The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 218, 240, 262, and 267 of the South Carolina Appellate Court Rules are amended as indicated in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

The South Carolina Appellate Court Rules (SCACR) are amended as follows:

(1) Rule 218, SCACR, is amended to add the following:

(d) Remote Oral Argument. With the permission of the Chief Justice, an appellate court may conduct oral argument in a case using remote communication technology. Further, any necessary oath or affirmation may be administered by remote communication technology. For the purpose of this provision, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time.

(2) Rule 240(h), SCACR, is amended to read:

(h) Hearing. Unless otherwise directed by the court, motions or petitions shall be decided without oral argument. If argument is directed, the appellate court may elect to conduct the argument using remote communication technology. Further, any necessary oath or affirmation may be administered by remote communication technology. For the purpose of this provision, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time.

(3) Rule 262, SCACR, is amended to read:

(a) Filing. Except for petitions for rehearing (Rule 221) and motions for reinstatement (Rule 260), filing may be accomplished by:

(1) Delivering the document to the clerk of the appellate court. The date of filing shall be the date of delivery;

(2) Depositing the document in the U.S. mail, properly addressed to the clerk of the appellate court, with sufficient first class postage attached. The date of filing shall be the date of mailing; or,

(3) Filing the document by electronic means in a manner provided by order of the Supreme Court of South Carolina.

(b) Proof of Service to Be Filed. Any document filed with the appellate court shall be accompanied by proof of service showing the document has been served on all parties.

(c) Service. Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the appellate court. Service upon the attorney or upon a party shall be made by:

(1) Delivering a copy to the person, in which case service is complete upon delivery. Delivery of a copy under this provision means: handing it to the attorney or to the party; or leaving it at the office of that person with a clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at the person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Depositing a copy in the U.S. mail, properly addressed to the person at that person's last known address with sufficient first class postage attached, or, if no address is known, by leaving it with the clerk of the appellate court. Service by mail is complete upon mailing; or,

(3) Serving a copy on the person by electronic means in a manner provided by order of the Supreme Court of South Carolina.

(4) Rule 267(b), SCACR, is amended to read:

(b) Signatures. A document filed with the appellate court shall be signed by the lawyer or the self-represented litigant filing the

document. In addition to a traditional hand-written signature, a lawyer or self-represented litigant may sign a document using "s/ [typed name of person]," a signature stamp, or a scanned or other electronic version of the person's signature. Regardless of form, the signature shall act as a certificate that the person has read the document; that to the best of the person's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended to add Rules 611 and 612 as indicated in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

The South Carolina Appellate Court Rules are amended to add the following rules:

RULE 611
EMERGENCY MODIFICATION OF REQUIREMENTS OF COURT RULES

In response to a natural or man-made disaster, including but not limited to a hurricane, earthquake, flood, war or other armed conflict, riot, or pandemic, the Supreme Court of South Carolina may, by order, temporarily modify the requirements of court rules as may be necessary to respond to the disaster, including declaring days to be holidays for the purpose of computing time. The order may be applicable to the entire state or may be limited to the county or counties directly affected by the disaster. The order may be effective for up to ninety (90) days, and the order may be extended for such additional periods of ninety (90) days or less as the Supreme Court may determine is appropriate. A copy of any order issued under this rule shall be provided to the Chairs of the House and Senate Judiciary Committees.

RULE 612
USE OF REMOTE COMMUNICATION TECHNOLOGY

By order, the Supreme Court of South Carolina may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. For the purposes of this rule, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time. The use of this technology for oral argument and hearings before the Supreme Court of South Carolina and the South Carolina Court of Appeals is governed by Rules 218 and 240, SCACR.

The Supreme Court of South Carolina

RE: Amendment to Rule 3(a) of the South Carolina Rules of Criminal Procedure

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 3(a) of the South Carolina Rules of Criminal Procedure is amended as indicated in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 3(a) of the South Carolina Rules of Criminal Procedure is amended to read as follows:

> **(a) Transmittal to Clerk.** Magistrates, municipal judges, and other officials authorized to issue warrants shall, in all cases within the jurisdiction of the Court of General Sessions, forward to the Clerk of the Court of General Sessions all documents pertaining to the case including, but not limited to, the arrest warrant and bond, within fifteen (15) days from the date of arrest in the case of an arrest warrant and date of issuance in the case of other documents. If it is determined that the defendant is already in the custody of the South Carolina Department of Corrections or a detention center or jail in South Carolina, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions. Transmittal shall be pursuant to procedures now or hereafter promulgated by the Office of South Carolina Court Administration.

The Supreme Court of South Carolina

Re: Amendments to Rules 2 and 5, South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2020-001509

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rules 2 and 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 2 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add new paragraphs (l) and (m), which provide:

(l) Online Dispute Resolution (ODR). The use of remote communication technology, such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time, at any stage of the ADR Conference or early neutral evaluation.

(m) Sign or signing. For purposes of these rules, the reference to sign or signing shall include the physical signature or electronic signature or electronic consent.

Rule 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add new paragraph (h), which provides:

(h) Online Dispute Resolution (ODR) in an ADR Conference or Early Neutral Evaluation. Unless a party objects, an ADR Conference or Early Neutral Evaluation may be conducted in whole or in part by ODR.

(1) The persons required to physically attend an ADR Conference or Early Natural Evaluation under these rules may attend via ODR if agreed to by the neutral and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit.

(2) A mediator, arbitrator, or evaluator shall at all times be authorized to control the use of ODR at any stage of an ADR Conference or Early Neutral Evaluation.

The Supreme Court of South Carolina

Re: Amendments to Rule 9, South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2019-001845

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 9 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 9, South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

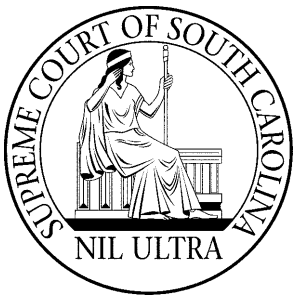
Rule 9
Compensation of Neutral

(a) By Agreement. When the parties stipulate the neutral, the parties and the neutral shall agree upon compensation.

(b) By Appointment. When the mediator is appointed by the Clerk of Court pursuant to Rule 4(c), Rule 4(d)(2)(B), or Rule 4(d)(2)(C) of these rules, the mediator shall be compensated by the parties at a rate of $200 per hour, provided that the court-appointed mediator shall charge no greater than one hour of time in preparing for the initial ADR conference. Travel time shall not be compensated. Reimbursement of expenses to the mediator shall be limited to: (i) mileage costs accrued by the mediator for travel to and from the ADR conference at a per mile rate that is equal to the standard business mileage rate established by the Internal Revenue Service, as periodically adjusted; and (ii) reasonable costs advanced by the mediator on behalf of the parties to the ADR conference, not to exceed $150. An appointed mediator may charge no more than $200 for cancellation of an ADR conference.

(c) Payment of Compensation by the Parties. Unless otherwise agreed to by the parties or ordered by the court, fees and expenses for the ADR conference shall be paid in equal shares per party. Payment shall be due upon conclusion of the conference unless other prior arrangements have been made with the neutral, or

(d) Indigent Cases. Where a mediator has been appointed pursuant to paragraph (b), a party seeking to be exempted from the payment of neutral fees and expenses based on indigency shall file an application for indigency prior to the scheduling of the ADR conference. The application shall be filed on a form approved by the Supreme Court or its designee. Determination of indigency shall be in the discretion of the Chief Judge for Administrative Purposes or his designee. In cases where leave to proceed in forma pauperis has been granted, a party is exempt from payment of neutral fees and expenses, and no application is required to be filed.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
February 3, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Ralph James Wilson, Jr., Respondent.

Appellate Case No. 2021-000095

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Independent of the request of the Office of Disciplinary Counsel, the request has been further reviewed pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE). Having reviewed the matter, the request for interim suspension is granted.

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

s/ John W. Kittredge A.C.J.
FOR THE COURT
Beatty, C.J., not participating.

Columbia, South Carolina
February 1, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Christopher H., a Juvenile under the age of Seventeen, Appellant.

Appellate Case No. 2017-001257

Appeal From Richland County
W. Greg Seigler, Family Court Judge

Opinion No. 5797
Submitted November 2, 2020 – Filed February 3, 2021

REVERSED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, all for Respondent.

THOMAS, J.: Christopher H. appeals a sentencing court's order requiring him to register as a sex offender on the private sex offender registry. On appeal, he argues the sentencing court erred by finding good cause existed to place him on the private sex offender registry because there was insufficient evidence showing he was at risk of reoffending. We reverse.

FACTS

On December 11, 2014, the State filed a juvenile petition alleging Christopher committed two counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree assault and battery against his six-year-old female cousin and her nine-year-old female friend. Christopher was between twelve and thirteen years old at the time of the offenses. Christopher pled guilty to two counts of second-degree assault and battery, and the State dropped the two counts of first-degree CSC. The plea court accepted the plea and ordered Christopher to undergo a secure evaluation at Midlands Evaluation Center (MEC), including a sex offender risk assessment and a psychiatric evaluation, with a dispositional hearing to follow. Following his evaluation, the sentencing court committed Christopher to the Department of Juvenile Justice (DJJ) for an indeterminate sentence not to exceed his twenty-first birthday, suspended upon alternative placement at Generations, an inpatient sex offender treatment facility, and two years of probation. Christopher was discharged from Generations and released to his parents' custody on July 22, 2016, after approximately sixteen months of inpatient sex offender treatment.

On March 29, 2017, the family court held a sentencing hearing to determine whether to place Christopher on the private sex offender registry. The State called Adam Whitsett, general counsel for the State Law Enforcement Division, as its only witness. He testified to the law regarding the public and private sex offender registry and stated Christopher's guilty plea to two counts of second-degree assault and battery would not qualify him for placement on the public registry. Whitsett testified placement on the private registry would prohibit Christopher from living on campus while he attended college. Whitsett also testified an order to register as a sex offender creates a lifetime requirement to register. The State relied on its brief and supporting documentation, which consisted of Christopher's records.

