," then it logically follows that it could not have undermined Respondent's credibility to a degree sufficient to justify the mistrial the dissent claims was necessary.

Respondent's "credibility was arguably substantially undermined when he volunteered on cross-examination that he had been convicted of nine bank robberies instead of just one."

Turning to the issue of whether a mistrial would have been required to redress the Rule 5 violation, we find the prejudice attributable to the State's nondisclosure to be incremental under the facts of this case and would not have compelled the trial court to declare a mistrial. Had counsel brought the nondisclosure to the trial court's attention, it would have been within the trial court's discretion to determine the appropriate redress, if any. Moreover, there is no evidence the State withheld Respondent's Facebook posting in bad faith or that the nondisclosure could not have been cured by other, less drastic means, such as a brief recess or a curative instruction. Accordingly, it was error for the PCR court to conclude a mistrial would have been manifestly necessary had trial counsel so moved. *See State v. Williams*, 386 S.C. 503, 510, 690 S.E.2d 62, 65 (2010) (finding the trial court committed no error in capital murder proceeding in not declaring a mistrial and giving an *Allen* charge after jury revealed it was divided nine to three in favor of death sentence); *Green v. State*, 351 S.C. 184, 193, 569 S.E.2d 318, 323 (2002) (finding counsel was not deficient in deciding not to request a mistrial after the jury inquired about the accused's failure to testify based on counsel's belief that the jury selected was favorable to the accused and finding there was no evidence of prejudice where nothing was presented to demonstrate the accused would be in a significantly better position upon retrial); *State v. Beckham*, 334 S.C. 302, 309–10, 513 S.E.2d 606, 609–10 (1999) (finding defendant, who was accused of murdering his wife, was not entitled to a mistrial where a witness referred to wife's visit to a battered women's center); *State v. Anderson*, 322 S.C. 89, 90–94, 470 S.E.2d 103, 104–06 (1996) (finding no error in failing to declare a mistrial where, in murder prosecution, the State's witness identified defendant in court and addressed him, "Why, [defendant]? Why did you do it?. . . He didn't have to take her life."); *State v. Craig*, 267 S.C. 262, 265–66, 227 S.E.2d 306, 308 (1976) (finding no abuse of discretion in trial court's refusal to declare a mistrial where the solicitor stated in front of the jury, "I'm not up here to give this defendant a Baby Ruth, I'm up here to put him in the electric chair"); *see also United States v. Martinez*, 455 F.3d 1127, 1130–31 (10th Cir. 2006) (affirming a federal trial court's refusal to declare a mistrial based on the government's violation of the similar federal rule, explaining that a court should "impose the least severe sanction that will accomplish prompt

and full compliance" with discovery rules and observing that a cautionary instruction, a continuance, or exclusion of the evidence are "preferred remedies" over "the drastic remedy of mistrial" (quotation marks and citations omitted)).

Because the trial court would not have been compelled to declare a mistrial, we find the PCR court committed an error of law in finding the outcome of Respondent's trial would have been different had trial counsel moved for a mistrial based on the State's failure to disclose the Facebook posting. Absent a showing of prejudice as required by *Strickland*, it was error to grant relief.

**III.**

We reverse the PCR court's order granting relief and reinstate Respondent's conviction and sentence.

**REVERSED.**

**BEATTY and HEARN, JJ., concur. PLEICONES, C.J., dissenting in a separate opinion. FEW, J., not participating.**

**CHIEF JUSTICE PLEICONES**: I respectfully dissent. Like the majority, I assume the State violated Rule 5, SCRCrimP, when it impeached Respondent with evidence it failed to disclose prior to trial. However, unlike the majority, I believe the PCR judge applied the correct standard of law in assessing whether the State's Rule 5 violation warranted a mistrial. Further, because I believe there is probative evidence in the record to support the PCR judge's findings of fact and conclusions of law, I would affirm the order granting Respondent relief. *See McCray v. State*, 317 S.C. 557, 559, 455 S.E.2d 686, 687 (1995) ("When there is evidence to support the findings and conclusions of the PCR judge, this Court will affirm those findings and conclusions.").

The majority states the PCR judge erred when he found a mistrial was the *only* remedy available to cure the prejudice resulting from the State's non-disclosure of the Facebook posting *as a matter of law*.[8] I read the order differently. Throughout his order, the PCR judge correctly articulated that the decision to grant or deny a motion for mistrial is within the trial judge's discretion and that a mistrial should only be granted "when the prejudice can be removed in no other way." This is a correct statement of law. *See State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.") (citations omitted).

After correctly stating the legal standard for a mistrial, the PCR judge evaluated the facts specific to this case, including: the timing of the State's introduction of the undisclosed evidence; the strength of the State's overall case against Respondent; and the importance of Respondent's trial testimony to his defense. Based on these facts, the PCR judge concluded that: if trial counsel had moved for a mistrial when the State impeached Respondent with undisclosed evidence, the trial judge would have found the prejudice resulting from the State's misconduct could not have been removed by a curative instruction and the trial judge would have granted the motion. This conclusion by the PCR judge is not a decision controlled by a misapprehension of the standard applied by a trial judge in considering a motion

[8] The majority states the PCR judge ruled the trial court would have been compelled *as a matter of law* to grant a mistrial; however, the words "as a matter of law" do not, at any point, appear in the PCR order.

for a mistrial. Rather, it is nuanced application of the law expected of a PCR judge vested with authority to assess the merits of PCR claims pursuant the *Strickland* standard. [9]

Further, I disagree with the majority's application of the two prongs of a *Stickland* analysis to the facts of this case. I disagree with the majority's assertion that the "quantum of prejudice the PCR judge should have considered was the extent to which Respondent was deprived of the opportunity to reduce the prejudice of the Facebook comment by strategically addressing it on direct examination." Assessing this "quantum of prejudice" is only pertinent in determining whether the State violated Rule 5, which, in turn, is relevant to the determination of whether trial counsel was deficient. The majority assumes, and I agree, that when the State introduced the Facebook posting at trial without having disclosed it prior to trial, trial counsel should have recognized the State's Rule 5 violation and acted accordingly. The PCR judge found that trial counsel was deficient for failing to do so, and, in my opinion, there is evidence in the record to support this finding. *See McCray, supra*.