Generations noted the following post-treatment recommendations on Christopher's discharge report: (1) no unsupervised access to children under thirteen years old; (2) no access to internet without parental controls installed; (3) monitoring of text messages and other communications with peers; (4) consistent access to outpatient therapy; (5) no access to electronics in his room at night; (6) consistent monitoring of his medications by a physician; (7) no contact with the victims or their families; (8) accountability for school work; (9) adult supervision in the community and at home until age eighteen; and (10) attendance at monthly meetings with his

probation officer until released. Meredith Lutz, Christopher's therapist at Generations, testified Christopher successfully completed all four levels of treatment. Lutz explained the restrictions regarding access to children and adult supervision at home and in the community as recommendations placed on every resident's discharge care plan. She explained the restrictions were not personalized toward Christopher. Lutz declined to give her personal recommendation regarding the sex offender registry, stating she does not recommend for or against placement on the registry for any of her patients. However, she explained Generations' view of the sex offender registry aligned with studies indicating placement on the registry does not reduce the rate of recidivism or otherwise provide safety to the community. Lutz concluded Christopher's risk of reoffending decreased because he completed treatment.

Dr. McKee, qualified and testifying as an expert in forensic psychology, testified he conducted a forensic psychological assessment of Christopher. He explained he assessed Christopher's risk of reoffending using four different sexual recidivism risk scales for juveniles widely used by clinicians. Dr. McKee testified the results from each assessment indicated Christopher had a low risk of reoffending and his prognosis was "good, even perhaps excellent." He added, "There are no psychological tests, no risk guides, no set of research that can ever say somebody will not reoffend. . . . [Y]ou never get to [zero] . . . . You just try to get as close as you can to [zero]." Dr. McKee testified the question was the degree of risk, not the existence of risk. He concluded "there [was no] empirical basis for placing Christopher on the sex offender registry."

Melanie Hendricks, qualified as an expert in social work as it relates to adolescent care, testified she supervised Christopher's outpatient therapist, Sara Hood. According to Hendricks, research indicates placement on the registry creates unintended negative consequences for juvenile offenders, such as difficulty being accepted to college, the inability to live in on-campus housing or participate in ROTC or the military, and an increased risk of alcohol and drug abuse and suicide. Hendricks testified there was no research indicating placement on the sex offender registry reduced the recidivism rate. She asserted Christopher should not be placed on the sex offender registry because his family was involved in and cooperated with his treatment, which increased his likelihood of success. She concluded she "would not deem [Christopher] to be appropriate for lifetime monitoring, whether public or private."

Finally, Sara Hood testified she was Christopher's outpatient therapist. Hood explained Christopher was definitely making good progress: he had a job at Sonic, attended school every day and was doing well in school, had not had any behavior problems at school, was playing the cello in Orchestra, and was in ROTC. She explained Christopher's family was involved in his therapy, contacted her with concerns and questions, and attended therapy sessions with Christopher. When asked if she believed Christopher was at a risk of reoffending, Hood answered, "I look for . . . red flag issue[s during his sessions] and there hasn't been anything like that. . . . I haven't seen anything there that's raised any real concern to me." She also stated she did not recommend that Christopher be placed on the sex offender registry because of his "low risk [of reoffending]."

The sentencing court found good cause existed to place Christopher on the private sex offender registry because there was evidence showing Christopher was at risk of reoffending. Christopher filed a motion to reconsider, which was denied. This appeal followed.

LAW/ANALYSIS

Christopher argues the sentencing court erred by placing him on the private sex offender registry because the evidence in the record indicated he had only a low risk of reoffending, which was insufficient to establish good cause. We agree.

"A [sentencing court] has broad discretion in sentencing within statutory limits." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "A [sentencing court] must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant." *Id.* The sentence imposed will not be overturned on appeal absent an abuse of discretion. *Id.* An abuse of discretion occurs when the sentence imposed was based on either an error of law or a factual conclusion not supported by evidence in the record. *Id.*

A sentencing court "may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor." S.C. Code Ann. § 23-3-430(D) (2007). In *M.B.H.*, our supreme court stated "good cause" for the purposes of placing a juvenile offender on the private sex offender registry "means only that the [sentencing court] must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually." 387 S.C. at 327, 692 S.E.2d at 542.

In *M.B.H.*, as in this case, the solicitor introduced the evaluation center's report to support the request for M.B.H. to be placed on the private sex offender registry. *Id.* In *M.B.H.*, "the [sentencing court] enumerated the issues identified in the [c]enter's report that constitute good cause for requiring Appellant to register, including: multiple offenses; multiple younger, same-sex victims; a sense of victimization; denial of harm to others; borderline intellectual functioning; and the [c]enter's recommendation that Appellant receive inpatient sexual offender treatment." *Id.* at 326, 692 S.E.2d at 542. Our supreme court found the sentencing court did not abuse its discretion by placing M.B.H. on the private registry because it "considered all the facts and circumstances of th[e] case, both aggravating and mitigating" and the evidence in the record supported the determination that M.B.H. was at risk of reoffending. *Id.* at 327, 692 S.E.2d at 542−43.

In this case, the State called one witness, who testified only regarding the law governing the registry and otherwise relied on Christopher's records. Unlike in *M.B.H.*, Christopher was doing well in school, had admitted his offenses, and had successfully completed his treatment. Christopher called four witnesses as fact or expert witnesses who either testified to his low risk to reoffend, that risk of reoffending can never be eliminated, or that Christopher should not be placed on the registry. Dr. McKee testified there is never no risk of reoffending and there was no basis to place Christopher on the registry. Here, there was other evidence indicating there was no cause to place Christopher on the registry. The sentencing court noted the testimony indicated Christopher was at a low risk of reoffending, but found "a" risk of reoffending existed; thus, good cause was established.

Our legislature explained the intent of the sexual registry statutes, stating, "[t]he intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." S.C. Code Ann. § 23-3-400 (Supp. 2019). Our supreme court indicated, "[t]he intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend." *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003). The requirement to register is considered non-punitive. *In Interest of Justin B.*, 419 S.C. 575, 583, 799 S.E.2d 675, 679 (2017).

However, placement of a juvenile convicted of a sexual offense on the registry is not automatic and requires the solicitor to show good cause. § 23-3-430(D). This requirement indicates an intent by the legislature to require more than a scintilla of

evidence of risk. It is axiomatic that a juvenile with a history of a sexual offense or offenses will be at some risk, even if the risk is very low. As Dr. McKee testified, "[Y]ou never get to [zero risk]." If any risk is sufficient to establish good cause, the statute requiring the solicitor to show good cause would be of no purpose because all juveniles would automatically be placed on the registry. An appellate court "must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). We presume the legislature must have intended some juveniles would not be required to register. Otherwise, there would be no need for the legislative requirement for a showing of good cause.

The State's brief to the sentencing court states it "offered to withdraw its request to enter the juvenile's name on the private sex offender registry if the defense witnesses could provide affidavits indicating he is not at risk to reoffend. None of the witnesses . . . were willing to do that . . . ." Their willingness, however, was explained by their testimony, which indicated there can never be zero risk because to completely eliminate all risk is impossible. As previously stated, if our legislature intended this, it would not have placed the burden of proving good cause on the solicitor.

We find the weight of the evidence indicated the State failed to show good cause for placing Christopher on the registry. The only evidence of risk indicated a low risk, and the evidence overwhelmingly indicated registry in this case was not appropriate. Such a low risk of reoffending does not seem to meet the intent of the statute. Thus, we find the sentencing court abused its discretion in ordering Christopher placed on the registry. *M.B.H.*, 387 S.C. at 326, 692 S.E.2d at 542 (explaining the sentencing court abuses its discretion when the sentence imposed was "based on an error of law or a factual conclusion without evidentiary support").

CONCLUSION

Based on the foregoing, the order on appeal is

REVERSED.[1]

HILL and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christopher Lampley, Appellant,

v.

Major Hulon, Dillon County Sheriff, Respondent.

Appellate Case No. 2018-000405

Appeal From Dillon County
Paul M. Burch, Circuit Court Judge

Opinion No. 5798
Heard November 12, 2020 – Filed February 3, 2021

REVERSED AND REMANDED

Robert Norris Hill, of Law Office of Robert Hill, of Lexington, and William P. Hatfield, of Hatfield Temple, LLP, of Florence, both for Appellant.

Kevin Lindsay Terrell, of Clarkson, Walsh & Coulter, P.A., of Spartanburg; C. Heath Ruffner, of McLeod & Ruffner, of Cheraw; and Andrew F. Lindemann, of Lindemann & Davis, P.A., of Columbia; all for Respondent.

THOMAS, J.: Christopher Lampley appeals from an order granting partial summary judgment to the Dillon County Sheriff (Sheriff) based on section 15-78-60(14) of the South Carolina Code (2005). Lampley argues the trial court erred in

(1) not finding section 15-78-60(14) unambiguously allows Lampley to recover damages from the Sheriff because the Sheriff was not his employer; (2) improperly altering the statute's unambiguous text with canons that do not apply; and (3) focusing on who funded the insurance, rather than who employed Lampley, which interjected uncertainty into an unambiguous statute. We reverse and remand.

FACTS

A Dillon County Deputy Sheriff and Lampley, who was a fireman employed by Dillon County, were responding to a house fire with entrapment. In the process of responding to the fire, there was a collision between the two vehicles just outside Dillon County. Both Lampley and the Deputy Sheriff were on duty and acting within the course and scope of their employment at the time of the accident. Lampley was injured in the accident and received worker's compensation benefits through Dillon County.

Lampley also filed an action against the County and limited his suit to his property damage claims because the County provided him with workers' compensation coverage. However, the County answered, asserting Lampley sued the wrong defendant because the Sheriff, not the County, employed the Deputy Sheriff. The County moved to dismiss because the Tort Claims Act required Lampley sue the Sheriff, not the County. Therefore, Lampley filed an amended complaint, substituting the Dillon County Sheriff as the named defendant and adding a claim for bodily injury to the prior claim for property damage.

The Sheriff then filed a motion to dismiss, or in the alternative, a motion for summary judgment. After a hearing, the trial court granted the Sheriff partial summary judgment and dismissed Lampley's claim for bodily injuries. The court allowed Lampley's claim for property damage to proceed to trial. The jury found Lampley and the Deputy Sheriff were equally at fault for the accident. Lampley now appeals only the partial summary judgment on his bodily injury claim.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). Our supreme court has established "[t]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) (quoting *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)).

LAW/ANALYSIS

Lampley argues the trial court erred in not finding section 15-78-60(14) of the South Carolina Tort Claims Act unambiguously allows him to recover damages from the Sheriff because the Sheriff was not his employer. We agree.

Section 15-78-60(14) provides:

> The governmental entity is not liable for a loss resulting from: (14) any claim covered by the South Carolina Workers' Compensation Act, *except claims by or on behalf of an injured employee to recover damages from any person other than the employer*, the South Carolina Unemployment Compensation Act, or the South Carolina State Employee's Grievance Act.

(emphasis added).

The trial court noted the issue of whether "as to the collection of workers' compensation benefits, County and Sheriff are, for all intents and purposes, the same 'employer' as contemplated by § 15-78-60(14)" is one of first impression in our state. The trial court considered *Buff v. South Carolina Department of Transportation*, 332 S.C. 472, 505 S.E.2d 360 (Ct. App. 1998), *rev'd on other grounds*, 342 S.C. 416, 537 S.E.2d 279 (2000), stating:

> [T]he Court of Appeals held that a private employee may receive workers' compensation benefits from his private employer and maintain an action in tort against a third-party governmental tortfeasor, but the Court is unaware of any reported decision involving a workers' compensation claim and third-party tort action against a government employer as in the case at bar.

The trial court then determined that "the County and Sheriff are so closely related for purposes of workers' compensation claims and benefits so as to constitute the same 'employer' as that term is used in §15-78-60(14)."

Lampley asserts the trial court did not find section 15-78-60(14) was ambiguous. Therefore, Lampley argues the statute allows him to sue the Sheriff because the Sheriff was not his employer. He maintains the County was his employer and provided his workers' compensation. Lampley asserts under South Carolina law, the Sheriff is a State employee.

In *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 287 n.1, 688 S.E.2d 125, 127 n.1 (2010), the Lexington County Sheriff's Department asserted the Lexington County Sheriff's Department and Lexington County were "one and the same entity." However, our supreme court held it is well-settled under South Carolina law that the Sheriff and Sheriff's deputies are state, not county, employees. *Id.* (citing *Cone v. Nettles*, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992) (holding sheriffs and deputies are state officials); *Heath v. Aiken Cty.*, 295 S.C. 416, 418, 368 S.E.2d 904, 905 (1988) (finding deputies are not county employees). *See also Gulledge v. Smart*, 691 F. Supp. 947, 954-55 (D.S.C. 1988), *aff'd*, 878 F.2d 379 (4th Cir. 1989) (holding sheriffs and deputy sheriffs in South Carolina are state officials).

Further, in *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 329, 566 S.E.2d 536, 543 (2002), the court stated the following four factors are used to determine whether a person is an employee of an entity: "(1) who has the right to control the person; (2) who pays the person; (3) who furnishes the person with equipment; and (4) who has the right to fire the person." Applying those factors to this case, the Sheriff does not control Lampley, does not pay Lampley,

does not furnish Lampley with equipment, and does not have the right to fire Lampley. Thus, under *Faile*, the Sheriff is not Lampley's employer.

Therefore, we find South Carolina case law states the sheriff and sheriff's deputies are state employees. Because Lampley's employer is the County, he should not be barred from suing the Sheriff, who is an employee of the State. Section 15-78-60(14) provides an injured employee can receive benefits under the South Carolina Workers' Compensation Act and recover damages from any person other than their employer.

Accordingly, we find the trial court erred in granting partial summary judgment on Lampley's claim for bodily injuries. *See Med. Univ. of S.C.*, 360 S.C. at 619, 602 S.E.2d at 749 ("In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) ("[S]ummary judgment is generally not appropriate in a comparative negligence case."). Because the issue of property damage was allowed to go to trial and the jury found Lampley and the deputy sheriff were equally responsible for the accident, we need not remand for a determination of liability. We remand the case for a determination on the amount of damages for bodily injury based on the jury's finding of equal liability. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) ("For all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.").

Lampley argues the trial court also erred in (1) improperly altering the statute's unambiguous text with canons that do not apply, and (2) focusing on who funded the insurance, rather than who employed him, which interjected uncertainty into an unambiguous statute. We need not address these issues as the first issue is dispositive. *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's grant of partial summary judgment on Lampley's claim for bodily injuries is reversed, and the case is remanded for a determination on the amount of damages for bodily injury based on the jury's finding of equal liability.

REVERSED and REMANDED.

HILL and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Glenn E. Vanover, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001917

Appeal From Lexington County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5799
Submitted March 2, 2020 – Filed February 3, 2021

AFFIRMED

Jonathan McKey Milling, of Milling Law Firm, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Melody Jane Brown, and Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

HEWITT, J.: Glenn Edwin Vanover (Petitioner) appeals the circuit court order denying his application for Post-Conviction Relief (PCR). A jury convicted him in 2012 of two counts of first degree criminal sexual conduct with a minor under section 16-3-655(A)(1) of the South Carolina Code (2015). He received concurrent

twenty-six-year sentences. This court affirmed the convictions and sentence on appeal.

Petitioner argues his trial counsel was ineffective in failing to investigate and present evidence that the alleged victim—Petitioner's daughter—previously made and recanted an allegation of inappropriate conduct against a middle school teacher. We agree with the PCR court that Petitioner did not establish this evidence would have been admitted or that he was prejudiced. Thus, we affirm.

BACKGROUND

This is a "delayed reporting" case. Daughter was sixteen years old at the time of trial and testified the sexual abuse occurred when she was younger. She alleged this began sometime between her second and fourth grade years and stopped when she was in fifth grade, around the age of ten or eleven.

Trial Testimony

Daughter described how the alleged abuse began and progressed. She said the first instance happened when she was at home with Petitioner and her older brother. Daughter claimed Petitioner invited her to watch TV in his bedroom and groped her while they were both clothed. She said Petitioner told her not to tell anyone.

Daughter explained the next instance of abuse involved sexual intercourse after Petitioner again asked Daughter to come into his bedroom. She testified she was certain they had intercourse because it was painful.

Daughter said she did not call out for help because she was afraid. She said Petitioner told her not to tell anyone about the interaction and warned her that she would be in a lot of trouble. Daughter claimed Petitioner abused her again on other occasions and that this always occurred while Melanie Vanover (Mother) was at work.

Around the time Daughter was in the fifth grade, the family moved into a house on property owned by Petitioner's mother (Grandmother). Daughter claimed Petitioner abused her once in this residence when she was about ten years old. As noted above, Daughter said the abuse stopped when she was ten or eleven.

Several witnesses acknowledged Daughter first told Mother about the alleged abuse roughly two years later. There is conflicting testimony about whether Daughter recanted these first allegations. We will discuss that shortly.

Two years after that first disclosure—and roughly four years after the alleged abuse stopped—Daughter disclosed the abuse to a teacher, Michael Horne. Criminal charges followed shortly thereafter.

Petitioner's defense relied on potential inconsistencies in Daughter's memory about the abuse's frequency. Daughter initially said the abuse happened about three times per month but later said it did not happen every month and instead occurred "very occasionally." Daughter ultimately said Petitioner abused her about three times a year, not three times a month.

Petitioner and other family members also claimed Daughter manufactured the allegations as revenge. Mother testified Daughter's first disclosure occurred on her brother's sixteenth birthday and appeared to be retaliation for Petitioner refusing to let Daughter take a car ride with her brother and his friends. Mother said Daughter "showed no emotion whatsoever" when discussing the abuse, gave differing accounts of the abuse over time, and eventually admitted she was lying.

Grandmother agreed with Mother's account, as did Petitioner. Petitioner and Mother hypothesized Daughter's disclosure to her teacher two years later resulted from Petitioner punishing Daughter for poor grades and skipping school.

Daughter disputed that her first disclosure occurred on her brother's birthday and adamantly denied recanting the allegations. Daughter said her family confronted her about the allegations and shunned her when she refused to recant.

Several witnesses testified about the disclosures that led to criminal charges. Horne—Daughter's teacher—said Daughter cried. The school resource officer, Deputy Jonathan Grooms, testified Daughter told him that the abuse occurred when she was between the ages of eight and ten and that the incidents happened in her home. Grooms recalled that Daughter had a blank look on her face, did not want to talk to him, and that he had to pull the information out of her.

Investigator Marty Longshore interviewed Daughter as well. He explained Daughter told him the abuse occurred over a period of time when she was between the ages of eight and eleven. He said Daughter was reserved, shy, and reluctant to write a statement, but Daughter eventually spoke to him about what happened and provided

a statement. He remembered Daughter cried and was upset, reserved, and shook while writing the statement.

An assessment worker with the Department of Social Services interviewed Daughter as well. This person visited Petitioner's residence to investigate the allegations and said that when she told Petitioner the reason for her visit, Petitioner announced that nobody had ever accused him of sexually abusing Daughter and that "he and his wife had a wonderful sex life, so why would he need to go elsewhere."

PCR

The alleged ground for PCR relates to evidence that Daughter previously accused a middle school teacher of some sort of inappropriate interaction. This appears to have occurred in the same general time period when Daughter first told Mother about the alleged sexual abuse at issue here.

The precise allegation is unclear. One of Daughter's seventh grade teachers—we will call him John Doe—explained at the PCR hearing that he received a phone call from Petitioner and Mother the day after he gave Daughter detention for talking with another student during class. According to Doe, Mother said Daughter accused Doe of asking Daughter and one of her friends about the color of their underwear, when they had their periods, and whether they had boyfriends.

Daughter was not on the phone call and Doe never spoke to Daughter about the allegation. Doe explained that he informed school administration and that he understood the allegation to have been recanted the next day. Doe also said the school took no action against him and Daughter was removed from his classroom.

Neither Mother nor Daughter testified at the PCR hearing. As noted above, Doe spoke only with Mother and with school administration about this incident.

Trial counsel gave a different account of this incident at the PCR hearing. Counsel explained he had been aware Daughter previously made some sort of complaint against a former teacher and said he understood the incident to have been minor. Counsel said Petitioner and other members of the family did not provide "a lot of substance" when counsel discussed it with them. Counsel said he learned of the incident from a letter Mother wrote. Mother's letter said Daughter "almost had a teacher fired because she [Daughter] said he [Doe] said, 'what color is your underwear.' But he [Doe] said, 'no one wants to see that, pull your pants up.'"

Trial counsel said there were several reasons he did not speak with Doe about this incident. He said that he took Mother's letter at face value and that neither the letter nor his conversations with Petitioner and Petitioner's family suggested the incident was noteworthy or relevant. Counsel explained that he could see himself telling a teenage girl to pull her pants up and that nobody wanted to see her underwear. Counsel also said nobody ever asked him to locate Doe, contact Doe, or call Doe as a witness.