As for the *Strickland* prejudice prong, it is the effect trial counsel's failure to move for a mistrial had on Respondent's trial *at the time the State's Rule 5 violation became apparent*, after which the PCR judge was required to determine whether Respondent had been prejudiced. And not, as the majority concludes, how trial counsel would have addressed the Facebook posting on direct examination had the State properly disclosed the evidence prior to trial.

In determining whether there was a reasonable probability trial counsel's deficiency affected the outcome of Respondent's case, I differ with the majority's interpretation of the record. The majority concludes Respondent committed perjury on the witness stand. After reading the colloquy, which the majority describes as demonstrating "lack of candor on the stand," I am convinced an

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[9] Indeed, as the majority states, "Had counsel objected, it would have been within the trial court's discretion to determine the appropriate redress, if any." That is correct. However, in a PCR action, it is the PCR judge who must determine how the trial judge would have exercised his or her discretion had counsel objected at trial. *See e.g. Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (where this Court found Morris was prejudiced by trial counsel's deficient performance in failing to move for a continuance because "the refusal of the continuance would have amounted to an abuse of discretion").

equally plausible reading is that Respondent did not intentionally lie, or withhold truth on the witness stand, but rather, merely provided an inartful response to an imprecise question. The fact that the State chose to characterize this response as a lie throughout the remainder of Respondent's testimony and in closing argument does not make it so. Moreover, in my opinion, it is not for this Court to determine on appellate review that Respondent committed perjury. It is the fact-finder's role, and solely the fact-finder, to determine the truth or falsity of a witness' testimony. *See State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 500 (2013) (stating "the assessment of witness credibility is within the exclusive province of the jury. . . ") (citations and alterations omitted).

Accordingly, I do not believe the PCR judge committed an error of law in considering the effect the State's impeachment evidence had on the jury's perception of Respondent's credibility. This is exactly the quantum of prejudice that should be considered in assessing whether there was a reasonable probability that trial counsel's deficient performance affected the outcome of Respondent's trial. Moreover, this case amounted to a pure swearing contest. The jury was asked to determine which story was true: the victim's, that Respondent propositioned him, or Respondent's, that he did not proposition the victim, but rather, confronted the victim about his shoplifting. There were no other witnesses to the interaction between the victim and Respondent by the Wal-Mart restroom. Accordingly, I would affirm the PCR judge's finding that Respondent's credibility was essential to his defense and the paramount issue for the jury to determine. Further, I believe there is evidence in the record to support the PCR judge's finding that, absent the Rule 5 violation, the credibility of Respondent's testimony would not have been called into question in such a devastating way.[10] Thus, pursuant to

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[10] I note the majority references Respondent's nine bank robberies as a reason why the introduction of the Facebook posting caused only "incremental" prejudice to Respondent. However, we recently held that robbery is not a crime in the nature of *crimen falsi*, which "bear[s] upon a witness's propensity to testify truthfully." *See State v. Broadnax*, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). Accordingly, it is questionable whether Respondent's admission to committing nine bank robberies should even bear upon the analysis of whether Respondent's credibility was damaged by trial counsel's failure to move for a mistrial.

Further, even if it were proper to consider the effect of Respondent's bank robberies in analyzing how Respondent's credibility was affected by the

our scope of review, I would uphold the PCR judge's finding of *Strickland* prejudice. *See McCray*, *supra*.

Finally, I am also troubled by the policy implication of the majority's opinion. The majority's proposed *Strickland* analysis essentially creates a new rule of law: as long as the State uses incriminating evidence it has withheld in violation of Rule 5 to *successfully* convince a jury the defendant's testimony is not credible, the defendant cannot argue he or she was prejudiced. By deflecting blame to the defendant for the State's Rule violation, the majority's opinion undermines both the goal of Rule 5 and the role of the State in criminal prosecutions. As the Court of Appeals explains, the purpose of Rule 5 is to ensure the criminal defendant's right to a fair trial:

> [Rule 5] is [not] designed to displace the adversary system as the primary means by which truth is uncovered, but rather to ensure that a miscarriage of justice does not occur. Furthermore, the prosecutor's role transcends that of an adversary because he is the representative not of an ordinary party to a controversy,

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introduction of the Facebook posting, I would still affirm the PCR judge's finding that Respondent was prejudiced by trial counsel's deficient performance. *See McCray*, *supra*. During Respondent's testimony, Respondent informed the jury that he pleaded guilty to the bank robberies because he committed them, while, in contrast, Respondent did not plead guilty to the charge for which he was on trial because he did not commit the crime. Thus, the effect of the bank robbery convictions on the veracity of Respondent's testimony was negligible. Further, in my opinion, the State's introduction of the undisclosed Facebook posting in a way that confused Respondent and created the opportunity for the State to characterize Respondent as an adult who lies about his social-media contact with a minor victim was manifestly more damaging to Respondent's credibility during a trial for criminal solicitation of a minor than Respondent's past bank robberies. Accordingly, there is evidence in the record to support the finding that, if trial counsel had moved for a mistrial when the State's Rule 5 violation became apparent, there is a reasonable probability the trial judge would have granted the motion. *See Strickland*, *supra*.

> but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.

*State v. Kennerly*, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998) (internal citations omitted) (internal quotation marks and alterations omitted).

There is probative evidence in the record to support the PCR judge's conclusion a reasonable probability exists that a mistrial would have been granted had trial counsel moved for one. Therefore, the PCR judge's determination that Respondent is entitled to relief must be upheld on review. *See McCray*, *supra*. To do anything else disregards the great deference afforded to PCR judges' findings of facts and conclusions of law and condones the State's action of withholding incriminating, discoverable evidence from the defense until the moment when introducing that evidence will have its most devastating effect.

Accordingly, I would affirm the PCR judge's order granting Respondent relief.

# The Supreme Court of South Carolina

In the Matter of James Darrell Dotson, Respondent.