Petitioner disputed trial counsel's recollection. He testified he told trial counsel about Doe, assumed counsel would speak to Doe as part of his investigation, and always assumed counsel would call Doe as a witness. Petitioner believed the incident with Doe was evidence Daughter "had a propensity" to make up "stories."

The PCR court denied relief. The court did not specifically rule on whether trial counsel was deficient. The court grounded its denial of relief on the finding that Petitioner failed to establish Doe's testimony would have been admissible or that trial counsel's failure to introduce Doe's testimony prejudiced Petitioner.

ISSUE ON APPEAL

Whether the PCR court erred in concluding Petitioner did not establish that Doe's testimony about the alleged false allegation would be admissible.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018); *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) (noting "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"). "We review questions of law de novo, with no deference to [the PCR court]." *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839.

LAW/ANALYSIS

Petitioner's argument has two components. First, Petitioner claims trial counsel was deficient for not speaking with Doe. Second, Petitioner claims counsel was deficient for failing to present evidence of Daughter's false allegation against Doe.

As noted above, the PCR court did not rule on whether trial counsel was deficient for not speaking with Doe, but instead grounded its denial of relief on the finding that Petitioner failed to establish Doe's testimony would have been admissible and failed to establish prejudice.

We will follow the same course. *Strickland* explains a court is not required to address all aspects of a claim that trial counsel was ineffective if the absence of proof on any part precludes relief. 466 U.S. at 697. We therefore turn to Petitioner's argument that trial counsel was deficient for failing to present evidence Daughter leveled a false allegation against Doe.

The rules of evidence recognize several avenues for impeaching a witness. Common methods are prior bad acts showing motive or absence of mistake, evidence of the witness's general character for truthfulness, and certain prior convictions. *See* Rules 404(b), 608(a), and 609, SCRE. This is not a complete list. The point is that with one exception we mention later in this opinion, the rules of evidence govern how a party attacks a witness's credibility.

Petitioner argues testimony about Daughter's allegations against Doe would be admissible under three rules: Rules 608, 404(b), and 613, SCRE. As we explain below, we respectfully disagree.

Testimony Regarding Character for Truthfulness

Rule 608 allows evidence in the form of an opinion regarding a witness's character for truthfulness or untruthfulness. It also permits asking a witness about specific instances of that witness's conduct if the conduct is probative of the witness's truthfulness or untruthfulness. *Id.*

We respectfully disagree with Petitioner's claim that this rule would permit him to present his own testimony, Mother's testimony, or Doe's testimony about Daughter's allegations against Doe. Rule 608(b) explicitly bars extrinsic evidence related to specific instances of a witness's conduct. *See also Mizell v. Glover*, 351 S.C. 392, 401, 570 S.E.2d 176, 180 (2002) ("Rule 608(b) allows specific instances of conduct to be inquired into on cross, but does not allow those instances of conduct to be proved by extrinsic evidence."). Thus, although there is no question trial counsel could have asked Daughter about the Doe allegation, Rule 608 would not be a vehicle for anyone else to offer testimony regarding the allegation.

Prior Bad Act Testimony

Rule 404(b) allows evidence of a witness's prior bad acts if offered "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." The prior bad act must be proved by clear and convincing evidence if it did not result in a conviction. *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). Evidence of prior bad acts also remains subject to Rule 403, SCRE's probative versus prejudicial balancing test. *Id*. at 155–56, 682 S.E.2d at 896.

There are two reasons we believe it is doubtful the trial court would have allowed testimony from Petitioner, Mother, or Doe under Rule 404(b).

First, the testimony about the Doe allegation was varying and inconsistent. Trial counsel testified Mother's letter did not describe the allegation as having any sexual connection and that neither Petitioner nor his family ever asked counsel to contact Doe. Doe said he had been accused of making an inappropriate comment to Daughter and her friend, but his version was inadmissible hearsay because he spoke only with Mother, not Daughter. Petitioner's testimony went further and was different than everyone else's. Petitioner claimed Daughter accused Doe of making an inappropriate comment and of smacking Daughter and her friend on the behind. There was no first-hand account of Daughter's accusation against Doe. Neither Daughter nor Mother testified at the PCR hearing.

This matters because the trial court has discretion to exclude evidence if admitting the evidence would lead to a "trial within a trial" that might confuse the issues and mislead the jury. *State v. Cottrell*, 421 S.C. 622, 641, 809 S.E.2d 423, 434 (2017). The variance in witness testimony and the lack of a first-hand account make it far from clear the testimony would be admitted.

Second, the Doe allegation's probative value is questionable. There do not appear to be many South Carolina cases involving prior false allegations made by a victim in a criminal sexual conduct case. Our supreme court articulated the standards for admitting such evidence in *State v. Boiter*, 302 S.C. 381, 383–84, 396 S.E.2d 364, 365 (1990). *Boiter* explains a trial court should determine whether the prior allegation is indeed false before considering "remoteness in time" and "factual similarity between [the] prior and present allegations to determine relevancy." *Id*.

This framework appears to follow the same general approach that applies in other jurisdictions, and there have been lots of similar cases in other jurisdictions. Speaking generally, prior false allegations are allowed if the allegations "suggest a pattern" that casts "substantial doubt" on the charges at issue. *People v. Diaz*, 988 N.E.2d 473, 477 (N.Y. 2013) (quoting *People v. Mandel*, 401 N.E.2d 185, 187 (N.Y. 1979)). One formulation of the rule is that "if the prior accusations are similar enough to the present ones and shown to be false, a motive can be inferred and from it a plausible doubt or disbelief as to the witness' present testimony." *White v. Coplan*, 399 F.3d 18, 26 (1st Cir. 2005).

The rationale for excluding prior false accusations that do not have a significant degree of similarity to the charge at issue is that those false claims lack any meaningful probative value. As one noted jurist explained, "[t]he fact that a teenage girl has a disordered past and lies a lot (who doesn't?) does not predict that she will make up stories about having sex." *Redmond v. Kingston*, 240 F.3d 590, 591 (7th Cir. 2001) (Posner, J.). In other words, evidence that a witness has lied in the past has questionable value "since very few people, other than the occasional saint, go through life without ever lying." *Id*. at 593.

Our review of these decisions leads us to believe that it is doubtful the trial court would have admitted evidence of Daughter's allegations against Doe.

At one end of the spectrum are cases in which the purported victim's prior false allegations were strikingly similar to the allegations being tried. *State v. Cox*, for example, was a rape trial. 468 A.2d 319 (Md. 1983). The victim had previously accused another person of sexual misconduct before recanting the allegation at trial. *Id*. at 320–21. Another similar case is *White v. Coplan*, in which the prior false allegations "bore a close resemblance" to the charges at issue. 399 F.3d at 24. A third example is *State v. Dennis*, which is of the same character as the others. 893 A.2d 250, 266–67 (R.I. 2006).

At the other end of the spectrum are lies that have no similarity whatsoever to the accusations on trial. For example, the fact that the alleged victim previously took her mother's car without permission, wrecked the car, and lied about the circumstances before recanting had no probative value with respect to the victim's allegation that she was raped. *State v. Wilson*, 256 S.W.3d 58, 60–62 (Mo. 2008), *abrogated on other grounds by Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. 2010). Less-extreme examples—all of them in sex crime cases—include cases where the alleged victim previously accused someone of physical abuse, excessive discipline,

and peering at the victim under a bathroom stall. *See Lopez v. State*, 18 S.W.3d 220, 225–26 (Tex. Crim. App. 2000); *State v. Botelho*, 753 A.2d 343, 346–47 (R.I. 2000); *State v. Ellsworth*, 709 A.2d 768, 772–74 (N.H. 1998). We also note *State v. Brum*, a case affirming a trial court's decision to exclude evidence of a prior false allegation even though that allegation and the conduct for which the defendant was on trial plainly had a sexual nature. 923 A.2d 1068, 1074–75 (N.H. 2007).

In light of these cases (and others), we find there is no reasonable probability a trial court would have found Daughter's allegations against Doe to be probative evidence of motive, a common scheme or plan, or any other ground recognized by Rule 404(b). Even adopting Petitioner's version of the Doe allegation—that Doe made an inappropriate comment before smacking Daughter and her friend on their behinds—the allegation bears no similarity to Daughter's allegation that Petitioner fondled her and sexually abused her several times, over several years.

Petitioner argues the allegations against him are sufficiently similar to the Doe allegations because both are evidence that Daughter manufactures accusations to avoid punishment and improve her circumstances. Respectfully, this characterization of these incidents is too broad and generic. The events are vastly more different than they are similar. We again note *Boiter*, which held "factual similarity" was relevant when a trial court is deciding whether to admit evidence of a victim's prior false allegation. 302 S.C. at 383–84, 396 S.E.2d at 365.

It is worth mentioning that any restrictions imposed by the rules of evidence must yield if they conflict with the defendant's right to effective cross-examination; a right that is guaranteed by both the State and Federal Constitution. *See Davis v. Alaska*, 415 U.S. 308, 316–17 (1974) ("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."); *State v. Cooper*, 291 S.C. 351, 355, 353 S.E.2d 451, 454 (1987). Some of the cases we cite in our analysis of Rule 404(b) did not turn on that rule, but on whether preventing evidence of the prior false accusation violated the defendant's constitutional rights. *See*, *e.g.*, *Botelho*, 753 A.2d at 345–47; *Lopez*, 18 S.W.3d at 223. We cite these cases because their discussion of "similarity" between prior false allegations and the charges being tried seem particularly germane to the purposes Rule 404(b) identifies for potential evidence.

Prior Inconsistent Statement

Rule 613 explains how to cross-examine a witness who has previously given a statement that contradicts the witness's in-court testimony. Here, the argument seems to be that Petitioner could have asked Daughter about her allegations against Doe and called other witnesses if Daughter denied making the accusation.

Although a witness may generally be cross-examined on anything, even a collateral matter, as credibility is always an issue, extrinsic evidence of a prior inconsistent statement is not admissible if the prior statement concerns a collateral matter. *See* 28 Charles Alan Wright & Victor J. Gold, *Federal Practice & Procedure Evidence* § 6206 (2d ed. 2012). Thus, and as is true under Rule 608, Petitioner could have asked Daughter about the Doe allegation but would be stuck with her answer.