Appellate Case No. 2016-002097;
Appellate Case No. 2016-002101

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ORDER

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The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, Esquire, pursuant to Rule 31, RLDE.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

This Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Finally, within fifteen (15) days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

October 13, 2016

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

South Carolina Department of Social Services,
Respondent,

v.

Ngoc Tran and Thomas Nguyen, Defendants,

Of Whom Ngoc Tran is the Appellant.

In the interest of a minor child under the age of eighteen.

Appellate Case No. 2014-001134

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Appeal From Anderson County
Edgar H. Long, Jr., Family Court Judge

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Opinion No. 5445
Heard September 8, 2016 – Filed October 10, 2016

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**VACATED AND REMANDED**

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Kimberly Yancey Brooks, of Kimberly Y. Brooks, Attorney at Law, of Greenville, for Appellant.

Kathleen J. Hodges, of South Carolina Department of Social Services, of Anderson, for Respondent.

Brittany Dreher Senerius, of Senerius & Tye, Attorneys at Law, of Anderson, for the Guardian ad Litem.

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**PER CURIAM:** Ngoc Tran (Mother), a Georgia resident, appeals the family court's order terminating her parental rights to her minor daughter (Child). On appeal, Mother argues the family court (1) lacked subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) and (2) erred in finding clear and convincing evidence supported two statutory grounds for termination of parental rights (TPR). Because we find the Department of Social Services (DSS) failed to establish subject matter jurisdiction, we vacate the underlying removal order and TPR order and remand for additional findings.

## FACTS/PROCEDURAL HISTORY

This case began as a removal action on May 21, 2012, when Mother—who was traveling through South Carolina—was admitted to the hospital due to an "altered mental status." DSS received allegations that Mother "was found sitting in the middle of the road and was not very responsive," Child was with her, and Mother could not identify a family member to pick up Child. Mother was still hospitalized when the family court held a probable cause hearing on May 24, 2012; the family court determined probable cause existed to remove Child and granted DSS custody of Child "[p]ending further orders."

According to a placement plan prepared by DSS, Mother previously had an "altered mental episode" in Georgia and left Child unattended; Mother had an "extensive history" with the Department of Families and Children in Georgia; Child had been placed in foster care in Georgia; and there were "allegations of criminal domestic violence in Harrisburg, Pennsylvania with [Mother's] husband." In a December 3, 2012 merits removal order, the family court found Mother placed Child at a substantial risk of harm of physical neglect and returning Child to Mother's home would place Child at an unreasonable risk of harm. The family court granted DSS custody of Child and ordered Mother to complete a placement plan.

On March 6, 2014, the family court held a TPR hearing. Mother was not present, and the family court denied her request for a continuance. At the hearing, a DSS foster care worker testified Mother was a resident of Cobb County, Georgia; Father's last-known address was in Philadelphia, Pennsylvania; and Child was born in Pennsylvania. Following testimony, the family court found clear and

convincing evidence showed Mother failed to remedy the conditions causing removal, Child had been in foster care for fifteen of the most previous twenty-two months, and TPR was in Child's best interest.

Mother filed a motion for reconsideration alleging she was a survivor of domestic abuse and had a pending case in Philadelphia County, Pennsylvania. The family court held a hearing on Mother's motion. During the hearing, Mother asserted "there was a case in Philadelphia in 2005 that she believed Child was going to be required to go back to." The family court asked DSS whether it had investigated the allegations of domestic violence in Pennsylvania. Counsel for DSS replied,

> [B]ased on 2005 we did not do an independent investigation early on in the case in terms of the Philadelphia situation. I can tell the [c]ourt that we have subsequently checked with Philadelphia to find out what the status of that case was. They can find nothing on their records. They're going back and checking. It's, I guess, nine years since that case would have happened.
>
> So at this point we don't have any, either verification or proof, you know, or disposition of that case.

Counsel for DSS stated records from Georgia's Department of Families and Children noted allegations of domestic abuse, but she believed that "referred back to the Philadelphia records." The family court acknowledged Mother sent letters to the court indicating she had a case in Philadelphia "scheduled for a hearing in July of this year"; it asked Mother's counsel whether she had anything to support that. Mother's counsel replied, "I don't, Your Honor. I mean, I was in this case to represent her in this case. I don't really know anything about the Philadelphia case nor did I investigate it." The family court then asked Mother whether she had any documents to support her allegation that she had an upcoming hearing scheduled in Pennsylvania; Mother submitted a document to the court. After reviewing the document, the family court replied, "Do you have something else? This looks like something she instituted through the Pennsylvania court system. I'm not sure. Do you have any further information?" Mother's counsel stated she did not.

Mother asserted she moved from Philadelphia to Georgia to escape domestic violence. She stated she had lived in Georgia for three years, and she and Child had not had any contact with Father since leaving Pennsylvania ten years prior.

The record on appeal contains two documents from a Pennsylvania court. The first document is a June 16, 2005 order from the Philadelphia County Family Court Division suspending Father's visitation with Child and scheduling a "protection from abuse hearing." The second document is a January 17, 2014 order from the Philadelphia County Family Court Division setting a custody hearing for July 16, 2014; Mother was the petitioner and Father was the Respondent.[1]

In its order denying Mother's motion for reconsideration, the family court found,

> [Mother] claims that a court case is pending in Philadelphia, Pennsylvania that involves the issue of custody of the child. It appears from the evidence presented that [Mother] instituted an action seeking an Order of Custody against the child's father, who may be [Mother's] current or ex-husband. The pending court case in Philadelphia, Pennsylvania is not relevant to the issue of [TPR] in the instant case. Furthermore[,] it appears that the Pennsylvania Courts do not have jurisdiction over the matter of custody of this minor child. A merits hearing was held on the removal on October 25, 2012[,] pursuant to [section] 63-7-1660 [of the South Carolina Code]. [M]other was properly served but did not appear. An Order for Removal arising from the merits hearing was filed on December 3, 2012. This was a final order, *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999), holding merits orders are final orders which must be timely appealed. [Mother] did not appeal the Removal order and therefore jurisdiction regarding the custody of [Child] vested in the State of South Carolina in 2012[,] and the Pennsylvania Courts are

[1] This appears to be the document the family court reviewed at the reconsideration hearing.