A skeptical reader might respond by claiming that Daughter's credibility was not a collateral matter, but was the very heart of the case. That is true of any case relying chiefly on witness testimony. We understand and expressly do not overlook the attraction of allowing testimony that an accuser in this sort of case has made a previous allegation of improper conduct and then recanted that allegation. Even so, this case was not about Daughter's purported allegation against Doe, and as we have already discussed, the nature of that claim—a false report of an inappropriate comment that was immediately recanted—is worlds apart from Daughter's claim that Petitioner repeatedly sexually abused her over a prolonged period of time. *See also State v. Finley*, 300 S.C. 196, 201, 387 S.E.2d 88, 90 (1989) ("[T]he state's interest in protecting criminal sexual conduct victims is stronger than the right of a defendant to attack such a victim's character in a manner that has limited or no relevance to the question of guilt.").

Failure to Cross-Examine Daughter with Doe Allegation

Petitioner argues that at a minimum, trial counsel was deficient for failing to ask Daughter about the Doe allegation.

We have no idea what Daughter's answer or explanation for the Doe allegation would have been. Daughter did not testify at the PCR hearing. We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter's explanation would have been. *See*, *e.g.*, *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding the absence of PCR testimony from alleged

alibi witnesses meant petitioner "could not establish any prejudice from counsel's failure to contact these witnesses").

We also note Daughter testified at trial that she was removed from her family's home as a result of her allegations against Petitioner and that she lived in a series of foster homes before being adopted by her uncle (her mother's brother) and his wife. Whatever answer Daughter might have given if cross-examined about the Doe allegation, we question whether that answer would have blunted the force of Daughter's testimony that her allegations against Petitioner did not improve her home life, but instead threw that life into turmoil.

CONCLUSION

For the foregoing reasons, the PCR court's denial of relief is

AFFIRMED.[1]

GEATHERS, J., concurs.

LOCKEMY, C.J., dissenting: I respectfully dissent. In my view, trial counsel provided ineffective assistance of counsel by failing to investigate and interview Doe and for failing to elicit testimony related to Daughter's accusations against Doe. Trial counsel had a duty to investigate Daughter's prior accusations and this duty was even more acute given trial counsel's theory of the case—that Daughter manufactured the accusation to avoid punishment. Trial counsel's reason for failing to investigate the accusation was that he "could see [him]self telling some young girl 'to pull your pants up.' Nobody wants to see [the] color [of] your underwear." However, whether trial counsel could see himself saying this to a student was not a sufficient reason for his failure to see the relevance of Daughter's potential false accusation against Doe.

Although there was a difference between what Petitioner and Mother told trial counsel regarding Daughter's accusations, in either scenario, trial counsel was informed that Daughter made a false accusation against Doe to avoid punishment and this was the same premise upon which Petitioner's defense rested. In my view that was enough information to require that trial counsel at a very minimum talk to

[1] We decide this case without oral argument per Rule 215, SCACR.

Doe. Had trial counsel done so, he would have understood that the conduct was much more sexually improper than he testified he understood it to be at the PCR hearing. Thus, trial counsel provided ineffective assistance of counsel by failing to investigate.

In my view Petitioner was prejudiced because trial counsel could have presented evidence of Daughter's accusation against Doe. Specifically, trial counsel could have asked Daughter whether she had accused Doe of asking her inappropriate sexual questions. If she admitted to having accused Doe of asking inappropriate questions, then the jury would have heard her admission, and trial counsel would have been able to cross-examine Daughter further under *Boiter*. *See* 302 S.C. at 383–84, 396 S.E.2d at 365. I respectfully disagree with the majority's analysis of the *Boiter* factors. We must examine "the factual similarity between [the] prior and present allegations to determine relevancy." *Id*. A key factor in this case is Petitioner's stance that Daughter made accusations against others to avoid punishment. The majority believes that Daughter's allegations against Doe were much less egregious than those she made against Petitioner. No doubt that is so. However, they were still allegations of inappropriate conduct of a sexual nature that Daughter claimed were directed at her. Petitioner's entire defense rested on the foundation that Daughter had made up the allegations against him to avoid punishment and that she had recanted her allegations about the conduct. Similarly, Doe's statement indicated that he was about to punish her for conduct and then she accused him of inappropriate conduct of a sexual nature, which she later recanted. The trial court never had an opportunity to rule upon whether Doe's statement was true or false, and the PCR court never made a finding that Doe's testimony was untrue. Further, the accusations that Doe referenced were not so remote in time compared to those against Petitioner because the two accusations were between one and three years apart. Using the factors set out in *Boiter*, the accusations against Doe would have been admissible.

On the other hand, if Daughter had denied accusing Doe, trial counsel could have offered evidence regarding the accusation against him. *See Clinebell v. Commonwealth*, 368 S.E.2d 263, 266 (Va. 1988) ("Consequently, in a sex crime case, the complaining witness may be cross-examined about prior false accusations, and if the witness denies making the statement, the defense may submit proof of such charges."). Rule 613, SCRE, states, "If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible." In my view Daughter's statement regarding a false accusation was not

a collateral matter. *See State v. Williams*, 409 S.C. 455, 469, 761 S.E.2d 770, 778 (Ct. App. 2014) (stating evidence is not collateral if is directly relevant to the ultimate issue at trial: a defendant's innocence).

Further, because there was no physical evidence and Petitioner's guilt came down to witness credibility, there is a reasonable probability that but for trial counsel's failure to investigate and elicit testimony, the result of Petitioner's trial would have been different. *See Strickland*, 466 U.S. at 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In summary, trial counsel was ineffective for failing to investigate and his failure to do so prejudiced Petitioner.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tappia Deangelo Green, Appellant.

Appellate Case No. 2017-001296

Appeal From Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5800
Heard November 7, 2019 – Filed February 3, 2021

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

HUFF, J.: Tappia Deangelo Green appeals from his convictions for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. He asserts the trial court erred in (1) allowing irrelevant testimony of a detective concerning the victim's fear, causing the detective to give the victim's story credibility, (2) allowing evidence of his post-arrest silence in violation of *Doyle v.*

Ohio,[1] and (3) not enforcing a grant of mistrial when a juror was unable to participate in deliberations due to a medical condition and asked to be relieved. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Green was tried before a jury May 22-25, 2017. The State presented evidence that: Green and two other individuals—Jonathan Johnson and a third, unknown man—kidnapped Keith Lee under gunpoint as he waited for his girlfriend who had entered a bank; they robbed him of a small amount of cash and jewelry; they drove him to his place of employment to collect his pay check; they drove him to a check cashing business; and they released him after taking his money from his paycheck. The defense's position was that Lee owed Johnson money for drugs; he voluntarily rode with the men to cash his check and turned over the money; and Lee only reported it as a crime to avoid his girlfriend's anger over him using his paycheck for drugs.

During the trial, Detective Jennifer Butler testified she interviewed Lee's girlfriend, Karissa, who identified Johnson[2] as a person she had seen while she was in the bank. Detective Butler transported Lee and Karissa home after their interviews. When asked about their emotional state during this time, she stated they both appeared "very shook'en up," they were very disturbed, they were concerned about retaliation, and they inquired about a special patrol request for their address. Detective Butler testified she detected "pretty genuine fear" and, in her experience as a detective, that was not common, and they appeared more shaken and concerned than average victims. The solicitor asked the detective if, based upon what she perceived as a very real fear, she believed their story. Defense counsel objected, stating, "He's asking her did she believe [their] story and I think that's irrelevant whether she believes it." The trial court allowed the testimony over the objection.

Green testified in his own defense, claiming Johnson stated Lee owed him money. He recounted how he, Johnson, Lee and a third person drove around smoking weed that day, indicating they went from the bank to Lee's place of employment and to a check cashing business. Green acknowledged that he was the person wearing all

[1] 426 U.S. 610 (1976).

[2] Karissa knew Johnson because she worked with Johnson's mother.

black as depicted on the camera at Lee's place of employment that day. Green disputed that Lee was forced or threatened to do anything by him or Johnson. Explaining how he touched the check or envelope belonging to Lee, Green stated that Lee and Johnson walked into a check cashing place and, after they came out and got in the car, Lee handed him a check or an envelope that he then gave to Johnson. Green testified Lee did appear upset at one point, though, commenting that his "gal" was going to "trip."

On cross-examination, the solicitor engaged in lengthy questioning of why Green had not told this story to the police and this was the first time anyone had heard it. Defense counsel eventually objected, asserting the solicitor was improperly commenting on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection and, at the trial court's direction, the solicitor moved on to other questions. Subsequently, a concern was raised that the solicitor's line of questioning may have violated *Doyle*. After hearing arguments and listening to a proffer of evidence on the matter, the trial court determined the evidence indicated Green was not *Mirandized* [3] and, therefore, the questioning was not violative of *Doyle*. However, no further questions were elicited, nor was any argument made, on the matter before the jury.

After the jury began deliberations, Juror 280 came before the court, apparently having asked to be relieved because of a menstrual problem. The trial court explained that they could quit early that day, but she would have to return in the morning. When asked if she wanted to go home early, she declined. She further declined the trial court's invitation to start a little later the following morning, explaining such would not matter. Juror 280 returned to the jury room, and the trial court stated, "This juror that was in here, she's not participating with discussions. She's just back there crying. She says it's going to be worse tomorrow." The trial court then stated, "I'm going to have to miss try [sic] the case." Defense counsel suggested they bring the jurors back the next week, but the trial court declined that suggestion and again stated, "I'm going to miss try [sic] the case" noting the juror was not participating, she stated it would be worse tomorrow, and she was not an effective juror. The defense declined to proceed with only eleven jurors, and the trial court stated, "Bring in the lady who's having the problem." However, before it could do so, the jury returned with a verdict.

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

After the trial court indicated it had been informed the jury had reached a verdict, it asked if the parties were ready to receive the verdict. Defense counsel replied that the defense was ready. When the jury returned to the courtroom, the trial court addressed the foreman, noted an issue had come up during deliberations, and asked if he felt "the jury has had an adequate opportunity to review the case and has issued its decision without duress." The foreman replied affirmatively. When asked if he thought it was a fair verdict in this matter, the foreman again replied affirmatively. The trial court then addressed Juror 280 and asked if she had been able to participate in this decision, if she felt it was a fair verdict on her part, and whether she had an opportunity to adequately consider the case. Juror 280 responded affirmatively to each question. The trial court had all the jurors confirm this was their verdict. The verdict was then published, with the jury finding Green guilty on all charges. When asked if the defense had any matters to consider before releasing the jury, defense counsel stated they had none.