> without jurisdiction to act regarding the custody of the minor child.

This appeal followed.

## LAW/ANALYSIS

Mother argues the family court lacked subject matter jurisdiction under the UCCJEA. She contends South Carolina was not Child's home state when this removal action began, and South Carolina only had emergency jurisdiction under section 63-15-336 of the South Carolina Code (2010). We agree.

In appeals from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011).

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)). A court without subject matter jurisdiction does not have authority to act. *Id.* at 238, 442 S.E.2d at 600. "A judgment of a court without subject-matter jurisdiction is void." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005).

"Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999) (quoting *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998)). "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this [c]ourt." *Id.* "[I]t is the duty of this court to take notice and determine if the [f]amily [c]ourt had proper jurisdiction for its actions." *Id.*

"The [Parental Kidnapping Prevention Act (PKPA)[2]] and the UCCJEA govern subject matter jurisdiction in interstate custody disputes." *Anthony H. v. Matthew G.*, 397 S.C. 447, 451, 725 S.E.2d 132, 134 (Ct. App. 2012). "The PKPA is

[2] 28 U.S.C.A. § 1738(A) (2006).

primarily concerned with when full faith and credit should be given to another [s]tate's custody determination." *Id*. (alteration by court) (quoting *Doe v. Baby Girl*, 376 S.C. 267, 278, 657 S.E.2d 455, 461 (2008)). "The UCCJEA's primary purpose is to provide uniformity of the law with respect to child custody decrees between courts in different states." *Id*. "[B]oth the PKPA and UCCJEA apply to TPR actions." *Id.*

The UCCJEA, which has been adopted by South Carolina,[3] Georgia,[4] and Pennsylvania,[5] provides three basic ways a state can establish jurisdiction over a case involving child: a state can have jurisdiction to make an initial child custody determination, a state can have jurisdiction to modify a child custody determination made by another state, or a state can have temporary emergency jurisdiction. *See* S.C. Code Ann. § 63-15-330 (2010) (initial determination jurisdiction); S.C. Code Ann. § 63-15-334 (2010) (modification jurisdiction); S.C. Code Ann. § 63-15-336 (2010) (temporary emergency jurisdiction). After a state issues an initial child custody determination, it retains exclusive continuing jurisdiction over that child until either (1) a court of the issuing state determines the child and the child's parents no longer have a significant connection with the state and substantial evidence is no longer available in the state or (2) the issuing state or the other state determines the child and the child's parents no longer reside in the state. S.C. Code Ann. § 63-15-332 (2010). South Carolina courts defer "to the jurisdiction of the state that initially rules on a custody matter." *Russell v. Cox*, 383 S.C. 215, 219, 678 S.E.2d 460, 462-63 (Ct. App. 2009) (quoting *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 87, 620 S.E.2d 333, 339-40 (Ct. App. 2005), *vacated in part on other grounds*, 375 S.C. 427, 653 S.E.2d 276 (2007)).

> [A] South Carolina family court, except [as provided by section 63-15-336], may not modify a custody order issued by a court of another state unless a court of this State has jurisdiction to make an initial custody determination under the [UCCJEA] and (1) the court of the issuing state determines either that it no longer has continuing jurisdiction or that a court of this State would be a more convenient forum; *or* (2) either a South

[3] S.C. Code Ann. §§ 63-15-300 to -394 (2010).
[4] Ga. Code Ann. §§ 19-9-40 to -104 (2015 & Supp. 2016).
[5] 23 Pa. Cons. Stat. §§ 5401–5482.

> Carolina court or a court of the issuing state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the issuing state.

*Id.* at 217-18, 678 S.E.2d at 462 (emphasis added by court) (citing § 63-15-334).

Section 63-15-336 sets forth when South Carolina may exercise temporary emergency jurisdiction:

> (A) A court of this [s]tate has temporary emergency jurisdiction if the child is present in this [s]tate and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse.
>
> (B) If there is no previous child custody determination that is entitled to be enforced under this article and a child custody proceeding has not been commenced in a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334, a child custody determination made under this section becomes a final determination, if it so provides and this [s]tate becomes the home state of the child.
>
> (C) If there is a previous child custody determination that is entitled to be enforced under this article, or a child custody proceeding has been commenced in a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334, any order issued by a court of this [s]tate under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state

> having jurisdiction under [s]ections 63-15-330 through 63-15-334. The order issued in this [s]tate remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> (D) A court of this [s]tate which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334, shall immediately communicate with the other court.

At the time of the removal, Mother and Child were traveling through South Carolina, and neither Mother, Father, nor Child had ever lived in this state. The evidence shows Georgia—not South Carolina—was Child's home state, and the record contains no evidence showing Georgia declined jurisdiction. Thus, South Carolina did not have jurisdiction to make an initial child custody determination pursuant to section 63-3-330 or modify a child custody decree from another state pursuant to section 63-3-334. South Carolina's only basis for jurisdiction was section 63-15-336, which allows a state to exercise temporary emergency jurisdiction. The South Carolina family court had a valid basis to exercise emergency jurisdiction at the time of the probable cause hearing; however, whether the subsequent removal order became a final order under the UCCJEA hinges upon whether another state issued a prior child custody determination entitled to be enforced under the UCCJEA. *See* § 63-15-336(B) (providing an order issued by a state exercising emergency jurisdiction can become a final order if (1) "there is no previous child custody determination that is entitled to be enforced under" the UCCJEA, (2) "a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under [s]ections 63-15-330 through 63-15-334," (3) the order "so provides," and (4) this state becomes the child's home state).

In the record on appeal, Mother submitted a 2005 order from the Pennsylvania court that could constitute a child custody determination under the UCCJEA because it concerned visitation of Child. *See* S.C. Code Ann. § 63-15-302(3) (2010) ("'Child custody determination' means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification

order."). Additionally, during oral argument, counsel for Mother indicated Cobb County, Georgia, had also issued an order affecting Child. Because Mother has submitted evidence of an existing out-of-state order, DSS has the burden of proving South Carolina has jurisdiction to proceed with this action. *See Anthony H.*, 397 S.C. at 452, 725 S.E.2d at 135 ("[F]or South Carolina cases involving jurisdictional questions under the UCCJEA, if the defendant provides evidence to the court of an existing out-of-state order, the plaintiff assumes the burden of proving the new state has jurisdiction to issue the initial child custody order and the issuing state has lost or declined to exercise its jurisdiction."). DSS has not met that burden; thus, we cannot find the final order in the removal action became a final order.

We acknowledge the record contains no evidence DSS and the family court were aware of the prior orders when the removal order was issued. However, both DSS and the family court should have been aware of the potential jurisdictional issues at the time of the removal hearing. According to the removal order, the DSS caseworker testified Mother and Child had been involved with Georgia Department of Families and Children and Pennsylvania Social Services; thus, both DSS and the family court should have been aware other orders affecting Child could exist. Additionally, DSS knew Mother was a resident of Georgia. Notwithstanding all of this, DSS and the family court proceeded without attempting to establish whether South Carolina had jurisdiction under the UCCJEA. DSS had the burden of proving subject matter jurisdiction, and it did not meet that burden. In the removal order, the family court merely stated, "This court has jurisdiction over the parties and the subject matter of this action." We find the family court erred in the removal order when it summarily found it had jurisdiction.

Accordingly, we vacate the family court's removal order and TPR order. Although the orders are void for lack of subject matter jurisdiction, we find South Carolina retains temporary emergency jurisdiction under section 63-15-336 pending the resolution of this jurisdictional issue, and we remand this to the family court to resolve the jurisdictional issue. *See Gorup v. Brady*, 46 N.E.3d 832, 842 (Ill. App. Ct. 2015) (vacating orders for lack of subject matter jurisdiction under the UCCJEA but maintaining temporary emergency jurisdiction pending resolution of the jurisdictional issue and remanding with instructions for the trial court to follow the temporary emergency jurisdiction procedures). On remand, the family court shall determine whether the Cobb County, Georgia order was a valid order under

the UCCJEA. If so, the family court shall communicate with the court in Cobb County to "resolve the emergency." § 63-15-336(D). If Georgia declines jurisdiction, the family court shall request Georgia issue an order finding it no longer retains exclusive, continuing jurisdiction; if Georgia issues such an order, DSS may proceed to properly establish jurisdiction under the UCCJEA and initiate another removal action. *See* § 63-15-332(A)(1).

If the family court determines the Cobb County order was not a valid order under the UCCJEA, it shall then determine whether the Pennsylvania order was a valid order under the UCCJEA. If it was, the family court shall communicate with the Pennsylvania court to "resolve the emergency." § 63-15-336(D). If Pennsylvania declines jurisdiction, the family court shall request Pennsylvania issue an order finding it no longer retains exclusive, continuing jurisdiction. *See* § 63-15-332(A)(1).

Based on the foregoing, the family court's removal order and TPR order are vacated, and this action is remanded for further findings consistent with this opinion. Additionally, consistent with section 63-15-336(C), South Carolina's exercise of emergency jurisdiction over this action shall expire sixty days from the date this opinion is filed or whenever another state having jurisdiction issues an order affecting Child.

**VACATED AND REMANDED.**

**LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Rickey Mazique, Appellant.

Appellate Case No. 2012-213631

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Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

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Opinion No. 5446
Heard January 4, 2016 – Filed October 19, 2016

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**AFFIRMED**

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J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia, and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

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**SHORT, J.:** Rickey Mazique appeals from his conviction for armed robbery, arguing the trial court erred in: (1) not conducting a timely and adequate inquiry as to his motion for the appointment of substitute counsel; (2) denying him the right to self-representation at a critical stage of the proceedings; (3) allowing the State to take advantage of him with its prejudicial and inflammatory comments to the jury; (4) denying his request to require the State to offer the entire audio of his police

interview; (5) refusing to require the State to provide him a copy of the officer's handwritten notes for cross-examination; (6) denying him the right to effective cross-examination of officers; (7) refusing to allow him to cross-examine a witness about any pending charges to examine for bias, motive, etc.; and (8) the cumulative effect of all the foregoing errors prevented him from having a fair trial. We affirm.

**FACTS**

A man wearing a wig robbed a Kangaroo convenience store; however, the store clerk recognized the robber because he regularly visited the store. The clerk did not know Mazique's name, but she later picked him out of a photographic lineup. The surveillance video shows the robber stuffing cigarettes into a trash bag.

The responding officer's investigation led him to Mazique's residence where Mazique's girlfriend consented to a search of the home. The officers found a trash bag full of cartons of cigarettes in a closet and a box of ammunition inside an air vent above the kitchen counter. The officers also found a jacket similar to the one the robber wore in the surveillance video from the convenience store. At the police station, Mazique gave two tape-recorded statements. Mazique admitted to robbing the convenience store. He also admitted to using a gun, which he threw away, and to hiding the ammunition in his kitchen.

A pre-trial hearing was held on November 8, 2012. During the hearing, Mazique told the court he wanted a new attorney. After hearing Mazique's complaints about his attorney, the court declined to rule on the request until the day of trial and ordered his attorney to represent him at trial unless Mazique chose to represent himself. The trial was held on November 15-16, 2012. Mazique was represented initially by Melinda A. Knowles at the pre-trial hearing and by Knowles and James C. Galmore at the start of his trial. On the day of the trial and prior to the selection of the jury, Mazique requested to represent himself. The court advised him of the dangers of representing himself in an armed robbery case, and Mazique responded that his two attorneys were "not an option" and he was "forced" to represent himself. Mazique proceeded throughout the trial and sentencing self-represented. The jury found him guilty of armed robbery and the court sentenced him to twenty-five years' incarceration. This appeal followed.[1]

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[1] J. Falkner Wilkes substituted as counsel prior to the briefing of this appeal and represents him in this appeal.

## STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

## LAW/ANALYSIS

### I. Appointment of Counsel

Mazique argues the trial court erred in not conducting a timely and adequate inquiry as to his motion for the appointment of substitute counsel. We disagree.