ISSUES

1. Whether the trial court erred by allowing irrelevant testimony by Detective Butler that Lee was purportedly more fearful than the average victim, causing the detective to believe his story and give it credibility, when the case turned on credibility.

2. Whether the trial court erred by allowing evidence of Green's post-arrest silence in violation of *Doyle*, when the court determined the matter hinged on whether Green had been provided with *Miranda* warnings, then disregarded testimony Green had been read *Miranda* and refused to hear and consider body camera recordings from two officers on scene at Green's arrest given time considerations.

3. Whether the trial court erred in not enforcing its grant of a mistrial when Juror 280 was unable to participate in deliberations due to a medical condition and asked to be relieved, Green asked that the case be continued until the following week when the juror's medical problem would be resolved, Green refused to waive his right to twelve jurors, the court stated it was declaring a mistrial because Juror 280 could not effectively participate in deliberations, and then the jury returned with a verdict.

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. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* at 6, 545 S.E.2d at 829. On review, this court is limited to determining whether the trial court abused its discretion. *Id.* Accordingly, we do not re-evaluate the facts based upon our own view of the preponderance of the evidence. *Id.* Rather, we simply determine whether the trial court's ruling is supported by any evidence. *Id.*

"In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009). "[T]his Court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 439, 676 S.E.2d at 152. "The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010).

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

LAW/ANALYSIS

I. Detective Butler's Testimony

On appeal, Green argues the trial court erred in allowing Detective Butler's testimony that she found Lee credible due to his appearing more fearful than the average victims she had come into contact with because such was "irrelevant, as it invaded the province of the jury," thereby rendering it incompetent. He contends, because credibility of Lee was a critical issue in the case, this irrelevant bolstering resulted in prejudice to him.

We agree with the State that Green's appellate argument that the testimony vouched for the credibility of Lee and invaded the jury's province is not preserved for our review. The record clearly shows defense counsel objected to admission of Detective Butler's testimony in this regard solely on the basis of relevance. *See State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (holding in order to preserve an issue for appellate review, the issue must be raised to and ruled upon by the trial court); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); *State v. Whitten*, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007) (holding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial court and ruled upon by the court). Further, starting with its opening statement to the jury and throughout the trial, the defense presented a theory that Lee owed money to Johnson for drugs, there was no robbery but only the collection of a drug debt, Lee's story was not credible, and Lee's reason for not telling the truth was to hide the true story from the police and his girlfriend. Thus, whether Lee's story was believable was relevant. Accordingly, the record supports the trial court's determination that the evidence was relevant. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Whether this testimony from Detective Butler was improper because it invaded the jury's province or improperly vouched for Lee was not raised to nor ruled upon by the trial court and, therefore, is not preserved for our review.

We additionally note that one of the responding police officers, Alexander Kaufman, testified without objection that, although this was a very unusual set of circumstances, he found Lee's and Karissa's statements to be credible because they were very cooperative, they gave consistent statements, they cooperated with the investigation, they returned calls and made calls to Kaufman, it was very unusual for victims of crime to be so cooperative, and he found no reason to doubt them. He stated it did not appear Lee and Karissa were involved in any criminal, gang, or drug activity, and their credibility continued to be established throughout the investigation. Accordingly, any error in the admission of Detective Butler's testimony in this regard is harmless. *See State v. Price*, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (noting any error in admission of improper evidence is harmless when such is cumulative to other unobjected-to evidence admitted at

trial); *State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122 (Ct. App. 2008) (finding, while an objection to the testimony presented by the victim was preserved, appellant failed to timely object to the similar testimony by two other witnesses and, therefore, the admission of the victim's testimony would have been harmless error as it was merely cumulative to the other that was entered into evidence without objection).

II. *Doyle*

When Green testified in his defense, his testimony supplied explanations for the State's evidence that Green's fingerprints were found on Lee's paycheck or envelope and for the video evidence of his presence. As noted, on cross-examination of Green, the solicitor thereafter engaged in lengthy questioning of why Green had not told this story to the police and why this was the first time anyone had heard it. Defense counsel eventually objected to this line of questioning, asserting the solicitor was improperly commenting on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection and the solicitor moved on to other questions. During re-cross examination of Green, an issue arose on another matter, and the trial court decided to dismiss the jury for the evening during which time the court intended to research the matter. When court resumed the next day, the trial court noted it had a conference with the attorneys in his chambers on two separate matters, including in regard to the solicitor's questioning of Green concerning his failure to offer an exculpatory statement during his almost two-year incarceration prior to trial. The trial court stated it had some concern whether the line of questioning violated *Doyle*, but noted the solicitor advised there was no record in the file to indicate Green had ever been given his *Miranda* rights. The solicitor then also indicated he had spoken with the arresting officer, who advised that Green had outstanding warrants when he was arrested, so she did not *Mirandize* or question him. Defense counsel protested that Green had informed him he was given post-arrest *Miranda* rights, and counsel sought to proffer Green's testimony on the matter. The trial court indicated it was hesitant to "try the circumstances of [Green's] arrest," but relented to a proffer after defense counsel asserted the matter was "critical to whether or not [Green was] entitled to a mistrial."

In the proffer, Green testified he was involved in a high speed chase and once he was apprehended, "this guy . . . read me my rights," and told Green he had "like eleven warrants." Green claimed this person read him his *Miranda* rights and put

him in a car with a female officer who then transported Green to the county jail. He stated the female did not read him his rights, but "just basically transported me to the county jail." Green expounded that he had run into an apartment and then was sitting on some steps when officers told him to come out with his hands up. At that point, he was cuffed and one of the North Charleston Police officers said, "[H]ey, that's Tappia Green" and he was given his *Miranda* rights. Green did not know the officer's name, but described him as an approximately thirty year-old white man with a bald head, a stocky build, and wearing all green. When pressed for a description of the person by the solicitor, Green stated, "That's why they do police body cameras. All that should be on record." He claimed the bald-headed officer asked him some questions, and he was then put into a cruiser by a man and transported to jail by a female officer.

The State thereafter proffered the testimony of arresting officer Danielle Smoak and K-9 Officer Brandon VanAusdal. Officer Smoak testified that on August 19, 2015, she was involved in a pursuit of Green, who was driving a vehicle and then fled into a building. She and her teammates surrounded the building and waited for the K-9 officer to arrive. Officer Smoak took the first position at the doorway on one side, while the K-9 officer was directly across from her on the other side. When the K-9 officer announced that he was going to release the dog, Green came out with his hands up. Officer Smoak took Green into custody as he came out the door, put him in handcuffs, and placed him in the back of her patrol car and waited for transport. They ran a records check and found Green had outstanding warrants for armed robbery, kidnapping, firearms and forgery. She did not *Mirandize* him or attempt to interrogate him. Officer Smoak stated that as soon as they found out Green had warrants, she notified the detective and "that was that." No one in her presence read Green his *Miranda* rights. When asked if the transport officer read Green his rights, Officer Smoak testified transport officers did not do that and such was not part of their protocol. Officer Smoak stated the only person present at the scene that fit the description of a stocky guy with a bald head wearing something like fatigues was K-9 Officer Brandon VanAusdal. Although she could not say with certainty that none of the other officers ever talked to Green that day, Officer Smoak testified no one usually talks to an arrested individual after she detains the person and puts them in a car. As far as she knew, no other officers except the K-9 officer had any contact with Green. Once Green was placed into Officer Smoak's patrol car, it was secured and locked such that nobody else could have entered her car to read Green his rights. When the transport officer arrived, Officer Smoak

unlocked her patrol car for the officer and the transport officer took Green from Officer Smoak's car, put him in hers, and then transported him to jail.

Officer VanAusdal testified that on August 19, 2015, he was involved with taking Green into custody after he fled into an apartment building. Upon arrival, he was at the door with Officer Smoak where he deployed his K-9 and gave three K-9 warnings, indicating he was getting ready to release the dog. Officer VanAusdal denied giving *Miranda* warnings to Green, and he did not hear anyone else read Green his *Miranda* rights. After Green was taken into custody, Officer VanAusdal returned his dog to his vehicle, at which point his function in the matter was over. When asked at what point Officer VanAusdal *would* give *Miranda* warnings, he stated he would do so if he was going to ask questions, "but if it's just a simple warrant service, handcuffs are put on, [and] he's transported." When asked if he recalled anyone else at the scene with a similar hairstyle to his, Officer VanAusdal stated he did not remember who was bald and who was not.

Following the proffer, the solicitor argued that *Doyle* does not apply if no *Miranda* warnings are given. Defense counsel moved for a mistrial, noting the incident report[4] from the night of Green's arrest indicated the event was recorded with body cameras. The trial court responded, "If that evidence is available, I'll watch it right now, but I've delayed this case today already for a whole morning on this issue."

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[4] The document that included the incident report was made part of the record as Court's Exhibit 3 for the proffer without objection. The report indicates that Officers Riley and Norwood, responding to a report of a possible subject wanted for a violent felony, pursued the suspect when he failed to comply with an attempted traffic stop, that the suspect jumped out of his vehicle and ran into an apartment building, a perimeter was set up with a K9 arriving for assistance, and the suspect subsequently surrendered and was taken into custody by Officer Smoak while perimeter units maintained officer safety. The report states that Officer Norwood activated his body camera and "the entire incident was captured" on his body camera, which included Officer Norwood "running in pursuit of the suspect and . . . the front view of the suspect as he walked out of the apartment and surrendered." A supplemental report by an Officer Cummins stated the officer responded to assist in the matter, stood perimeter, a K9 arrived on the scene, the suspect came out with his hands up, the suspect was detained without incident, and '[t]his incident was recorded with the department issued body worn camera."

Defense counsel asserted it was incumbent on the State to prove the matter beyond a reasonable doubt. The trial court disagreed with such a burden of proof, stating it was a question of whether or not Green received *Miranda* warnings at the scene. Nonetheless, the court stated it would "probably find . . . beyond a reasonable doubt . . . that there is sufficient evidence to indicate [Green] was not *Mirandized* at that time." The court noted Court's Exhibit 3 contained a place on the form to fill out if rights were given, but it was not checked and no copy of the advisement of rights was attached. The trial court found nothing in the document indicated Green's rights had been given to him by anyone; the officers who were present at the door when he was taken into custody testified neither administered him *Miranda* rights; and the officers indicated that with warrant arrests, such rights are generally not given. Accordingly, the trial court found the matter was not violative of *Doyle*, allowed the question to stand,[5] and denied Green's motion for mistrial.