The question of whether an appellant's court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge, and this court will not interfere absent an abuse of such discretion. *State v. Graddick*, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001). The "[a]ppellant bears the burden to show [a] satisfactory cause for removal." *Id.* at 386, 548 S.E.2d at 211.

In *Graddick*, our Supreme Court held the trial court did not abuse its discretion in refusing to grant Graddick's request for new counsel four days before the start of his trial for murder when he made only the most conclusory arguments as to why his counsel should have been relieved, including: "[My attorney] is not representing my interests and is not fully prepared for this case. I do not feel comfortable going to court with him as my lawyer." *Id.*

During the pre-trial hearing on November 8, Mazique told the court he wanted another attorney appointed: "I'm not qualified to go *pro se*; I just want another attorney." The court allowed Mazique to expound on why he was unhappy with his attorney. First, he stated his attorney waived his rights to his preliminary

hearing without his consent. The court explained to Mazique that the Grand Jury true billed his indictment and he was not entitled to a preliminary hearing.

Second, Mazique stated his attorney knew the solicitor was in possession of exculpatory evidence, an alleged altered tape recording of his statement to police, and she would not file a pre-trial motion to obtain the evidence. The State asserted it turned over all the recordings to Mazique and there was no alteration of the recordings. Mazique then stated he wanted the recording device and the officer's hard drive. Mazique's attorney stated she filed the motion to receive the evidence Mazique requested and the State replied it did not have access to the recording machine. The court then explained to Mazique that he was not entitled to the actual recording device, just the original recording, and the recording's authenticity would be questioned at trial.

Third, Mazique stated the arresting officer committed perjury by changing his indictment from committing an armed robbery with a box of ammunition to committing an armed robbery with a firearm. The State responded that the arrest warrant and the indictment both stated Mazique committed armed robbery. The State explained he was also charged with possession of bullets as a federally convicted felon; however, the State was only going forward on the armed robbery. The court explained the indictment for armed robbery was true billed and he was going to trial on the exact language contained in the indictment.

Fourth, Mazique asserted he had been asking his attorney to file a motion for the production of the cigarettes so he could have his own independent tests done on them. The State responded the police found forty to sixty cartons of cigarettes in Mazique's house and after photographing them, the State returned the cigarettes to the store. Mazique told the court he had two other pending strong-armed robberies where he stole cigarettes and he had the right to determine if the cigarettes were from this robbery or another one. The court found it was sufficient that the State had video of Mazique in the store with a gun, taking Newport cigarettes and putting them in a plastic bag; statements from Mazique; a positive identification from the witness at the store; and cartons of cigarettes at his residence.

Next, Mazique told the court he would not move forward with his attorney because he did not trust her and there was no "line of communication." The court told Mazique he had three options: go to trial the next week with his current attorney; hire his own attorney; or represent himself. The court stated Mazique was entitled

to a lawyer, but not the lawyer of his choice, and his current attorney was an excellent lawyer. Mazique responded, "If you compel me to [be] my own la[w]yer, I'll be my own lawyer. I don't want her representing me." The court told Knowles that, "If on the morning of the trial, he tells me under oath before this Court Reporter, that he wants to represent himself, I'm gonna let him do that. Otherwise, you're gonna represent him." The court then held a *Jackson v. Denno*[2] hearing with Knowles representing Mazique against his objections.

On appeal, Mazique argues the trial court "indicated that it would listen to [his] grounds but then cut [him] off before he finished" and the court "never conducted a proper inquiry into the basis for [his] motion to have new counsel appointed." Further, he asserts "the trial court's failure to conduct a through [sic] inquiry resulted in a lack of record for this Court to affirm the trial court's denial of [his] motion." We find the court listened to Mazique's complaints about his attorney and found them to not be a satisfactory cause for removal; therefore, the trial court did not abuse its discretion in declining to appoint Mazique new counsel seven days before his trial.

## II. Right to Self-Representation

Mazique argues the trial court erred in denying him the right to self-representation at a critical stage of the proceedings. We disagree.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). An accused is allowed to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. *Faretta v. California*, 422 U.S. 806, 835 (1975).

> To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved

[2] 378 U.S. 368 (1964).

> in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

*In re Christopher H.*, 359 S.C. 161, 167-68, 596 S.E.2d 500, 504 (Ct. App. 2004). "At bottom, the *Faretta* right to self-representation is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (quoting *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162 (2000)).

"[A]fter [a] trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time." *State v. Jones*, 270 S.C. 587, 588, 243 S.E.2d 461, 462 (1978). "The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge. Only in a case of abuse of discretion will this [c]ourt interfere." *State v. Samuel*, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015) (quoting *State v. Sims*, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991)). "An abuse of discretion occurs when the decision of the trial [court] is based upon an error of law or upon factual findings that are without evidentiary support." *Id.* "The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." *Id.* at 212, 777 S.E.2d at 401. "A trial court must be permitted to distinguish between a manipulative effort to present particular

arguments and a sincere desire to dispense with the benefits of counsel." *Id.* (quoting *Frazier-El*, 204 F.3d at 560).

At the pre-trial hearing, Mazique told the court he wanted a new attorney and he did not want to proceed Pro Se: "I'm not qualified to go Pro Se; I just want another attorney." The court responded, "on many occasions folks who are set for trial on serious charges, the way you are, first thing they do to try and dodge it is throw off on the lawyer, want a new lawyer." Mazique told the court: "If you compel me to [be] my own [lawyer], I'll be my own lawyer. I don't want her representing me." He continued, "And for the record, Your Honor, I'm not insisting that I represent myself but I'm . . . also bringing it to the Court's attention the ineffectiveness of my lawyer . . . " The court told Knowles, "to excuse you to continue the trial would be to fall right into his trap of trying to get a continuance and I'm not going to give it to him" and "I've heard this so many times he just don't want to go to trial." Mazique stated: "Well, I'll represent myself, I don't want you representing me. I'll represent myself; she not representing me." Knowles then stated: "Your Honor, you said a moment ago that you would only remove me if he said on the record to you that he did not want me and he wanted to represent himself." The court responded: "No, sir, he didn't – I haven't heard him say that." Mazique then told the court: "I represent myself but I'm forced to do it. I'm gonna represent myself. I don't want this lawyer." The court responded to Knowles, "[A]fter he thinks about it over the weekend and after we've had these motions, I'll entertain it later." Mazique stated, "It's apparent that she's not objecting to that then I'll file these right now. If I have to represent myself, I will, I'm prepared to." Knowles told the court he has a right to represent himself if he wants. The State added:

> [I]f the court is going to allow [Mazique] to represent himself, the State would ask that, respectfully, that you go through the protracted list of advising him of all his rights and whether he's waiving them and giving them up and whether he actually wants to go Pro Se. He's said multiple times he doesn't want to go Pro Se.

Knowles stated, "He just said outright he wanted to represent himself." The court responded to Knowles: "I'm gonna leave you in this case during this *Jackson v. Denno*; it's a very legal matter and he needs representation. At the appropriate time, if he wants to represent himself, I'll deal with it. I'm not gonna deal with it until this *Jackson v. Denno* hearing is over."

During the remainder of the *Jackson v. Denno* hearing, Mazique repeatedly stated he would represent himself. The court told Knowles to continue to represent him until trial. Mazique responded, "What about now, Your Honor? I'm telling you now that I want to represent my – this is pretrial." The court stated: "I'm not going to do that now. I want him to have a lawyer under these technical issues." Towards the end of the hearing, the court told Mazique:

> If on the morning of the trial – I just want you to have her preparation for the next week, in fairness to you. If on the morning of the trial, after examination, you tell me that you want to represent yourself, I'm gonna give you that opportunity. But in fairness to you, I want her to at least prepare for trial and turn over her trial material to you. I'm trying to help you if you'll let me.

Mazique responded: "Your Honor, and I'm asking you, you say you're trying to help me and I'm telling – I'm explaining to you, I understand the law. I understand that the pretrial proceeding is the most important part of the trial." The court did not respond. After Mazique was removed from the courtroom for talking when he was instructed not to, Knowles repeated to the court that Mazique had the right to represent himself if he chooses. The court responded:

> He does, clearly. But he hasn't really said that yet and I wanted you to stay here for these legal motions that he's not competent to handle. But it's obvious to me and should be to everybody in the courtroom what he's trying to do and we can't be a party to that.

At the start of trial, Mazique again asserted he wanted to represent himself. The court gave Mazique warnings about self-representation and asked him about his age, educational background, and knowledge of the law. After allowing Mazique to raise multiple motions to the court, the court again addressed Mazique's motion to represent himself. The court advised Mazique: "I would urge you, . . . as strong as I can given the dangers of representing yourself, to let these two distinguished attorneys with more than twenty years of experience represent you in this case." The court continued:

> I have this decision to make, you are faced with a serious serious charge. You read some books but you are not qualified as a lawyer. You don't know the law of evidence. You don't know the law of hearsay. You don't know what's admissible and what's not admissible. Those are numerous things that you can't possibly know as a layman and for you to attempt to represent yourself in an armed robbery case is pure folly, however, the only thing the law requires me to do is make sure that it's your decision knowing the dangers of it and I would urge you to let these lawyers represent you in the trial of this case. Now having said that if you say, ["]I knowing the dangers wish to represent myself[,"] I'm going to let you do it but they will not be available to you in the trial; now do you understand that?

Mazique responded: "Yes sir, I understand that." The court asked Mazique to answer the question, "knowing that they will not be available to you in the trial of the case, knowing the danger of representing yourself, is it your intention to represent yourself or to have these lawyers help with trial?" Mazique finally responded: "No, I don't, I'll represent myself, I'm forced to, I will represent myself." The trial proceeded with Mazique representing himself.

On appeal, Mazique argues the court erred by not conducting a *Faretta* hearing during the *Jackson v. Denno* hearing when Mazique told the court he wanted to represent himself. He asserts that once the court conducted the proper inquiry during the trial, the court found Mazique capable of representing himself; thus, there was no basis to deny his right to self-representation at the pretrial stage. Mazique asserts the denial of his requests to represent himself require a reversal of his conviction. Although Mazique told the court he no longer wanted his attorney to represent him, he was equivocal about whether he wanted to represent himself. Because the request to proceed *pro se* must be clearly asserted by the defendant, we find no error in the court's initial denial to dismiss Mazique's counsel during the pretrial hearing. *See Fuller*, 337 S.C. at 241, 523 S.E.2d at 170.

Further, Mazique argues that during the jury selection, he was denied the right to self-representation when his stand-by counsel responded to the court's question asking whether there were any objections to the selection of the jury; whereby

waiving his ability to make a *Batson v. Kentucky*, 476 U.S. 79 (1986), motion. At the beginning of trial, the court allowed Mazique to represent himself, and Mazique conducted the jury selection process. Once the jury was selected, the court asked the State if it had any motions. The State replied it did not. The court then asked if the defense had any motions. Galmore responded, "No, sir." Mazique did not say anything. After lunch, Mazique told the court he wanted to make a *Batson* motion. The court then told Mazique he could not make the motion because the defense did not object after the jury selection. If Mazique had an objection to the jury selection, he could have said so after Galmore responded to the court's question. Therefore, we find no error in the court's denial of his motion.

## III. Comments to Jury

Mazique argues the trial court erred in allowing the State to take advantage of him with its prejudicial and inflammatory comments to the jury. We disagree.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "[I]mproper comments do not require reversal if they are not prejudicial to the defendant." *State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Id.*

Mazique did not object to the State's comments at trial. However, while the general rule is the lack of a contemporaneous objection to an improper argument acts as a waiver, our supreme court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

On appeal, Mazique argues the State repeatedly made flagrant and inflammatory comments to the jury. First, he asserts the solicitor told the jury he believed Mazique was guilty. Second, Mazique argues the solicitor put into issue the credibility of his girlfriend's testimony about her consent to search the house and

argued facts not in the record by telling the jury how much a carton of Newport cigarettes cost.