On appeal, Green contends the trial court erred by allowing the evidence of his post-arrest silence in violation of *Doyle* (1) when it determined the matter hinged on whether he had been provided *Miranda* warnings but then disregarded testimony that he had been read his rights, and (2) by refusing to consider body camera recordings of the two officers on scene at the arrest based upon time considerations. He maintains the trial court's factual finding that Green had not been provided with *Miranda* warnings was an abuse of discretion because it was unsupported by the evidence. Alternatively, Green argues the trial court committed legal error in allowing the State to impeach him with his pretrial silence because there was evidence in the record from his own testimony that he had been provided with *Miranda* warnings, and our appellate courts have upheld the admission of such evidence for impeachment "only where there is **no evidence** in the record the accused had received *Miranda*." We disagree.[6]

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[5] It should be noted, although the trial court stated it would "allow the question to stand," no further testimony was elicited after the court's ruling, and the last the jury heard on the matter was that the defense's objection to the questioning was sustained.

[6] As an initial matter, we do not agree with the State's assertion that this issue is not preserved for our review. Though the solicitor asked numerous questions in this regard before an objection, defense counsel did object during this unbroken line of questioning, arguing it was an improper comment on Green's exercise of his Fifth Amendment rights. The trial court sustained the objection at that time, but subsequently undertook to consider whether this questioning amounted to a *Doyle*

In *Doyle*, the United States Supreme Court (USSC) ruled that a prosecutor may not attempt to impeach a defendant's exculpatory story—told for the first time at trial—by cross-examining him concerning any failure to have told the story after receiving *Miranda* warnings at the time of his arrest, as use of the defendant's post-arrest silence in this manner violates due process. 426 U.S. at 611. The court noted "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings" and "[i]n such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. It thus held "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

Thereafter, in *Fletcher v. Weir*, 455 U.S. 603 (1982), the USSC clarified the rule set forth in *Doyle*. In that case, Weir, who was on trial for intentional murder, took the stand in his defense and, for the first time, offered an exculpatory version of the stabbing of the victim. *Id.* The prosecutor cross-examined Weir as to why he failed to offer this exculpatory explanation when he was arrested. *Id.* at 603-04. The Sixth Circuit Court of Appeals concluded Weir was denied due process of law when the prosecutor used his post-arrest silence to impeach him. *Id.* at 604. The

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violation. The trial court allowed a proffer of evidence on whether Green received *Miranda* warnings and, thereafter, ruled on the issue. The issue was raised to the trial court by Green with sufficient specificity, was raised in a timely manner, and was ruled upon by the trial court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))).

USSC noted, "Although it did not appear from the record that the arresting officers had immediately read respondent his *Miranda* warnings, the [Sixth Circuit Court of Appeals] concluded that a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given." *Id.* The court observed the significant difference between Weir's case and *Doyle* was "that the record [did] not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." *Id.* at 605. It then reversed the Court of Appeals, holding that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," the state does not violate a defendant's due process rights by permitting cross-examination of his post-arrest silence when a defendant takes the stand. *Id.* at 607.

In *Brecht v. Abrahamson*, the USSC stated "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest . . . or after arrest if no *Miranda* warnings are given," and "[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." 507 U.S. 619, 628 (1993).

Our courts have applied *Doyle* and its progeny to hold the Due Process Clause prohibits the prosecution from commenting on an accused's post-*Miranda* silence. Citing *Brecht*, our supreme court has held, "The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of the *Miranda* warnings, in order to impeach the defendant's testimony at trial." *State v. McIntosh*, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004). "Due process is not violated because '[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.'" *Id.* (quoting *Brecht*, 507 U.S. at 628). Additionally, our courts have found no due process violation from cross-examination on a defendant's silence for impeachment purposes when the record was devoid of evidence that the defendant received *Miranda* warnings. *See State v. Bell*, 347 S.C. 267, 271, 554 S.E.2d 435, 437 (Ct. App. 2001) (finding no due process violation when there was "no evidence in the record that Bell ever received *Miranda* warnings" and refusing to presume the warnings were given at the time of Bell's arrest); *Brown v. State*, 375 S.C. 464, 480-81, 652 S.E.2d 765, 773-74 (Ct. App. 2007) (holding, in a post-conviction relief matter, that Brown failed to meet his burden of proving the solicitor committed a *Doyle* violation and that trial counsel erred in failing to object when there was "no evidence in the record that Brown ever received the *Miranda* warnings").

A. Abuse of Discretion

First, we disagree with Green's assertion the trial court abused its discretion in determining he had not been provided with *Miranda* warnings because such finding was unsupported by the evidence. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (observing that "an abuse of discretion is a conclusion with no reasonable factual support"). Although Green testified he was given *Miranda* warnings at the scene and Officer Smoak was unable to say with certainty that no other officers ever talked to Green at the scene of his arrest, there is evidence to support the trial court's finding that Green was not *Mirandized*. In his proffer, Green claimed a white, baldheaded, male officer with a stocky build and wearing all green gave him his *Miranda* rights after he came out of the apartment building and he was cuffed. He stated this officer put him into a police cruiser with a female officer, who then transported him to jail. The State proffered evidence from Officer Smoak that she was standing in the first position of the doorway outside the building; K-9 Officer VanAusdal was directly across from her; when Officer VanAusdal announced he was going to release his dog, Green came out with his hands up; Officer Smoak took Green into custody as he came out the door, she put him in handcuffs, and she placed him in the back of her patrol car to wait for transport; Officer Smoak did not *Mirandize* Green and no one in her presence read Green his rights; the only person present at the scene who fit the description given by Green was Officer VanAusdal; as far as she knew, no other officer at the scene had contact with Green other than Officer VanAusdal; no one usually talks to an arrested individual after she detains the person and puts him in her car; once she placed Green in her car, she secured and locked the car such that no one else could have entered the car to read Green his rights; once the transport officer arrived, she unlocked her patrol car for the female transport officer, who then removed Green from Officer Smoak's car and transported him to jail; and transport officers do not read arrestees their rights and such is not part of their protocol. The State further proffered testimony from K-9 Officer VanAusdal, who confirmed he was at the door with Officer Smoak and gave K-9 warnings to Green. Officer VanAusdal denied giving *Miranda* warnings to Green and stated he did not hear anyone else do so. Thus, the proffered testimony reflects, while Green claimed he was given *Miranda* warnings at the scene of his arrest by a male officer who then placed him into the car of a female transport officer, the only person known to have contact with Green at the scene of his arrest other than Officer Smoak was Officer VanAusdal; Officer VanAusdal fit the description of the individual Green claimed read him his rights;

Officer Smoak did not give Green his *Miranda* rights and did not hear anyone else read him his rights; being in the first position, Officer Smoak placed Green in handcuffs and secured him in her locked car, which meant no one else had access to Green until the transport officer arrived; Officer Smoak unlocked her door for the female transport officer, who then took Green to jail; and Officer VanAusdal denied reading Green his *Miranda* rights. Thus, contrary evidence was submitted by Green and the State as to whether Green was read his *Miranda* rights by a male officer at the scene.

Further, though the trial court indicated a reluctance to delay the trial any further, it did not specifically refuse to consider any body camera evidence. Rather, the trial court stated, "If that evidence is available, I'll watch it right now, but I've delayed this case today already for a whole morning on this issue." Defense counsel did not, thereafter, seek to obtain any such evidence, nor did he ask the court for any additional time to do so. Additionally, upon review of the report cited by defense counsel, there is nothing to indicate the body cameras of the perimeter officers who indicated body cameras recorded the incident would have captured any alleged giving of *Miranda* warnings to Green from Officer Smoak, K9 Officer VanAusdal, or any other officers. Rather, Officers Norwood and Cummins indicated in the report that the body cameras captured the pursuit, Green's surrender, and his placement in detention. There is nothing to indicate they would have been close enough to Green after he was taken into custody for their body cameras to capture whether he was thereafter *Mirandized*. Accordingly, we find no abuse of discretion.

B. Legal Error

We further disagree with Green's contention that the trial court committed legal error in allowing the State to impeach him with his pre-trial silence because there was evidence in the record he was provided with *Miranda* warnings. He contends our appellate courts have upheld the admission of such evidence for impeachment purposes "only [when] there is **no evidence** in the record the accused received *Miranda* [warnings]." We agree that our courts have determined no *Doyle* violation occurred when the prosecution referred to a defendant's post-arrest silence based upon the fact that there was "no evidence" the defendant received any *Miranda* warnings during the pertinent period of time. However, it does not necessarily follow that when the question of whether a defendant has been given

Miranda warnings is in contention, *Doyle* automatically applies. We believe the question is not whether any evidence has been presented that a defendant received *Miranda* warnings when determining whether a *Doyle* violation has occurred.[7] Rather, the question is whether the trial judge, who saw and heard testimony on the matter and is in a better position to judge credibility, has the authority to make a factual determination on whether *Miranda* warnings have been given for purposes of determining a *Doyle* violation issue when contrary evidence is presented, and the standard of review to be applied to the trial court's determination in such a matter.

Research reveals no South Carolina cases—nor have we discovered any other jurisdiction's cases—addressing whether a *Doyle* violation has occurred based upon comments on an accused's silence when there is competing evidence as to whether a defendant has been administered his *Miranda* rights. Further, research reveals very little from other jurisdictions indicating whether the burden is on the defendant to show a *Doyle* violation, or whether the burden is on the State to prove *Doyle* is inapplicable. However, our sister state, Georgia, has held the burden rests on the defendant to show a *Doyle* violation has occurred.

In *Mattox v. State*, the trial court allowed the State to cross-examine the defendant with regard to her post-arrest silence over a defense objection. 395 S.E.2d 288, 289 (Ga. Ct. App. 1990). While the record before the court failed to indicate whether Mattox received any *Miranda* warnings, the court went on to address where the burden of proof rests in considering a possible *Doyle* violation. *Id.* The court noted "the determination of whether the defendant has the burden of showing a *Doyle v. Ohio* violation or the State has the burden of showing the applicability of *Fletcher v. Weir* is one of first impression in this State." *Id.* at 290. The *Mattox* court observed that the USSC in *Fletcher* reversed the lower court's grant of habeas corpus after observing the record did not indicate whether or not the defendant had received *Miranda* warnings during the period of silence immediately after his arrest. *Id.* It reasoned, had the burden been on the State to show *Doyle* was inapplicable, i.e. that the defendant had not received the *Miranda* warnings, the *Fletcher* court would have affirmed the grant of habeas corpus. *Id.* Thus, the court construed *Fletcher* "as authority for the proposition that, as a matter of

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[7] Were that the case, any defendant could wait until he or she testifies and then, upon being challenged for giving a story for the very first time in his testimony, automatically receive a mistrial by claiming he or she was *Mirandized*.

constitutional law, the burden may be placed upon the defendant to show that the *Miranda* warnings were given prior to his silence that is relied upon by the State for impeachment purposes" and determined it was necessary for the defense to make a proper showing before *Doyle* would apply. *Id.* Accordingly, the court held the record showed Mattox failed to meet her burden of showing her post-arrest silence occurred after she received *Miranda* warnings. *Id.*

We are persuaded by the reasoning in *Mattox* that such burden falls upon the defendant to show a *Doyle* violation. As observed by the *Mattox* court, the USSC in *Fletcher* reversed the lower court's grant of habeas corpus, noting the record there failed to indicate the defendant received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. Had the burden been upon the State to affirmatively demonstrate *Doyle* was not applicable, the failure of the record to indicate whether or not the defendant received any *Miranda* warnings during the period of silence after his arrest would have presumably been fatal to the State meeting its burden of proof and would have resulted in affirmance of the grant of habeas corpus. Accordingly, we believe the burden is upon the defendant to show a *Doyle* violation has occurred. *See also Lainhart v. State*, 916 N.E.2d 924, 936 (Ind. Ct. App. 2009) ("[When] a defendant asserts a *Doyle* violation, he 'ordinarily bears the burden of showing that *Miranda* warnings were given prior to the post-arrest silence used by the state for impeachment purposes.'" (quoting 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n. 47 (3rd ed. 2007))); *id.* (holding, because the court had no indication at what point the defendant was *Mirandized* for purposes of a *Doyle* and *Fletcher* analysis, the defendant failed to meet his burden of showing that he received *Miranda* warnings prior to the silence with which he was impeached and, therefore, no *Doyle* violation occurred); 3 Wayne R. LaFave, *Criminal Procedure* § 9.6(a) n.52 (4th ed. 2019) ("The defendant ordinarily bears the burden of showing that *Miranda* warnings were given prior to the post-arrest silence used by the state for impeachment purposes.").

Further, even assuming the burden shifted to the State to show *Doyle* was inapplicable once Green proffered evidence *Miranda* warnings were provided to him, we find no error. Given the manner in which this matter arose, the issue boiled down to a factual determination. As with other issues that arise during trial when determinations concerning competing evidence must be resolved by the trial court, this court should not reevaluate the facts based on our own view of the preponderance of the evidence but must simply determine whether the trial court's

ruling is supported by any evidence.[8] As previously noted, there is evidence to support the trial court's finding that Green was not given *Miranda* warnings. *See Wilson*, 345 at 5-6, 545 S.E.2d at 829 (holding that in criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous); *id.* at 6, 545 S.E.2d at 829 (providing the appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence); *Halcomb*, 382 S.C. at 443, 676 S.E.2d at 154 ("In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party."); *Torres*, 390 S.C. at 625, 703 S.E.2d at 230 ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."). Ultimately, the matter came down to a question of fact determined by the trial court. It is well settled that rulings on admissibility of evidence involving credibility determinations are within the sound

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[8] For instance, in evaluating the admissibility of a custodial defendant's statement pursuant to *Miranda*, "[t]he State bears the burden of proving the defendant was properly advised of his *Miranda* rights," as well as proving the defendant voluntarily waived his rights and freely made a statement. *State v. Hill*, 425 S.C. 374, 380, 822 S.E.2d 344, 348 (Ct. App. 2018). "If a defendant makes a custodial statement, then the trial court must not only make an inquiry into the voluntariness of the statement, but also conduct an inquiry to ensure the police complied with the mandates of *Miranda* and its progeny." *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 906-07 (Ct. App. 2002). In *State v. Davis*, 267 S.C. 456, 461, 229 S.E.2d 592, 594 (1976) our supreme court found no error in the admission of the defendant's statement—even though defendant denied that he was ever given his *Miranda* warnings—noting evidence relative to voluntariness of a confession is often in sharp conflict and the trial court must make the initial determination of its admissibility. In determining the admissibility of a defendant's statement, our courts have held "[t]he trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). Further, "[w]hen reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

discretion of the trial court, and the appellate court should not engage in de novo review but must leave a credibility determination to the trial judge, who saw and heard the witnesses and is, therefore, in a better position to evaluate their veracity.[9] *See State v. Johnson*, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015) (noting "[c]redibility findings are treated as factual findings" and holding, in spite of defendant's claim that she invoked her right to counsel such that her statement was inadmissible, the trial court's determination that defendant's testimony regarding her invocation of her right to counsel was implausible was to be given great deference, and the appellate inquiry was limited to reviewing whether the trial court's factual findings were supported by any evidence); *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (finding an appellate court is bound by the trial court's factual findings unless they are clearly erroneous, and the same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases); *State v. Tutton*, 354 S.C. 319, 325-26, 580 S.E.2d 186, 190 (Ct. App. 2003) (noting, in a case involving the issue of admissibility of other bad act evidence, "[t]he determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity"). Because there is evidence to support the trial court's finding that Green was not given *Miranda* warnings at the scene as he claimed, the solicitor's questioning concerning Green's post-arrest silence was permissible, and no due process violation occurred.

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[9] Notably, during the solicitor's questioning of Green before the jury regarding this being the first time he had told this story, Green stated he "was never questioned," that "a warrant was issued directly for [his] arrest," that he "never wrote a statement," and that he never "did an interview." He further stated that he was not locked up for this crime until three months after it occurred and "there was no talking,[]" [i]t was just straight, we have a warrant for your arrest, take you to county jail, that's that, deal with the courts." This testimony is in line with the State's assertion that Green was not given *Miranda* warnings at the scene because he had warrants. Additionally, at no time did Green claim during this testimony before the jury that he had been *Mirandized*, a logical explanation as to why he would not have spoken to officers about the matter. It was only in his subsequent proffer that he claimed he was *Mirandized* at the scene and was asked a couple of questions.

Finally, this issue comes to us based upon the denial of Green's motion for a mistrial. We note that in the jury's presence, the trial court sustained defense counsel's objection to the testimony and the solicitor moved on to other questioning as instructed by the court. Thereafter, no further evidence was elicited on the matter before the jury. Defense counsel subsequently made a motion for mistrial based upon a *Doyle* violation and testimony on the matter was proffered, but this did not occur in the presence of the jury. Thus, the last the jury heard on the matter was that defense counsel's objection had been sustained. The decision to grant or deny a mistrial is within the trial court's sound discretion, and its decision on such will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Wiley*, 387 S.C. at 495, 692 S.E.2d at 563. "The grant of a motion for a mistrial is an extreme measure which should be taken only [when] an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010) (quoting *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999)). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" *Id.* (quoting *State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000)). Given the specific difficulty facing the trial judge, including the manner in which the issue arose, the fact that the trial court sustained defense counsel's objection to the line of questioning, the fact that the jury was never privy to the trial court's ultimate ruling that the questioning did not violate *Doyle*, and the fact that no other testimony on the matter was elicited before the jury after the trial court sustained the defense objection, we find no abuse of discretion in the trial court's denial of Green's motion for a mistrial.

III. Participation of Juror

Green contends the trial court erred in failing to enforce its grant of a mistrial when Juror 280 was unable to participate in deliberations due to a medical condition and had asked to be relieved. He argues juror illness has long been recognized by our courts as a basis for a mistrial that does not violate the prohibition against double jeopardy. Green maintains his constitutional right to a trial by a jury of twelve was violated when Juror 280's illness during deliberations resulted in a verdict by a jury composed of less than twelve participating members. He contends it was illogical

to accept the jury verdict after the court ruled Juror 280 could not effectively participate in deliberations and the defense had declined to proceed with only eleven jurors.

We find Green has waived any possible error by waiting until after the verdict was announced to move for a mistrial based upon Juror 280's situation. When the trial court indicated the jury had reached a verdict, defense counsel raised no objection but confirmed the defense was ready to receive the verdict. The trial court then engaged in questioning of the foreperson and Juror 280 regarding the jurors' opportunity to deliberate and, in particular, Juror 280's ability to participate in deliberations, and confirmed all jurors agreed to the verdict reached. Defense counsel did not raise any objections or seek to further question the jury, and the verdict was then published. Defense counsel also agreed to the release of the jury after the verdict was read without posing any questions or raising any concerns about juror participation. Although Green thereafter moved for a mistrial, he did not do so until after the jury's verdict was published. Because our courts have held that one may not preserve a vice in a trial until he learns what the result will be and then, dissatisfied with the result, take advantage of the vice on appeal, we find Green has waived any alleged error. *See State v. Penland*, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (holding the trial court did not err in denying appellant's motion for mistrial when, although defense counsel objected to the solicitor's alleged improper remarks during closing arguments, he failed to move for a mistrial until after the verdict was returned, as "[o]ne may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal"); *State v. Burnett*, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice . . . , taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."). *See also State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (noting a party must object at the first opportunity to preserve an issue for review, and finding no error in the trail court's refusal to conduct further inquiry into possible premature jury deliberation when, prior to the jury's verdict, defense counsel discovered the allegedly premature deliberations and there was no indication on the record that the trial court was made aware of such or that the trial court was asked, prior to the verdict, to question the jurors regarding any premature deliberations).

At any rate, we find no error. Though the trial court indicated it was inclined to grant a mistrial based upon concerns that Juror 280 was not able to participate, the

jury returned a verdict before the court could do so. Before accepting the verdict, the trial court inquired of the foreman and Juror 280, ensuring that the jury and Juror 280 had adequate opportunity to consider the case, the decision was reached without duress, and Juror 280 participated. *See Wiley*, 387 S.C. at 495, 692 S.E.2d at 563 (holding the decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law); *id.* ("A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.").

For the foregoing reasons, Green's convictions are

AFFIRMED.

WILLIAMS, J., concurs. MCDONALD, J., concurs in result only.