We find the solicitor's comments referring to his belief that Mazique was guilty were in response to Mazique's closing argument to the jury that the solicitor had an obligation to investigate before charging and that the solicitor mislead the jury. *See Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("Conduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense."). The question of whether Mazique's girlfriend consented to the search of the home was an issue for the court, not the jury. Thus, although the comment was improper, we find it was not prejudicial to Mazique. Also, the value of the stolen cigarettes was not an element of the crime or vital to the evidence in the case; thus, the comment was not prejudicial to Mazique. We further find the solicitor's brief comments do not rise to "extraordinary circumstances" that would excuse the failure to make a contemporaneous objection. *See Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (holding that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice."). Mazique finally argues this is a novel issue because "this case involves an obvious attempt by the solicitor to take advantage of the self-represented defendant." Therefore, he asserts the State should not be allowed to raise his failure to object to its improper statements as a defense. We do not find this is a novel issue, and Mazique chose to represent himself at trial. *See Barnes*, 407 S.C. at 31, 753 S.E.2d at 547 ("Appellant [who moved to be allowed to proceed *pro se*] acknowledged he understood he would be held to the same standards as an attorney regarding the rules of court and of evidence.").

## IV. Audio of Police Interview

Mazique argues the trial court erred in denying his request to require the State to offer the entire audio of his police interview. We disagree.

At trial, the State played for the jury a shortened version of the audio tape from his interview with the police. Mazique objected to the introduction of only a portion of the interview, requesting the whole interview be played for the jury. The State asserted it left out the parts of the recording mentioning other crimes and the investigation of other crimes.

On appeal, Mazique argues he was entitled to play the audio tape pursuant to Rule 106, SCRE. Rule 106 provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

He argues the trial court erred in allowing the State to offer only a portion of the interview, which "forced [him] to introduce" the entire audio tape that had been redacted over his objection in the State's case. He argues the court improperly forced him into choosing between introducing evidence he thought was important or losing the right to the last argument. He maintains the court knew he did not plan to testify and there were no other witnesses, but he had to recall Detective Chatfield to examine him about the portion of the audio the State did not play for the jury and Officer Brian Scales to question him about portions of the store surveillance and in-car video. This resulted in him losing the last argument. He asserts this was error because had he been allowed to argue last, he could have more adequately addressed the improper issues raised by the State in its closing argument. Thus, he asserts the loss of last argument was not harmless beyond a reasonable doubt.

During the *Jackson v. Denno* hearing, the trial court redacted all parts of the police interviews that were prejudicial to Mazique, and Mazique did not object. Because the audio tapes were redacted for Mazique's benefit, we find the court did not err in allowing the State to play only the redacted portions not prejudicial to Mazique. We also find no violation of Rule 106, SCRE, because the court allowed Mazique to play the full audio recording in his defense. Further, because Mazique chose to recall two witnesses in his defense, he would have lost last argument regardless of whether the court had not redacted the audio tapes. Finally, we find any error was harmless in light of the overwhelming evidence of Mazique's guilt. *See State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained).

## V. Officer's Notes

Mazique argues the trial court erred in refusing to require the State to provide him a copy of the officer's handwritten notes for cross-examination. We disagree.

During Mazique's cross-examination of Detective Chatfield, it was revealed that Chatfield had written notes about the case. Mazique told the court he had not received any written notes in his discovery. The State responded that the policy is to not turn over written notes of a detective's thoughts or feelings. The court agreed, and Mazique did not object. Because Mazique did not object or move to have the notes produced, we find this issue is not preserved for our review. *See State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct. App. 2005) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.").

## VI. Cross-Examination of Officers

Mazique argues the trial court erred in denying him the right to effective cross-examination of officers. We disagree.

Mazique argues on appeal that the court erred in not allowing him to challenge Detective Chatfield's testimony and recollection of events by offering into evidence a document produced by Chatfield that Mazique believed would show additional inconsistencies between Chatfield's report and testimony. Further, he asserts the court did not allow him to play the interview audio to impeach Chatfield's testimony during cross-examination and did not allow him to question Chatfield about whether the tapes were altered from the original. Further, he asserts his cross-examination of Officer Scales was unduly limited by the court not allowing him to play the surveillance video for the jury. Finally, he argues the court's refusal to make the transcript of the pre-trial hearing available to Mazique limited his ability to cross-examine Chatfield during the trial.

Mazique fails to cite to any case law for these assertions; therefore, we find he has abandoned them. *See* Rule 208(b)(1)(D), SCACR (requiring citation to authority in the argument section of an appellant's brief); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (holding "[a]n issue is deemed abandoned

and will not be considered on appeal if the argument is raised in a brief but not supported by authority").

## VII. Cross-Examination of Witness

Mazique argues the trial court erred in refusing to allow him to cross-examine a witness about any pending charges to examine for bias, motive, etc. We disagree.

Rule 608(c), SCRE, provides: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

Mazique argues the trial court erred under Rule 608(c), SCRE, by preventing him from cross-examining the robbery victim about the existence of any pending charges against her. He argues Rule 608(c) provides evidence of a witnesses' pending charges is appropriate when it is offered for impeachment purposes. He maintains "[p]ending charges could create the possibility that [the victim] would give biased testimony in an effort to have the solicitor highlight to her future trial judge how she had cooperated in the instant case."

However, at trial, Mazique asked the victim if she had ever been arrested and did not ask her whether she had any pending charges. Because Mazique did not object or offer evidence of the victim's pending charges, we find this issue is not preserved for our review. *See Walker*, 366 S.C. at 660, 623 S.E.2d at 130 ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.").

## VIII. Prejudicial Effect

Finally, Mazique argues the cumulative effect of all the foregoing errors prevented him from having a fair trial.

He asserts the record shows a multitude of substantial issues that prevented him from having a fair trial, and reversal is required under the doctrine of cumulative error. Because we find no error by the trial court on any of the issues raised by Mazique, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an

appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

**CONCLUSION**

Accordingly, the trial court is

**AFFIRMED.**

**GEATHERS and MCDONALD, JJ., concur.**